

# *Fordham Environmental Law Review*

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*Volume 18, Number 1*

2006

*Article 2*

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## Sustaining the Environmental Rights of Children: An Exploratory Critique

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## ARTICLE

# SUSTAINING THE ENVIRONMENTAL RIGHTS OF CHILDREN: AN EXPLORATORY CRITIQUE

*Karen E. MacDonald\**

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water . . . .

. . . .

Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well . . . .<sup>1</sup>

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1. See Press Release, United Nations Env't Programme, Living in a Pollution Free World a Basic Human Right, U.N. Doc. UNEP/49 (Apr. 27, 2001), available at <http://www.unep.org/Documents/Default.asp?DocumentID=197&ArticleID=2819> (quoting Klaus Toepfer, Executive Director of the United Nations Environment Programme at the 57th Session of the Comm'n on Human Rights, Geneva, 2001).

## I. INTRODUCTION – THE AIM OF THIS WORK

This article suggests that the interpretation and implementation of human rights as environmental human rights should explicitly consider *children*<sup>2</sup> as the holders, recipients or beneficiaries of environmental rights and explores the means and reasons for doing so.

Some authors have remarked that the right of children to a clean environment is a “problem” that is “part of a broader problem of the right to a clean environment in general” and that “in this respect, several fundamental issues are still unresolved, including the very question of the existence of such a right.”<sup>3</sup> Noting that there are doctrinal complexities that currently surround the “environmental human rights” debate including, *inter alia*, whether environmental human rights can exist and how they should be formulated,<sup>4</sup> this article aims to offer some solutions to this “problem” - the problem of being unable to define, structure and situate a right to environment for children. This article, does this, *inter alia*, by 1) narrowing the focus of environmental rights to those of children; and 2) using existing human rights, rather than calling for a “new” environmental right, as a mechanism for advancing the environmental rights of children.

In order to advance the primary arguments outlined, Part II presents a brief synopsis as to the current “state of play” on the status of environmental human rights, and more specifically, the environmental rights of children.

The article emanates from the assumption that children can “have” environmental rights. Part III looks at rationales for acknowledging that children can have environmental rights or be recognized as a distinct category of environmental rights-holder. Justifications for

2. The working definition of children within this article is based upon the definition of “child” provided under Article 1 of the United Nations Convention on the Rights of the Child [hereinafter “UNCRC”]; “a child means every human being below the age of 18 years.” See UNCRC, *infra* note 7, at art. 1 (stating “[A] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).

3. Malgosia Fitzmaurice, *The Right of the Child to a Clean Environment*, 23 S. ILL. U. L.J., 611, 611 (1999).

4. For an insight into the debate see, among others, Paula M. Pevato, *A Right to Environment in International Law: Current Status and Future Outlook*, 8 REV. EUR. CMTY. & INT’L. ENVTL. L. 309, 309 (1999); and HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996)[hereinafter Boyle & Anderson].



this position are presented throughout in an attempt to demonstrate how and why the environmental rights of children *can* be acknowledged and advanced in a more pragmatic manner, building upon existing human rights. In this regard, reasoning is offered as to why the environmental rights of children can be linked to the concept and practice of sustainable development, as it is currently understood, as a means of not only recognizing those rights but also of achieving some pragmatic environment-related goals. This is in view of the gradual acknowledgment that the policy agenda is evolving from “environment” to “sustainable development.”<sup>5</sup> The mobilization of environment-related human rights to achieve practical goals for children is an additional focus of this work.

Part IV identifies links between environmental rights and sustainable development as promulgated in several international environmental instruments, including those agreed to at the World Summit on Sustainable Development (WSSD),<sup>6</sup> in order to support the argument for recognizing and acknowledging the importance of the environmental rights of children.

As for international human rights law, in Part V a critical evaluation of the environment-related provisions of the United Nations Convention on the Rights of the Child (UNCRC)<sup>7</sup> is undertaken, namely via Articles 6, 16, 24, 27 and 29 - where a link can be drawn

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5. See THE PRECAUTIONARY PRINCIPLE: PROTECTING PUBLIC HEALTH, THE ENVIRONMENT AND THE FUTURE OF OUR CHILDREN (Marco Martuzzi & Joel A. Tickner eds., 2004), available at <http://www.euro.who.int/document/EEHC/eba doc09.pdf>; See United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, *Agenda 21*, ¶¶ 1.1-1.6, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter *Agenda 21*].

6. The World Summit on Sustainable Development (the “WSSD”) was held in Johannesburg, South Africa from August 26 to September 4, 2002 (also referred to as Earth Summit II). The reader may wish to be directed to the United Nations WSSD website: <http://www.un.org/jsummit/> or <http://www.un.org/events/wssd/> (follow “documents” hyperlink, then follow “English” hyperlink).

7. The UNCRC was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 on November 20, 1989. See UNCRC, G.A. Res. 44/25, Annex, U.N. Doc. A/Res/44/49 (Nov. 20, 1989). In accordance with Article 49, the Convention entered into force on September 2, 1990. *Id.* at art. 49. Of those States that are eligible to ratify the Convention, only two have not. The USA intends to ratify but has yet to do so, and Somalia is precluded from ratification due to not having a recognized government. See Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 10-11 (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>.



with the environment and the WSSD aims of increasing sustainable development and poverty reduction. Such evaluation is based on the fact that the UNCRC can potentially operate as a launching pad for greater application of the environmental rights of children.

Further in Part V a brief examination of case law is undertaken to identify the links between the environment, rights, sustainable development, and where possible, children.

Part VI will assess some of the limitations and possible solutions with respect to the enforcement and implementation of children's environmental rights. Lastly, Part VII will provide some conclusions from the discussion of this article.

## II. IDENTIFYING KEY CONCEPTUAL AND LEGAL FRAMEWORKS

This article moves from the premise that recognizing and advancing the environmental rights<sup>8</sup> of children will 1) improve the quality of life of children (both in terms of physiology<sup>9</sup> and qualitative standards<sup>10</sup>) and 2) that environmental protection goals might simultaneously be advanced and improved. These arguments are offered and form the motivation for this work particularly as both human rights and environmental protection goals have common objectives, including those of improving the lives of others and attaining social goods, elements which can both be directed at children.

The approach offered is not to argue the case for a new, distinct right to environment for children but is to identify whether the environmental rights of children can be an extension of the broader realm of human rights, such as, but not limited to, the rights to life, property, water, food, education, health and the right to development.

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8. The term "environmental rights" is deliberately applied. A significant part of the ongoing debate is how a right to environment would be formulated: would it be a right to a "healthy" environment, a right to a "clean" environment, or would there be some other way of determining standards and thresholds? Hence, referring broadly to "environmental rights" or a "right to environment" avoids entering this debate in greater detail, which is beyond the scope of this article.

9. For example, through reduced incidence of respiratory disease, perhaps achieved through fulfillment of economic, social and cultural rights such as the right to health and civil and political rights such as the right to life.

10. Such standards may include aesthetic standards, reduced urban areas, and sanitary services etc., perhaps achieved through social and economic rights. See Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 267 (1995).

This is based on the supposition that the aforementioned rights can be used to fulfill, in part, environmental rights-based goals that can benefit children, a view that is echoed elsewhere:

Environmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living, to sufficient food, to housing, to education, to work, to culture, to non-discrimination, to dignity and the harmonious development of one's personality, to security of person and family, to development, to peace, etc.<sup>11</sup>

Others<sup>12</sup> have even argued that environmental harm can result in a breach of the right to security of the person (non-intervention).<sup>13</sup>

The umbrella of sustainable development, particularly in light of the WSSD,<sup>14</sup> provides a useful interpretive tool for recognizing and advancing the environmental rights of children and reinforces the arguments presented herein.

Justifications for linking the environmental rights of children to the WSSD are borne from a practical perspective. States pledged at the WSSD to implement certain practical goals within a specific time frame, a concept explained further below. In our view, these goals, if achieved, can greatly benefit children and the environment. The WSSD goals can thus serve as a practical means by which to implement key environmental and related human rights goals espoused elsewhere; a central idea in this article.

Finally, as this article is international in focus, it should be noted that there is, as of yet, no explicit, legally recognized right to environment, *per se*, that has been enshrined in a legal instrument that is universal in application. Nor is there a legally recognized right to

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11. United Nations Comm'n on Human Rights, Sub-Comm. on Prevention of Discrimination & Protection of Minorities, *Human Rights and the Environment*, ¶ 248, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (prepared by Fatma Zohra Ksentini) [hereinafter U.N. Comm'n on Human Rights].

12. See, e.g., JAN HANCOCK, *ENVIRONMENTAL HUMAN RIGHTS: POWER, ETHICS AND LAW*, 107-17 (Ashgate 2003).

13. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 9, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force March 23, 1976 in accordance with Article 49).

14. See WSSD, *supra* note 6.



sustainable development.<sup>15</sup> Granted, selected countries<sup>16</sup> and regions<sup>17</sup> have guaranteed a right to the environment in some form, and it is also noteworthy that states have tended to link health issues with environmental rights, in this regard.<sup>18</sup> Nevertheless, unfaltering universal acknowledgement and acceptance of such a right in a “hard law,” global instrument has not yet been forthcoming.<sup>19</sup>

There are, however, internationally recognized human rights norms that are related to the environmental rights of children, such as the rights to life, property, water, food, education, health and the right to development, which can be used to fulfill, in part (provided that the latter is “sustainable”), environmental rights-based goals, as potentially too can, environmental “soft law” instruments.<sup>20</sup> Linkages shall be made to these rights, concepts and instruments as appropri-

15. There is a legally recognized ‘right to development’, although its status is strongly debated. *See, e.g.*, United Nations Declaration on the Right to Development, G.A. Res. 41/128, art.1, U.N. Doc. A/Res/47/128 (Dec. 4, 1986), *available at* <http://www.un.org/documents/ga/res/41/a41r128.htm>. Discussion as to the relationship between the scope of the right to development and the relationship with sustainable development is beyond the scope of this work.

16. *See, e.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, opened for signature Nov. 14, 1988, 28 I.L.M. 156 (1989), *available at* <http://www.worldpolicy.org/globalrights/treaties/achr-esc.html> (“1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment”) [hereinafter San Salvador Protocol]; *see also* Federation of Bosnia and Herzegovina Framework Law on Environmental Protection, art. 3 (Official Gazette FB & H no. 33/03) (“The right to a healthy and ecologically sound environment for everyone is recognized as a basic constitutional right. Every person has the right to live in an environment adequate to his or her health and well-being both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”).

17. *See, e.g.*, African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3, rev. 5, *reprinted in* 21 I.L.M. 58 (1982) (“All peoples shall have the right to a general satisfactory environment favourable to their development.”).

18. *See supra* note 16.

19. *See generally* Fitzmaurice, *supra* note 3 and PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 259 (2d ed. 2002).

20. *See, e.g.*, United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, Annex I, U.N. Doc. A/CONF.151/26, *reprinted in* 31 I.L.M. 874 (Aug. 12, 1992) [hereinafter Rio Declaration], *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>; PHILIPPE SANDS & PAOLO GALIZZI, *DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW* 17 (2d ed. 2004).



ate in order to support the case for the environmental rights of children.

*A. Right to Environment, Right to Health, Right to Life*

A fundamental question that needs to be addressed at this stage is: What exactly does “environmental rights” mean?

Precise and agreed definitions of an “environmental right” and “environmental rights” vary within the international community<sup>21</sup> and also among academic commentators.<sup>22</sup> Shelton avers that a “more manageable interpretation” of “environmental rights” is to refer to them in the “reformulation and expansion of existing human rights and duties in the context of environmental protection.”<sup>23</sup> In the name of “manageability,” I will, for the purpose of this article, simply argue that environmental rights are those rights related to environmental standards or protection that are safeguarded so as to benefit someone or something. That someone or something could be the environment itself, humans or combinations thereof. Environmental rights thus concern the right to protect human health and private or common property (including the “natural” environment) from damage or potential damage sourced through the environment. From this there spring two main dichotomies: anthropocentric and ecocentric approaches to the advancement of environmental rights.

The notion of children’s environmental rights can be interpreted anthropocentrically, that is to say, from the perspective of regarding human life as the central element of environmental goals. Here, environmental rights should afford children a minimum standard of “environment” for the intrinsic benefit of children, for the protection of their life and to provide a life of dignity. Environmental rights in this regard would be human rights that emphasise environmental goals or concerns for the benefit, health and well-being of children,

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21. For examples, see *supra* notes 16-17.

22. See, e.g., Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 117 (1991); Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, Boyle & Anderson eds., *supra* note 4, at 50 (“Definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms.”); Phillip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607, 617 (1984) (“[I]t is clear that the issue of whether to proclaim some form of environmental rights cannot realistically be resolved through the application of standardized criteria: it is, after all, a quintessentially political issue.”).

23. Shelton, *supra* note 22, at 117.

such as the provision of clean drinking water.<sup>24</sup> As noted by India's Kerala High Court: "The right to sweet water, and the right to free air, are attributes of the right to life, for these are the basic elements which sustain life itself."<sup>25</sup> A contrasting, ecocentric view would promote environmental rights for the intrinsic benefit of the environment *per se*. There are also versions of environmental rights that mix both anthropocentric and ecocentric goals.

For my purpose, however, the notion of environmental rights is expressed primarily anthropocentrically as my concern relates to environmental protection as a means to enhance the life of children or to achieve a direct benefit to children. Applying environmental rights for the protection of children does not, however, negate a benefit that may consequently occur to the environment itself. Rather, it is assumed by this author as a means of advancing the arguments offered herein that an anthropocentric notion<sup>26</sup> of environmental rights might best serve this goal of enhancing the life of children, as opposed to an ecocentric notion.<sup>27</sup> This is the approach

24. See John Scanlon et al., *Water as a Human Right?*, IUCN ENVTL. POL'Y & L. Paper No. 51, (2004), available at <http://www.iucn.org/themes/law/pdffdocuments/EPLP51EN.pdf#search=%22water%20as%20a%20human%20right%20iucn%20scanlon%22>.

25. *Attakoya Thangal v. Union of India W.P.*, 1 KLT 580 (Kerala H.C. 1990) (recognizing the right to clean water as a right to life). The Court recognized the right of people to clean water as a right to life enshrined in Article 21 of the India Constitution, stating that: "The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself."

26. For additional supporting insights into anthropocentrism see Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 64, 80-81 (2003) ("*Anthropocentric utilitarian ethics* suggest that our guiding principle of the good should be to maximize welfare for humans . . . an anthropocentric utilitarian ethic is a familiar justification for many regulatory statutes, including many environmental laws . . . . *Anthropocentric rights-based ethics* - [are] ethics that are grounded in respect for the rights of humans . . . . [T]he recent interest in environmental justice suggests the desire to reincorporate distributive justice - a notion grounded in an anthropocentric rights-based framework - into the ethics that guide our environmental laws.").

27. For insights into ecocentric approaches to environmental rights, Miller comments, "The second conception of environmental rights is ecocentric rather than anthropocentric; these are not human rights in the sense [of anthropocentric rights], but rights - above all the right to a continued existence unthreatened by human activities - attached to non-human species, to elements of the natural world



adopted in this work, noting in particular, *inter alia*, Gillespie's comments on anthropocentrism that "humanity protects Nature because Nature protects humanity".<sup>28</sup> Of course, the merits of an anthropocentric versus ecocentric approach require further debate beyond the scope of this article.

I chose the concept of enhancing the life of children as the central theme to demonstrate how environmental and human rights law and legal analysis can make a practical contribution to improving the lives of children. Enhancement or improvement of the life of children could include, but are certainly not limited to: reducing vulnerability; improving standards of living; improving health; improving food security; improving life chances; improving social standards; increasing fulfillment of potential; improving access to resources; reducing poverty – factors that are all arguably, aspirations of sustainable development.

### *B. Schools of Thought*

Before the role of sustainable development in advancing environmental rights is examined a brief assessment of the "state of play" as to the status of environmental rights in current environmental jurisprudence will help to clarify my position.

There tend to be three distinct, yet related schools of thought as to the status of environmental rights, aptly summarized by Anderson:<sup>29</sup>

1. That existing human rights can be used to achieve environmental goals;
2. That existing human rights can be re-interpreted to take account of environmental concerns; and,
3. That a new, "third generation"<sup>30</sup> "right to environment" could be created.<sup>31</sup>

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and to inanimate objects." CHRISTOPHER MILLER, ENVIRONMENTAL RIGHTS: CRITICAL PERSPECTIVES 6 (1998).

28. See ALEXANDER GILLESPIE, INTERNATIONAL ENVIRONMENTAL LAW, POLICY AND ETHICS 19 (2002) (commenting on the anthropocentric approaches in environmental law, or what Gillespie terms "The Self-Interest Justification for Environmental Protection").

29. See Michael R. Anderson, *An Overview*, in Boyle & Anderson eds., *supra* note 4, at 4.

30. 'Third Generation' rights are also referred to as collective or solidarity rights, such as the right to self determination or the right to participate in the common heritage of mankind. See e.g., Alan Boyle, *The Role of International*



Though the essence of this article does not permit a thorough critique of the aforementioned schools of thought, a brief sojourn is necessary by way of background and scene-setting.

### 1. The First School of Thought – Using Existing Human Rights to Achieve Environmental Goals

The first school of thought presents a persuasive argument. In the context of implementing environmental human rights so as to improve the lives of children, existing human rights (civil and political rights and, economic, social and cultural rights) provide a convincing means by which to achieve environmental goals and objectives. Adherence to this argument makes sense as several human rights norms already exist that can be, and are, implemented via international human rights instruments, such as the right to life or the right to health.<sup>32</sup>

The existence of an internationally agreed upon set of norms codified in and strengthened by international law provides a solid basis by which to hold states accountable for environmental action or inaction in terms of the impacts on children and other citizens. “Perhaps the most important source of added value in the human rights ap-

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*Human Rights Law in the Protection of the Environment*, in Boyle & Anderson, *supra* note 4, at 46; Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L.J. 459 (2000). The advancement of this new ‘sub-set’ of rights is quite recent. Third generation rights can be contrasted with first generation rights (negative rights) which are essentially ‘liberty rights’ relating to the individual, of a civil and political nature such as the right to life and the right to a fair trial. Such rights require the state to *not* act in a certain way. Second generation rights are essentially ‘egalitarian’ in essence, requiring the state to carry out a *positive* obligation relating to social, economic and cultural issues. Examples of such rights are the right to fair wages or the right to safe and healthy working conditions. See International Covenant on Economic, Social and Cultural Rights arts. 7(a)(i), 7(b), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3. French jurist Karel Vasak first identified the “three generations of human rights” based on the notions of *liberté, égalité* and *fraternité*. See Karel Vasak, *Pour une Troisième Génération des Droits de l’Homme*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 839 (Christophe Swinarski ed., 1984).

31. See J. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT’L L. 351 (1993).

32. See Michael. R. Anderson, *An Overview*, in Boyle & Anderson, *supra* note 4, at 4.

proach is the emphasis it places on the accountability of policymakers and other actors whose actions have an impact on the rights of people. Rights imply duties and duties demand accountability.”<sup>33</sup>

It can be argued that obligations already exist to respect and achieve certain environmental objectives related to these rights (for example, the right to life, the right to health) that otherwise might result in a breach of the right in question. As Boyle observes, focusing on existing human rights helps us overcome certain other obstacles present in the “environmental rights” debate. As he asserts, “up to a point, problems of definition can be overcome by adopting a more specific focus, for example, on health.”<sup>34</sup> Further support for my argument centers upon the fact that enforcement procedures are firmly entrenched and the successful interpretation of existing human rights in an environmental context has an established precedent in several jurisdictions, as is noted further below.<sup>35</sup>

These factors amount to a convincing proposition, supported by, among others, Merrills,<sup>36</sup> Churchill,<sup>37</sup> Harding,<sup>38</sup> Ksentini,<sup>39</sup> and Brice.<sup>40</sup> This, described by Fitzmaurice as “an intermediate position,” acknowledges that an environmental right does exist but that it

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33. See Celestine Nyamu-Musembi & Andrea Cornwall, *What is the “rights-based approach” all about? Perspectives from International Development Agencies* 3 (Inst. of Dev. Stud., Working Paper 234, Nov. 2004) (quoting the Office of the United Nations High Commissioner for Human Rights, “Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies”), available at [http://portal.unesco.org/shs/en/file\\_download.php/24f65f378cc5fa926ba8271c13d1441dRights+based+approach+\(IDS+Sussex\).pdf](http://portal.unesco.org/shs/en/file_download.php/24f65f378cc5fa926ba8271c13d1441dRights+based+approach+(IDS+Sussex).pdf).

34. Boyle, *supra* note 30, at 50.

35. See, e.g., *López Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994) (concerning, *inter alia*, the right to health); *Öneryildiz v. Turkey*, App. No. 48939/99, 39 Eur. H.R. Rep. 12 (2002) (concerning, *inter alia*, the right to life), initial opinion available at <http://www.echr.coe.int/eng>; *Attakoya Thangal v. Union of India W.P.*, 1 KLT 580 (Kerala H.C. 1990) (concerning, *inter alia*, recognition of the right to clean water as a right to life).

36. John G. Merrills, *Environmental Protection and Human Rights: Conceptual Aspects*, in Boyle & Anderson, *supra* note 4, at 25-43.

37. Robin Churchill, *Environmental Rights in Existing Human Rights Treaties*, in Boyle & Anderson, *supra* note 4, at 89-109.

38. Andrew Harding, *Practical Human Rights, NGOs and the Environment in Malaysia*, in Boyle & Anderson, *supra* note 4, at 227-45.

39. See U.N. Comm’n on Human Rights, *supra* note 11.

40. Susan E. Brice, *Convention on the Rights of the Child: Using a Human Rights Instrument to Protect Against Environmental Threats*, 7 GEO. INT’L ENVTL. L. REV. 587 (1995).



derives its existence from other human rights.<sup>41</sup> Symonides further illustrates this point by reference to the right to life, stating that “the right to a clean, balanced and protected environment is a fundamental one because it is vital for the exercise of other individual rights and duties, including the right to life.”<sup>42</sup>

By way of a further supporting illustration, this point is also implicit in existing human rights instruments. Article 11 -“The right to protection of health”- contained in Part II of the European Social Charter,<sup>43</sup> for example, provides, “[w]ith a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organizations, to take appropriate measures designed *inter alia* . . . to remove as far as possible the causes of ill-health; . . . .”<sup>44</sup> Here, it can be implicitly assumed that environmental pollution and degradation are causes of, or contributory factors of, ill health.

Pathak also provides further support averring that “the right to a healthful environment may be regarded also as a vital aspect of the right to life, for without a sound environment it would not be possible to sustain an acceptable quality of life or even life itself.”<sup>45</sup>

Of course, the extent to which existing rights can be used to advance environmental rights very much depends upon the scope of the existing right in question. Linked to this is a dilemma that somehow goes full circle to the issues surrounding the environmental rights debate in general. For example, when does a right to health constitute a *right* to environment? What criteria would be used in determining this? Would it just be a simple case of an environmental right being one where pollution causes ill health? What “level” of illness would be required in order to determine a breach? What “quality” of life would be acceptable in terms of regulating pollution? Some even call for a no thresholds, “zero-tolerance” approach

41. Fitzmaurice, *supra* note 3, at 613.

42. Janusz Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT’L J. LEGAL INFO. 24, 29 (1992).

43. European Social Charter art. 11, Oct. 18, 1961, 529 U.N.T.S. 89 [hereinafter *European Social Charter*].

44. *Id.*

45. Raghunandan S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND NEW DIMENSIONS 205, 213 (Edith Brown Weiss ed., 1992).



implying that no level of “harm” should be acceptable.<sup>46</sup> Would death due to adverse environmental factors be the ultimate “breach” of the right to life?

Though a comprehensive exploration of possible solutions to the above dilemma is beyond the scope of this article, the questions need to be raised. Nevertheless, one solution here, in the absence of consensus, and so as not to be too distracted from the case that is being advanced in this article, is to apply standards that are already being set or aspired to in environmental law generally. This is preferable to reaching an impasse and this is where current sustainable development goals and environmental agreements can play a role, and this also leads us to the second school of thought.

## 2. The Second School of Thought – Reinterpreting Existing Human Rights

For the second school of thought, going a step further and reinterpreting existing human rights as opposed to just mobilizing them can also advance my argument for environmental rights of children. Following Anderson,<sup>47</sup> such a re-interpretation would require that specific environmental criteria be created to determine whether the human rights standards in question are being met in terms of environmental goals. For example, it would not suffice to argue that the right to life cannot be fully realized if the environment is degraded, but that practical means of implementation, enforcement and standards are needed, such as emission and effluent limits, in order to fully articulate the right to life, and other existing rights, and to give them substance, in terms of environmental objectives.<sup>48</sup>

Drawbacks to the above argument, however, revolve significantly around practical matters. For example, how would agreement be reached in determining which emissions standards are acceptable enough? Again, I argue that one solution is to use existing environmental law and sustainable development standards and goals as these offer benchmarks that have largely been set and accepted by several

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46. See, e.g., HANCOCK, *supra* note 12, at 107-08.

47. See Michael R. Anderson, *An Overview*, in Boyle & Anderson, *supra* note 4, at 7, 199-227.

48. *Id.*

parties in international fora.<sup>49</sup> They indicate some level of agreement and provide an immediately available option.

### 3. The Third School of Thought – Creating a New “Right” to the Environment

In terms of the third school of thought, it is possible that the creation of new, third generation rights such as the “right to a clean environment” can also advance the environmental rights of children, though such will not be a main focus of this article. “Third generation” rights are also referred to as “group rights,” “solidarity rights” or “collective rights.”<sup>50</sup> However, in terms of subjects of environmental rights, we are concerned with mobilizing environmental rights for children – as individuals, as well as collectively as a group,<sup>51</sup> and hence, such a construction of rights under the aegis of “third generation” as currently interpreted, may not perfectly serve this purpose.

Further, some in the debate lean towards the argument that an environmental right, *per se*, is difficult to codify as a result of an inability to agree on definitions and standards of such a right that could be met in practice.<sup>52</sup> For example, would the right be to a “clean” or a “healthy” or an “adequate” environment or one of a myriad of other adjectives describing one’s right to the environment, and how

49. At the international level, see for example, 1999 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, U.N. Doc. E/ECE/EB.Air/1999/1 (Nov. 30, 1999) [hereinafter Gothenburg Protocol], available at <http://www.unece.org/env/lrtap/full%20text/1999%20Multi.E.Amended.2005.pdf>. This treaty aims to reduce emissions of sulphur, nitrogen oxides, ammonia and volatile organic compounds caused by human activity. The preamble acknowledges that these “compounds have been associated with adverse effects on human health and the environment” through processes of acidification, eutrophication and tropospheric ozone formation resulting from long-range transboundary dispersal.

50. Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in Boyle & Anderson eds., *supra* note 4, at 46.

51. Antonio A. Cançado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND NEW DIMENSIONS, *supra* note 45, at 259 (supporting the view that in terms of subjects, “the right to a healthy environment, like the right to development, discloses both individual and collective dimensions at a time.”).

52. See Philippe Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 296 (2d ed. 2003); Pevato, *supra* note 4, at 309; Boyle & Anderson eds., *supra* note 4.



would such standards be measured and by what threshold?<sup>53</sup> Here, then, for my purpose, I avoid supporting the case for a “new” right to environment, but shall rely on existing rights.

#### 4. A Hybrid School of Thought

For the purpose of this article a hybrid jurisprudential approach can be applied in order to advance a new position. That is to say, the more persuasive argument of the three above “interpretations” of environmental rights combines the first and second school of thoughts in order to create a new point of view. My position is to advocate this “new” point of view.

For example, there is an inevitable interlinkage between environmental protection and first generation civil and political rights if interpreted widely, such as the right to life. If one cannot breathe clean air, how can one live adequately? Further, if there are not enforceable emissions standards, how can an adequate right to life be achieved? Equally, there are links with second generation economic, social and cultural rights and the environment, such as the right to education. If one is not educated (formally or informally about the environment) how can one assist in its conservation? (This is not withstanding the potential for debate as to what exactly a right to education comprises and observing that education is culturally relative and can range from formal lessons, to conversations between a child and a grandparent or tribal elder, for example). Or if there are not certain environmental standards, how can one exercise the right to an adequate standard of living? By way of further example, a precondition to fully exercising the right to life is health, and health depends on a clean, *relatively* unpolluted environment, *i.e.*, a certain amount of pollution is acceptable and life can still exist.

All three examples of the rights, above (life, education, health), impose both positive and negative obligations upon the state and individuals in terms of re-interpreting existing rights and agreeing upon criteria for meeting environmental standards. For example, the right to a clean environment in order to achieve good health would require a company not to pollute the air (a negative obligation) or a government to provide clean drinking water (a positive obligation) in compliance with national legislation. It is here that the concept of

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53. Pevato, *supra* note 4, at 312.



sustainable development can be applied in order to further the debate at the practical level, where human rights are ultimately focused.

*C. The Role of "Sustainable Development"*

In applying the argument that existing human rights can be used to create environmental rights for children, the relationship with and the utility of the argument for sustainable development becomes convincing.

For example, insufficient and unsustainable development, *e.g.*, inadequate access to or availability of drinking water coupled with groundwater contamination, unrestrained urban development, poor pollution control, management and regulation can all lead to environmental and health problems and thus an infringement of environmental rights: based upon the above justification for environmental rights, environmental rights cannot be denied, as they can be linked to other, fundamental human rights.

Further, individual human rights cannot be seen in total isolation from one another. There are inextricable links between the right to life, the right to health and the right to environment and other rights, such as the right to enjoyment of property free from pollution, which form the *ratio legis* at the nexus of international human rights law and international environmental law<sup>54</sup> – that, of survival, existence and continuation of human life, which is inextricably linked to sustainable development.

By means of a practical illustration of the inter-connectivity of human rights, Chapter 6 of Agenda 21 acknowledges the link between health and development. A recommendation is to protect vulnerable groups, of which "[i]nfants and [c]hildren" are one,<sup>55</sup> particularly as "[t]he health of children is affected more severely than other population groups by malnutrition and adverse environmental factors."<sup>56</sup> A further recommendation is to "protect children from the effects of environmental and occupational toxic compounds."<sup>57</sup>

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54. For further discussion of the linkages see, Antonio A. Cançado Trindade, *Environmental Protection and the Absence of Restrictions on Human Rights*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 561-593 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

55. Agenda 21, *supra* note 5, ¶ 6.19(c) (reaffirmed at the 1990 World Summit for Children).

56. *Id.*

57. *Id.* ¶ 6.27(a)(iv).

By way of summary, this section of the article has attempted to illustrate what environmental rights are and can be; that existing human rights can fulfill environmental rights-based objectives; that sustainable development goals and environmental law can assist in the “interpretation” of human rights in order to achieve environmental goals. This can then provide an opening to the environmental rights of children.

### III. WHY CHILDREN’S ENVIRONMENTAL RIGHTS AS OPPOSED TO ADULTS’ ENVIRONMENTAL RIGHTS?

“[C]hildren reading away the morning hours at school and growing in healthy leaps and bounds with their bellies full and their thirst quenched with clean water – is a dream for most of the world”.<sup>58</sup> It is probably agreed in most societies that children should be the priority in the world, but finding a justification, reason or legal basis in international (environmental) law can prove difficult. I offer three arguments in support of environmental rights for children.

#### A. *Children as a Distinct Group*

Firstly, in terms of identifying a distinct category of person that can be afforded protection, a rationale for promoting the environmental rights of *children* in addition to “adult” environmental rights – which tend to be the current focus – can be established. Or, more accurately, having *children* as a distinct category of environmental rights holder can be legitimized.

It was Hillary Clinton who, in 1973 famously wrote that “[c]hildren’s rights” is a “slogan in search of a definition.”<sup>59</sup> What has since followed has more or less provided such a definition through the acknowledgement that childhood is an accepted societal

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58. Barbara Rose Johnston, *Introduction to WHO PAYS THE PRICE? THE SOCIOCULTURAL CONTEXT OF ENVIRONMENTAL CRISIS* 3 (Barbara Rose Johnston ed., 1994) quoted in Tim J. Schorn, *Drinkable Water and Breathable Air: A Liveable Environment as a Human Right*, 4 GREAT PLAINS NAT. RESOURCES J. 121, 121 (2000).

59. Hillary Rodham (later Clinton), *Children Under the Law*, 43 HARV. EDUC. REV. 487, 487 (1973) (quoted in Michael D.A. Freeman, *The Future of Children’s Rights*, 14 CHILD. & SOC’Y 277, 277 (2000)).



construct.<sup>60</sup> Socially and culturally, a distinct category of person has emerged over the centuries,<sup>61</sup> that of the “child”.<sup>62</sup> This category, along with others such as that of “woman”, has gained increasing moral and, more importantly for our purposes, legal status, as illustrated below.

Moral and legal acknowledgement of the construct of “child” has been given acceptance and legitimacy through legislation. This has, among others, included international legislation that confers rights claims upon children, for example, the 1959 UN Declaration on the Rights of the Child (IDRC)<sup>63</sup> and, thirty years later, the UNCRC, ratified by all but two eligible states.<sup>64</sup> David asserts the Convention “recognizes the child as a human being entitled to a full array of rights.”<sup>65</sup>

“Traditional” child rights doctrine can also advance our argument. It rests very much upon two theories that are equally applicable in the context of the environmental rights of children: 1) liberationist theory, that children should be “liberated” from the adult-dominant, adult-constructed world of childhood; and, 2) protectionist theory, which recognizes that children need protection within society on account of their powerlessness and vulnerability.<sup>66</sup> These theories offer further support for the justification of the environmental rights of children (and perhaps make additional sense if we can say that adults have caused more environmental problems than children), particularly in the context of the right of children to participate in

60. See, e.g., MICHAEL D.A. FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* (1983).

61. This “distinct category” of person began to emerge over 400 years ago in Europe. See BOB FRANKLIN, *THE RIGHTS OF CHILDREN* 8 (1986).

62. *Id.*

63. See Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959), available at <http://www.unhchr.ch/html/menu3/b/25.htm>.

64. The USA and Somalia have not ratified the UNCRC. See *supra* note 7.

65. Paulo David, *Implementing the Rights of the Child: Six Reasons Why the Human Rights of Children Remain a Constant Challenge*, 48 INT’L REV. EDUC. 259, 259 (2002).

66. See Brian Littlechild, *Children’s Rights to be Heard in Child Protection Processes – Law, Policy and Practice in England and Wales*, 9 CHILD ABUSE REV. 403, 405 (2000) (referencing *THE HANDBOOK OF CHILDREN’S RIGHTS: COMPARATIVE POLICY AND PRACTICE* (Bob Franklin ed., 1995)); Lorraine Fox Harding, *Recent Developments in ‘Children’s Rights’: Liberation For Who?* 1 CHILD & FAMILY SOC. WORK J. 141, 141-50 (1996).

environmental matters and the right of children to be protected from environmental harm.

Based on the argument that "child" is a distinct category, we can also accept that "children" are one among several categories of persons that may be more susceptible to under representation and marginalization in the global arena (including the "environmental" arena). Cançado Trindade supports the assertion that children are among a category of "specially vulnerable and disadvantaged groups," adding that they in fact "rank among the particularly vulnerable and stand in special need of protection."<sup>67</sup>

Henceforth, if we conceive of children as a distinct social category in this regard, and some reasons for this are presented under the third argument below, they should thus benefit from a distinct category of environmental rights or be explicitly recognized as a distinct category of environmental rights holders. Based on this, children should not be overlooked as being capable of having or exercising environmental rights, particularly on the grounds of basic human dignity and stake in society. As O'Neill asserts, "children can easily become victims. If they had rights, redress would be possible . . . they (like other oppressed groups) would have legitimate and (in principle) enforceable claims against others. Although they (unlike many other oppressed groups) cannot claim their rights for themselves, this is no reason for denying them rights."<sup>68</sup>

### B. Child-Specific Rights

Though the international community has undertaken few formal steps in relation to addressing the interrelated issues of children and the environment, the advancement of a distinct legal regime for the protection of children's rights in the form of the UNCRC coupled with an emerging discourse on the environmental rights of children<sup>69</sup> and child/environment concerted action among non-governmental organizations (NGOs) further provides legitimacy and distinctiveness to this area. Agreements that are devoted solely to the ad-

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67. See Trindade, *supra* note 51.

68. Onora O'Neill, *Children's Rights and Children's Lives*, 98 *ETHICS* 445, 445 (1988).

69. See generally Fitzmaurice, *supra* note 3; Brice, *supra* note 40; *THE RIGHT OF THE CHILD TO A CLEAN ENVIRONMENT* (Agata Fijalkowski & Malgosia Fitzmaurice eds., 2000).



vancement of children's rights, such as the UNCRC and the IDRC,<sup>70</sup> along with precise provisions in treaties, such as Article 16 of the San Salvador Protocol<sup>71</sup> and Article 7 of the European Social Charter,<sup>72</sup> further acknowledge that children can be a distinct category of rights holders.

In addition, determining whether children need to be, or are, a distinctly recognized "category" in international environmental law, and thus capable of having environmental rights, can also be argued.

### C. *International Environmental Protection and Children*

At the evolutionary stage of international environmental law, indirect references to environmental rights and obligations were traditionally expressed in terms of male adults through, for example, references to "man" and "he"<sup>73</sup> This has later evolved to "human beings,"<sup>74</sup> and humans are all encompassing of age and gender. However, "human" may frequently be interpreted as "adult," particularly as it is often adults who are at the helm of international environmental law discourse, creation, interpretation, application and implementation.

It is this conceptualization of "adult" that arguably provides a current frame of reference for the application of environmental law. It

70. Declaration of the Rights of the Child, *supra* note 63.

71. See San Salvador Protocol, *supra* note 16 (Article 16 - Rights of Children: "Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.").

72. European Social Charter, *supra* note 43, art. 7 ("The Right of Children and Young Persons to Protection").

73. See, e.g., Declaration of the United Nations Conference on the Human Environment, princ. 1, June 16, 1972, 11 I.L.M 1416 (1972), [hereinafter Stockholm Declaration] ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . ."); see also Stockholm Declaration, Principle 26 ("Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction . . .").

74. See, e.g., Rio Declaration, *supra* note 20 at Principle 1 ("Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.").

is this frame of reference that can and may sometimes overlook the application of international environmental law and environmental rights to children even though there is no discounting the fact that children are human and international environmental law's scope is far-reaching. To redress this, and noting above that we can conclude that children are a distinct category in law and society, the term human should be interpreted to also include children.

To this extent, environmental treaties and human rights agreements can be, and should be, interpreted specifically in the context of children. Thus, the environmental rights of children can then clearly be acknowledged. Treaties provide scope for this, as too does the direction in which current legal thought is heading.<sup>75</sup> Explicit interpretation of the provisions of environmental agreements in the context of children can thus assist in advancing the arguments outlined in this article.

In further support of the scope of application of international environmental law to children, it is noted that international environmental instruments such as the Stockholm and Rio Declarations (which may use "man" or "human" as the baseline) also contain "neutral terms" such as "victim"<sup>76</sup> or "the younger generation."<sup>77</sup> These terms can be interpreted so as to also refer to children and add further credence to the argument.

Further, the language in some international environmental instruments does not only confer environmental rights (via the obligations placed on States to protect and safeguard the environment and hu-

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75. See for example, the Review of European Community and International Environmental Law which recently dedicated a whole edition of the Review to the Millennium Development Goals, examining in the current policy climate, the role of these internationally agreed objectives in achieving environmental, poverty-reduction, development and human rights-related objectives. See 15 RECIEL. 123 (2006).

76. Stockholm Declaration, *supra* note 73, at Principle 22 ("States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.").

77. Stockholm Declaration, *supra* note 73, at Principle 19 ("Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.").



man life<sup>78</sup>) but often requires “man” or, more accurately in the context of today, “human beings” *not to cause harm* “themselves” to the environment, as illustrated in the Stockholm and Rio Declarations.<sup>79</sup> Such harm to the environment can arguably have an impact on children (who are likely more vulnerable, see below),<sup>80</sup> particularly, if States are not undertaking any pollution control measures. This interpretation would warrant the consideration of children in the environmental obligations of actors and environmental decision-making processes at the international and national levels, hence with children as the recipients of environmental rights.

#### D. *Human Rights Discourse as a “Gap Filler”*

In addition, human rights discourse fills a “gap” where action might otherwise not be taken on environmental matters. For children, this can be significant. For example, Rodriguez-Rivera<sup>81</sup> notes “one obvious gap not covered by international environmental law involves the protection of human life and dignity from the threats associated with environmental degradation, especially when such threats result as a consequence of actions or inactions taken by an individual’s own national government. This is the area of international law where international human rights issues overlap with international and national environmental issues.” While the international community may have reached consensus (with few exceptions) on how to regulate substantive areas of environmental concern such as climate change or depletion of the ozone layer, there is as of yet no comprehensive regime that extends to environmental human rights. This becomes particularly compelling if the adverse conse-

78. For example, Principle 7 of the Rio Declaration, *supra* note 20, affirms that: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem . . . .”

79. Stockholm Declaration, *supra* note 73, at Principle 18 (“Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.”); Rio Declaration, *supra* note 20.

80. Children should also have obligations not to harm the environment but this article is more concerned with the mobilization of environmental rights to protect and enhance the well being of the child, particularly as children are normally more ‘innocent’ in terms of the harm they can cause.

81. Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 *COLO. J. INT’L ENVTL. L. & POL’Y* 1, 9 (2001).

quences associated with, for example, climate change, continue unabated because the future potential impacts on a vulnerable group such as children may be severe.

It is in the absence of such safeguards that we can thus turn to existing human rights. This also has the potential to put pressure on national governments to take measures at home to act on environmental issues, noting that international human rights law aims to protect the individual from, as Rodriguez-Rivera says, action or inaction that results in "abuse" by their own State. This is further bolstered by the pressure exerted through international environmental law.

#### *E. Global Standards*

An additional argument is also offered here as to why human rights have been chosen as the vehicle for improving the environment for children. In the absence of global consensus and benchmarks, human rights (and not withstanding arguments here related to cultural relativism) are possibly the nearest manifestation to fundamentally agreed global standards relating to humans that we may ever achieve. Noting the seriousness with which a considerable faction of the international community regards human rights and the associated standards, it seems feasible to attempt to advance the environmental rights of children through this mechanism.

#### *F. Pragmatism*

A further justification for the explicit recognition of the environmental rights of children, and a means by which to illustrate the link between children, environment and sustainable development can be shown in pragmatic terms.

Children are more vulnerable than adults on account of age, physical development, and mental development and are by default often more vulnerable to environmental hardship and exploitation.<sup>82</sup> Moreover, children are less aware of and much less likely to exercise their rights *vis-à-vis* adults.

Poverty, war, social degradation and natural disasters, *inter alia*, can contribute to the deterioration of natural resources and the envi-

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82. See GERMAN FEDERAL ENVIRONMENTAL AGENCY (UMWELTBUNDESAMT), Environmental Health Risks: What are the differences between children and adults? ACTION PROGRAMME FOR ENVIRONMENT AND HEALTH (May 2004).



ronment,<sup>83</sup> which in turn impact child development and health. Equally, environmental degradation and other physical hazards are often more “common and inescapable for the poor in densely populated cities, where infectious disease can spread rapidly.”<sup>84</sup> These are, contrary to popular belief, not solely problems in developing countries,<sup>85</sup> though some incidences are perhaps more widespread.

In terms of environmental contaminants and pathways, “children breathe more air, drink more water and eat more food than adults do per unit body weight and this higher rate of intake results in greater exposure to pathogens and pollutants.”<sup>86</sup> Equally, on account of their narrow airways children have a more rapid rate of respiration.<sup>87</sup> As a result, in polluted areas, children inhale more pollutants per kilogram of body weight than adults.<sup>88</sup>

According to a UNEP-UNICEF-WHO study,<sup>89</sup> asthma is the leading chronic disease among children in *developed* countries. In the United States alone, asthma affects 4.8 million children under the age of 18 and asthma-related hospitalization and death rates are increasing. Air pollution, both indoor and outdoor, is one of the triggers for asthma episodes. High concentrations of ozone in the air have been directly linked to the development of asthma in children exercising outdoors. This also does not discount other environmental triggers.

83. THE UNITED NATIONS CHILDREN’S FUND [hereinafter UNICEF] ET AL., CHILDREN IN THE NEW MILLENNIUM: ENVIRONMENTAL IMPACT ON HEALTH 20 (2002) [hereinafter CHILDREN IN THE NEW MILLENNIUM].

84. *Id.* at 24; see also, JUDITH A. CHERNI, ECONOMIC GROWTH VERSUS THE ENVIRONMENT: THE POLITICS OF WEALTH, HEALTH AND AIR POLLUTION (Palgrave 2002).

85. See CHERNI, *supra* note 84.

86. CHILDREN IN THE NEW MILLENNIUM, *supra* note 83, at 31.

87. Of interest is a recent study published in the British Medical Association journal, *Thorax*, concluding that domestic exposure to volatile organic compounds (VOCs) in Perth, Western Australia, at levels below currently accepted recommendations may increase the risk of childhood asthma. Measurement of total VOCs may underestimate the risks associated with individual compounds. Krassi Rumchev, *Association of Domestic Exposure to Volatile Organic Compounds with Asthma in Young Children*, 59 THORAX 746, 746-754 (2004).

88. EUROPEAN ENVIRONMENT AGENCY AND THE WHO REGIONAL OFFICE FOR EUROPE, Children’s Health and Environment: A Review of Evidence, ENVIRONMENTAL ISSUE REPORT NO. 29, 90 (Giorgio Tamburlini, Ondine S. von Ehrenstein & Roberto Bertollini, eds., 2002).

89. CHILDREN IN THE NEW MILLENNIUM, *supra* note 83, at 73 (citing a study by Kiros McConnell et al., *Asthma in Exercising Children Exposed to Ozone: A Cohort Study*, 359 THE LANCET 386, 386-91(2002).

Further, children under 15 years of age bear 15.4 percent of the global burden of disease associated with environmental factors.<sup>90</sup> Such diseases include acute respiratory infections (ARIs). The biggest causes of childhood mortality are ARIs caused by bacteria that thrive in unclean environments, diarrhoeal diseases and malaria.<sup>91</sup> Nitrate absorption (particularly from contaminated drinking water) has also been linked to “blue baby syndrome” (*methaemoglobinemia* – the reduced ability of the blood to carry oxygen because of reduced levels of normal haemoglobin).<sup>92</sup>

Children are not only affected in terms of direct health impacts. There are other issues that are either a symptom of, or contributor to, environmental problems, issues or degradation that may also impact on the life quality of children or render children vulnerable. These include personal displacement,<sup>93</sup> food security<sup>94</sup> and standard of living.<sup>95</sup> Globally 149 million children are currently malnourished, with two thirds of them located in Asia. The absolute number of malnourished children has also increased in Africa.<sup>96</sup>

Schorn echoes these views:

Considering, for example, that a polluted environment can harm the growth of children, both physically and mentally, and can severely reduce the quality of life of all individuals, it is arguable that denying someone an environmental human right is an affront to justice. This is especially the case when the quality of air and water has more to do with where you are born. Moreover, when the vulnerable of the world society – children – are con-

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90. *Id.* at 19.

91. *Id.* at 18.

92. IRC International Water and Sanitation Centre, *World Water Day 2001, Disease fact sheet: Methaemoglobinemia* (2001), available at <http://www.worldwaterday.org/wyday/2001/disease/methaem.html>.

93. See for example, Philippe Cullet, *Human Rights and Displacement: the Indian Supreme Court Decision on Sardar Sarovar in International Perspective*, 50 INT'L COMP. L. Q. 973-987 (2001) which analyses the human rights and environmental implications of building a dam.

94. CHILDREN IN THE NEW MILLENNIUM, *supra* note 83 at 75.

95. *Id.* at 7.

96. *Id.* at 76 (citing The Secretary-General, *Report of the Secretary General on We the Children: End-Decade Review of Follow-up to the World Summit for Children, delivered to the Special Session of the General Assembly on Children*, U.N. Doc. A/S-27/3 (May 4, 2001)).



fronted with surroundings that harm them, oftentimes because of negligence or inaction, this becomes a moral issue.<sup>97</sup>

The issues that are central to this article are universal and not country or "hemisphere" specific. These are, of course, a few select examples of the direct link between children and the environment.

It is hoped that the ideas espoused herein could assist in the provision of workable global frameworks with the aspiration that advancing the environmental rights of children might eventually help sustainable development become a reality.

When viewed with such pragmatism, it becomes apparent that the link between sustainable development and children's environmental rights is a significant one. It is even more conceivable to suppose that, to a certain degree, children can only have environmental rights, or to be more precise, benefit from environmental rights, when the preconditions for implementing the concept of "sustainable development" actually exist.

This article is thus concerned to ensure that children are not overlooked in the application or focus of environmental law and sustainable development goals and that, to some extent, their environmental rights might be fulfilled. Detailed arguments for acknowledging the environmental rights of children in the context of sustainable development are presented below.

#### IV. THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND ITS RELATION TO THE ENVIRONMENTAL RIGHTS OF CHILDREN – A RATIONALE

It is arguable that the recognition of the environmental rights of children within the broader context of sustainable development can accomplish several goals. It can: protect or enhance the well being of children; protect or enhance the natural environment; and protect or enhance society in general.

The concept of "sustainable development" has customarily focused on striving for *balance* between *economic* development goals and *environmental* protection efforts as a solution to dealing with developmental needs and environmental conservation goals. More re-

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97. Schorn, *supra* note 58, at 127.

cently, within the Johannesburg Declaration on Sustainable Development<sup>98</sup> and the resultant WSSD Plan of Implementation, the idea of *social* development has been added to the equation.

Sustainable development provides an existing framework within which to address both the environmental rights of children and issues of environmental protection, particularly through the links to environmental degradation, health, and poverty, and through providing substance to existing human rights. It provides a framework within which to interpret or reinforce the argument for environmental rights of children at the practical level.

Framing the environmental rights of children within the concept of sustainable development legitimates the idea that sustainable development is generally perceived to fit within the broader context of "environment." It is envisaged that such an interpretation of "environmental rights" is broad enough to accommodate sustainable development goals as traditionally espoused both in environmental law<sup>99</sup> and also in human rights law.

In addition to the connections highlighted above, a rationale for linking the concept of the environmental rights of children to the concept of "sustainable development" concerns the notions of intra- and inter-generational equity, concepts that are themselves intrinsic to the idea of sustainable development. This link is easier to understand if one examines the classic (and potentially one of the most widely accepted) definition of sustainable development that was promulgated in the 1987 Brundtland Report, *Our Common Future*: "Sustainable development is 'development that meets the needs of

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98. World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *The Johannesburg Declaration on Sustainable Development*, ¶¶ 5,11, U.N. Doc A/CONF.199/20 (Sept. 4, 2002), available at [http://www.johannesburgsummit.org/html/documents/summit\\_docs/1009wssd\\_pol\\_declaration.doc](http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc) [hereinafter *Johannesburg Declaration*].

99. For insights into the concept of sustainable development, see also ALEXANDER GILLESPIE, *THE ILLUSION OF PROGRESS: UNSUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW AND POLICY* (2001); MICHAEL DECLERIS, *LAW OF SUSTAINABLE DEVELOPMENT: GENERAL PRINCIPLES*, (European Communities Union 2000); INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES, (Alan E. Boyle & David Freestone, eds., OUP 1999); Philippe Sands, *International Law in The Field of Sustainable Development: Emerging Legal Principle*, 58-62 in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW*, (Winfried Lang ed., 1995).



the present without compromising the ability of future generations to meet their own needs’.”<sup>100</sup>

Sands dissects this further, indicating that there are two inherent concepts: 1) “the concept of “needs”; in particular the essential needs of the world’s poor, to which overriding priority should be given; and 2) the idea of limitations, imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”<sup>101</sup> These concepts, particularly the first one, arguably add further legitimacy to my argument.

The Brundtland definition of “sustainable development,” which is one of many,<sup>102</sup> may be used to further advance the link between environmental protection and the rights of children if the term “future generations” is supplanted with the term “children.” This is, of course, only one interpretation.

Conserving and protecting the environment for the future and for the intrinsic interests of children melds well with the concept of sustainable development and hopes for a better world, underlying goals of both environmental and human rights law.

The Rt. Hon. Lord Justice Sedley has reflected on the severity of the issue:

The despoliation of the environment is arguably the gravest of all the problems we are going to hand on to our children and grandchildren. They will not thank us – particularly those of us who work in the administration of justice – for having done too little about it at a time when action and prevention were feasible.<sup>103</sup>

Sustainable development provides a viable framework within which to situate the environmental rights of children, particularly in terms

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100. Report of the World Commission on Environment and Development, G.A. Res. 42/187, 96th plen. mtg, U.N. Doc. A/RES/42/187 (Dec. 11, 1987) [hereinafter Brundtland Report].

101. See Sands, *supra* note 52, at 253 (citing the Brundtland Report at 43).

102. For an in-depth discussion on the concept of “sustainable development” in environmental law, see Marc Pallemmaerts, *International Law and Sustainable Development: Any Progress in Johannesburg?*, 12 REV. EUR. CMTY. & INT’L. ENVTL. L. 1, 1-11 (2003); GILLESPIE, *supra* note 99; DECLERIS, *supra* note 99; Boyle & Freestone, eds. *supra* note 99. 103. The Rt. Hon. Lord Justice Sedley, *Foreword to COSTING THE EARTH, GUIDANCE FOR SENTENCERS 1* (Paul Stookes ed., 2002).

of applying existing human rights. Nevertheless, the concept of “sustainable development” should not be confused with the idea of “development” *per se*, as development may not always be sustainable and does not necessarily relate to development in an environmental context.<sup>104</sup>

As the field of international environmental law has gradually evolved, legal credence has increasingly been given to the 1987 concept of sustainable development via several key soft law instruments. The texts agreed around those (and other) instruments, namely Agenda 21 and the Rio Declaration<sup>105</sup> both from 1992, offer some codification of the concept and the definition of sustainable development, the aspirations of which can be applied to children. Furthermore, these texts exhibit, through the language used, acknowledgement of the link between human rights and environmental protection.

Moreover, in 1972, an international congress of nations concluded the Stockholm Declaration,<sup>106</sup> which codified some of the first strands of thinking on what became the concept of sustainable development. Some provisions are couched in rights-based language and can be interpreted to apply to children: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . . .”<sup>107</sup>

The reference here is to human beings (“man”) and includes children, in aspirations for a certain standard of environment, as we assert, this should be and is being, interpreted widely as a reference to all human beings, male and female. This Principle acknowledges that conservation and environmental protection can impact the quality of human life, both present and future. Again, the intergenerational reference, particularly, can be interpreted as a reference to future children.

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104. There is the potential for overlap and linkages with the existing claim for a ‘right to development’ and the concept of sustainable development. It is clear that the debate between the two concepts would merit further deliberation, though this is beyond the remit of this article.

105. Agreed at the United Nations Conference on Environment and Development, 1992. See generally Rio Declaration, *supra* note 20.

106. Agreed at the United Nations Conference on the Human Environment, 1972. This agreement is non-binding, soft law. See generally Stockholm Declaration, *supra* note 73.

107. Stockholm Declaration, *supra* note 73, at Principle 1.



It is also illuminating to note that the work of the Preparatory Committee of the 1972 United Nations Conference on the Human Environment considered that the Stockholm Declaration “was based on the recognition of the rights of individuals to an adequate environment.”<sup>108</sup>

Principle 2 of the Stockholm Declaration further hints at emerging environmental rights linked to the concept of sustainable development and inter-generational equity: “The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”<sup>109</sup>

In addition, Chapter 25 of Agenda 21, Section B, *Children in Sustainable Development* provides under paragraph 25.12:

Children not only will inherit the responsibility of looking after the Earth, but in many developing countries they comprise nearly half the population. Furthermore, children in both developing and industrialized countries are highly vulnerable to the effects of environmental degradation. They are also highly aware supporters of environmental thinking. The specific interests of children need to be taken fully into account in the participatory process on environment and development in order to safeguard the future sustainability of any actions taken to improve the environment.<sup>110</sup>

Here there are calls for action in terms of several rights-based goals linked to sustainable development, these goals include: providing children with the tools and means of protecting and conserving the

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108. Rodriguez-Rivera, *supra* note 81, at 17 (citing the Preparatory Committee for the United Nations Conference on the Human Environment, ¶ 77, U.N. Doc.A/Conf.48/PC/17 (1972)).

109. Stockholm Declaration, *supra* note 73, at Principle 2.

110. See Agenda 21, *supra* note 5. “Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts the environment.” U.N. DEP’T OF ECON. & SOC. AFFAIRS, Division for Sustainable Development: Documents, Agenda 21 (Dec. 15, 2004), *available at* <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>. Agenda 21 was adopted at the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil, from June 3-14, 1992. See *supra* notes 5 and 20.

environment; providing increased access to environmental protection and conservation goals to children from developing countries; safeguarding children everywhere from environmental pollution and degradation (for health and other reasons); providing children with access to environmental education and information; and, including (or representing) children in the environmental decision-making process.<sup>111</sup>

The United Nations Secretary-General's "Agenda for Development" also acknowledges the link between children and sustainable development:

Children are the most important resource for the future. Greater investment in children by parents and societies is essential to the achievement of sustained economic growth, social development and environmental protection. Therefore, the promotion, to the fullest extent, of the health, well-being and potential of all children, adolescents and youth is a crucial objective.<sup>112</sup>

The 1992 Rio Declaration also supports an anthropocentric application of environmental rights in Principle 1: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."<sup>113</sup> The term "human beings" by contemporary interpretation includes children.<sup>114</sup>

Principle 3 further draws out the link between children and sustainable development in terms of rights: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations," again strengthening the link between intra- and inter-generational equity and children.<sup>115</sup>

Principle 4 also advances the goals of sustainable development: "In order to achieve sustainable development, environmental protec-

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111. See Agenda for Development, G.A. Res. 51/240, ¶¶ 129-132, U.N. Doc. A/RES/51/240 (Oct. 15, 1997) [hereinafter Agenda for Development].

112. *Id.* ¶129.

113. Rio Declaration, *supra* note 20, at Principle 1.

114. See UNCRC, *supra* note 7.

115. Rio Declaration, *supra* note 20, at Principle 3.



tion shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>116</sup>

In pragmatic terms, the link between children, sustainable development and the environment is perhaps easier to establish. There is inter-relatedness between development (or lack of) and environmental enhancement and protection (or degradation), and related social aspects, such as health. By way of illustration, 12 million people die each year from lack of water, including 3 million children from waterborne disease: 1.1 billion lack access to clean water; and 2.4 billion live without decent sanitation.<sup>117</sup>

Other key Principles of the Rio Declaration can be used to support the argument for the environmental rights of children. Principle 5 calls for the eradication of poverty “as an indispensable requirement for sustainable development” particularly to improve the lives of the worlds poor as poverty is inextricably linked to health, environment and social degradation.<sup>118</sup> Principle 6 calls for special attention to be paid and priority to be given to the “situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable.”<sup>119</sup> The majority of children that would most benefit from environmental rights and environmental protection measures are in developing countries. As children are often among the victims of environmental degradation, Principle 21 calls for consideration of the opinions and contribution<sup>120</sup> of “the youth of the world” to be taken into account in achieving sustainable development.<sup>121</sup> Principle 23 can potentially apply to children, where it states, “the environment and natural resources of people under oppression, domination and occupation shall be protected.”<sup>122</sup> Finally, Principle 24 acknowledges that “warfare is inherently destructive of sustainable development” and asks that “States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”<sup>123</sup> This is also linked to Principle 25 which accurately

116. *Id.* at Principle 4.

117. See UNICEF, *The State of the World's Children*, 2002, available at <http://www.unicef.org/sowc02/fullreport.htm> or <http://www.unicef.org/sowc02/pdf/sowc2002-eng-full.pdf>.

118. Rio Declaration, *supra* note 20, at Principle 5.

119. *Id.* at Principle 6.

120. *Id.* at Principle 21.

121. *Id.* at Principle 23.

122. *Id.* at Principle 24.

123. *Id.* at Principle 25.

observes "Peace, development and environmental protection are interdependent and indivisible."<sup>124</sup>

The WSSD<sup>125</sup> itself contributed to the debate and advanced the precedents set by the Rio and Stockholm Declarations for taking the human rights and environment link further. Giving children environmental rights could arguably assist in meeting the sustainable development goals agreed at the WSSD and *vice versa* as evidenced in the Johannesburg Principles, Declaration and Plan of Implementation, critiqued below.

*A. The Johannesburg Principles on the Role of Law and Sustainable Development and the Johannesburg Declaration*

The non-binding Johannesburg Principles on the Role of Law and Sustainable Development, adopted in 2002 by world judges at the WSSD acknowledge the link between human rights<sup>126</sup> and sustainable development and contain a statement by the judges to affirm their commitment to the Millennium Development Goals<sup>127</sup> and the pledge made by world leaders in the UNGA Millennium Declaration, "to spare no effort to free all of humanity, and above all our

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124. *Id.*

125. See *supra* note 6.

126. These principles are non-binding on states and are merely soft guidance. The principles affirm the role performed by the judiciary in advancing the goals of environmental protection, sustainable development and poverty reduction. The principles comprise a document that affirms that "an independent judiciary is vital for the implementation, development and enforcement of environmental law." Johannesburg Principles on the Role of Law and Sustainable Development, ¶5, available at <http://www.unep.org/dpdl/symposium/Principles.htm> (Adopted Aug. 20, 2002, in Johannesburg, South Africa, at the Global Judges Symposium) [hereinafter Johannesburg Principles].

127. The Millennium Development Goals ("MDGs") are drawn from several development goals agreed at international conferences and world summits during the 1990s. These include the International Conference on Population and Development (Cairo, 1994) and the Fourth World Conference on Women (Beijing, 1995). At the end of the decade, world leaders distilled the key goals and targets into the "Millennium Declaration" which was adopted by 189 nations and signed by 147 heads of state and governments during the UN Millennium Summit in September 2000. The MDGs comprise 8 goals which are broken down into 18 quantifiable targets which are measured by 48 indicators. See United Nations Population Fund website, 'Frequently Asked Questions', available at <http://www.unfpa.org/icpd/qanda.htm> and United Nations Development Programme website on the MDGs link to 'About the MDGs', available at <http://www.undp.org/mdg/basics.shtml>.



children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.”<sup>128</sup> Again, here there is acknowledgement of the link between sustainable development and intra- and inter-generational equity and the notion of rights.

The Principles build upon the Millennium Development Goals established by world leaders at the Millennium Summit in September 2000, key relevant goals and target dates of which are:

- To ensure Environmental Sustainability – with the primary aims of integrating the principles of sustainable development into national policies and programs in an attempt to reverse the loss of environmental resources, nationally and internationally, by 2015.
- Key target dates are:
  - 2015, reduce by half the proportion of people without access to safe drinking water and
  - 2020, achieve significant improvement in the lives of at least 100 million slum dwellers.
- Reduce child mortality:
  - A key target date is 2015, to reduce by two thirds the mortality rate among children under five.<sup>129</sup>

More than one billion people currently lack access to safe drinking water<sup>130</sup> and more than two billion lack sanitation.<sup>131</sup> During the

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128. United Nations Millennium Declaration, G.A. Res. 55/2 (Sept. 18, 2000) (This Declaration is soft law as “the decisions of the Assembly have no legally binding force for governments, they carry the weight of world opinion, as well as the moral authority of the world community”); *see id.* ¶ 12 (An example of a relevant pledge is found in Paragraph 12: “We resolve therefore to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty”). All 189 UN Member States adopted the Millennium Declaration which contains the core group of Millennium Development Goals (MDGs) and targets. Basic Facts About the United Nations, DPI/2155 Rev.1 - December 2002 - 40M ISBN: 92-1-100850-6, available at <http://www.un.org/millennium/declaration/ares552e.htm>; *see also* Johannesburg Principals, *supra* note 127, ¶¶ 1-5.

129. United Nations Millennium Development Goals. *See supra* note 127, and also the United Nations Millennium Declaration, *supra* note 128, ¶19. Every year nearly 11 million young children die before their fifth birthday, mainly from preventable illnesses, but that number is down from 15 million in 1980. *See*, The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005, 05-27078 (E) 210305, at 7, (2005).

1990s, however, nearly one billion people gained access to safe water and the same number to sanitation.<sup>132</sup> Thus, it is the view of this author that this serves as convincing evidence that effective implementation can have positive effects in terms of advancing human rights and achieving sustainable development goals.

The Johannesburg Declaration on Sustainable Development (the "Johannesburg Declaration"), adopted at the 17<sup>th</sup> plenary meeting of the WSSD, on September 4, 2002, saw representatives from all over the world reaffirm their commitment to sustainable development.<sup>133</sup> The full implementation of Agenda 21, the Programme for Further Implementation of Agenda 21 and the Commitments to the Rio Principles, were also strongly reaffirmed.<sup>134</sup>

Paragraph 2 of the Johannesburg Declaration commits representatives to "building a humane, equitable and caring global society, cognizant of the need for human dignity for all."<sup>135</sup> The content of this commitment clearly reflects goals frequently associated with human rights law.

The Johannesburg Declaration also explicitly declares a commitment to children in the context of the environment, sustainable development and human rights:

At the beginning of this Summit, the children of the world spoke to us in a simple yet clear voice that the future belongs to them, and accordingly challenged all of us to ensure that through our actions they will inherit a world free of the indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development. As part of our response to these children, who represent our collective future, all of us, coming from every corner of the world, informed by different life experiences, are united and moved by a deeply felt sense that we urgently need to create a new and brighter world of hope. Accordingly, we assume a

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130. See *The State of the World's Children*, *supra* note 117.

131. *Id.*

132. WORLD HEALTH ORGANIZATION & UNICEF JOINT MONITORING PROGRAMME, GLOBAL WATER SUPPLY AND SANITATION ASSESSMENT 2000 REPORT, at page v, available at <http://www.unicef.org/wes/files/gafull.pdf>.

133. Johannesburg Declaration, *supra* note 98, ¶ 1.

134. *Id.* ¶ 8

135. *Id.* ¶ 2.



collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels. From this continent, the cradle of humanity, we declare, through the Plan of Implementation of the World Summit on Sustainable Development and the present Declaration, our responsibility to one another, to the greater community of life and to our children. Recognizing that humankind is at a crossroads, we have united in a common resolve to make a determined effort to respond positively to the need to produce a practical and visible plan to bring about poverty eradication and human development.<sup>136</sup>

*B. Johannesburg Plan of Implementation of the WSSD*

The Plan of Implementation finalized at the WSSD set and reaffirmed several targets for sustainable development,<sup>137</sup> some of which comprise the 8 MDGs and were included in the Millennium Declaration. States agreed, *inter alia*, to halve by 2015 the proportion of people lacking access to basic sanitation;<sup>138</sup> to minimize the harmful effects on human health and the environment from the production and use of all chemicals by 2020;<sup>139</sup> to halt the decline in fish stocks and restore them to sustainable levels no later than 2015;<sup>140</sup> to begin implementation of national strategies on sustainable development by 2005;<sup>141</sup> and, to halt the loss of biodiversity by 2010, as, previously agreed by the Parties to the 1992 Convention on Biological Diversity.<sup>142</sup>

If I use, by way of illustration, the goal to halve the proportion of people lacking access to basic sanitation, one way to achieve this goal is through the interpretation of existing rights-based instruments or rights-based provisions. For example, legislating to give children

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136. *Id.* ¶¶ 3-7.

137. World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, ¶2, U.N. Doc A/CONF.199/20 (Sept. 4, 2002) [hereinafter POI]

138. *Id.* ¶ 8.

139. *Id.* ¶ 23.

140. *Id.* ¶ 31(a).

141. *Id.* ¶ 162(b).

142. *Id.* ¶ 44.

the right to clean drinking water would assist in meeting this goal and is a component of achieving the right to health and the right to life.

Environmental rights given to children based on the identified sustainable development goals would assist in meeting certain basic standards in the quality of children's lives, as required under the UNCRC. It would also assist in fulfilling certain environmental protection efforts. This balance between social and life-enhancing development and environmental protection meets with the policy goals behind the concept of sustainable development.

Though the Plan of Implementation (POI) does reiterate existing pledges made elsewhere in other environmental instruments,<sup>143</sup> it is quite an all-encompassing and broad action plan for poverty reduction, sustainable development, environmental protection, recognition of human rights and other social enhancement. In the view of this author it is this gathering together of previous pledges that highlights relevant links and provides a convincing document of next-steps for the international community. While a comprehensive examination of the POI is beyond the scope of this article, there are several provisions that are linked directly to children, environment and human rights that require due emphasis.

Notably, Paragraph 3 stresses that "the implementation of the outcomes of the Summit should benefit all, particularly women, youth, children and vulnerable groups."<sup>144</sup> Further, Paragraph 5 of the Introduction identifies respect for human rights as a key factor for achieving sustainable development<sup>145</sup> while Paragraph 7 sees poverty eradication as an "indispensable requirement" for sustainable development<sup>146</sup> Paragraph 6(f) calls for a "reduction in environmental health threats, taking into account the special needs of children and the linkages between poverty, health and environment."<sup>147</sup>

Nations are reminded in Paragraph 40(a) of the need to "realize the right to a standard of living adequate for the health and well-being" for individuals and their families, including those standards related

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143. See, e.g., Rio Declaration, *supra* note 20; see, e.g., 1992 United Nations Convention on the Conservation of Biological Diversity: United Nations Framework Convention on Climate Change, June 5, 1992, U.N. Doc. DPI/1307, reprinted in 31 I.L.M. 818.

144. POI, *supra* note 137, ¶ 3.

145. *Id.* ¶ 5.

146. *Id.* ¶ 7.

147. *Id.* ¶ 6(f).



to food.<sup>148</sup> Paragraph 57 calls on nations to “[p]hase out lead in lead-based paints and in other sources of human exposure [and] work to prevent, in particular, children’s exposure to lead and strengthen monitoring and surveillance efforts and the treatment of lead poisoning.”<sup>149</sup>

Emphasis is also on the importance of education for school children,<sup>150</sup> the link between quality sanitation, clean water and health in achieving sustainable development,<sup>151</sup> the need to eliminate child labor<sup>152</sup> (which can, of course, be linked to environmental problems); child ill health and environmental causes;<sup>153</sup> reduction in child exposure to lead;<sup>154</sup> natural disaster management<sup>155</sup> youth participation in environmental matters;<sup>156</sup> the need for increased access to public information and participation<sup>157</sup> and increased technical and financial assistance;<sup>158</sup> and, the need for stakeholder involvement, including the “role of youth” in using biodiversity in a sustainable way.<sup>159</sup>

However, though the goals outlined above are highly optimistic, the extent to which existing or new rights instruments can successfully accord environmental rights to children depends on the efforts undertaken by governments to recognize, implement and enforce the rights, which is an issue examined below.

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148. *Id.* ¶ 40(a).

149. *Id.* ¶ 57.

150. POI, *supra* note 137, ¶ 7(g).

151. *Id.*

152. *Id.* ¶ 12.

153. *Id.* ¶ 53.

154. *Id.* ¶ 57.

155. *Id.* ¶ 58.

156. POI, *supra* note 137, ¶ 128; *see also* United Nations Environment Programme, Know Your Environmental Rights, Teen Planet Magazine, Dec. 2000, available at <http://www.unece.org/env/pp/documents/teenplanet.e.pdf> (last visited Sept. 7, 2006) [hereinafter Teen Planet] (This is a concern that the Aarhus Convention Secretariat are notably active in, for which they have produced *Teen Planet Magazine - Know your Environmental Rights*).

157. POI, *supra* note 137, ¶ 80.

158. *Id.* ¶ 85(d).

159. *Id.* ¶ 44(k).

#### V. ARE ENVIRONMENTAL RIGHTS OF CHILDREN RECOGNIZED IN INTERNATIONAL LAW?

Within the international community there is no single instrument on environmental rights<sup>160</sup> nor is there an agreement that specifically codifies the environmental rights of children, per se. The closest that the international community has come to codifying environmental rights is the Ksentini Report and the annexed Draft Declaration of Principles on Human Rights and the Environment (“Draft Principles”)<sup>161</sup> which is still embryonic in form. The fact that the Draft Principles have not been codified or ratified by the international community is, in my view, indicative of the complexities surrounding the human/environmental rights debate. Nevertheless, the Draft Principles do provide a substantial blueprint from which to progress with the children/sustainable development/environmental rights debate.

Of relevance in this context is Principle 1, which acknowledges the fundamental linkage that “human rights, an ecologically sound envi-

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160. See, e.g., Vienna Declaration and Programme of Action, U.N. Doc A/CONF.157/23 (July 12, 1993) [hereinafter Vienna Declaration]. (There have been attempts by the international community to advance the environmental rights dialogue. For example, at the 1993 World Conference on Human Rights held in Vienna, 171 states adopted the Vienna Declaration and Programme of Action on 25 June 1993). Note in particular, paragraph 11: “The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone. Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping.” See also United Nations Commission for Human Rights, Human Rights and the Environment, ¶ 3, E/CN.4/1995/14 (Feb. 24, 1995) (In addition, the U.N. Commission on Human Rights resolution 1995/14, Human Rights and the Environment, recognized “that environmental damage has potentially negative effects on human rights and the enjoyment of life, health and a satisfactory standard of living.”).

161. U.N. ESCOR, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Human Rights and the Environment: Final Report*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (prepared by Farma Zohra Ksentini). The Draft Declaration of Principles on Human Rights and the Environment (May 16, 1994) [hereinafter Draft Declaration] is contained in Annex I. For an additional source, see <http://www.worldpolicy.org/globalrights/environment/envright.html>.



ronment, sustainable development and peace are independent and indivisible” and Principle 2 which acknowledges, “[a]ll persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.”<sup>162</sup>

In the absence of a binding global agreement on environmental rights, and particularly one that relates to the rights of children, it is logical to turn to existing human rights instruments that may contain environment-related provisions or that may be interpreted in that fashion. For this purpose, it is sensible to examine the United Nations Convention on the Rights of the Child.<sup>163</sup>

*A. The United Nations Convention on the Rights of the Child*

With regard to the environmental rights of children, the Convention does not proffer any *explicit* or *direct* recognition of substantive environmental rights *per se*, such as a codified “right to a healthful environment” or a “right to a clean environment.”

The Convention does, however, recognize some *environment-related* rights of children in the form of articles 16(1), 24, 27(1) and 29(1)(e).<sup>164</sup> Articles 6 and 32(1) are also open to environment-related interpretation. Though the Convention requires that certain minimum standards be met by governments so that the rights contained therein can be implemented, the extent to which nations interpret these articles in the context of potential environmental implications is debatable, subjective and within the autonomy of the States themselves and their sovereign rights. Further, though the articles are binding under international law and are subject to a monitoring committee, they are flexible in application as long as minimum standards are met in providing services to children.<sup>165</sup> If States do not interpret relevant articles in an environmental context, or in a manner that is as environmentally-oriented as possible, they may still be fulfilling their obligations and achieving the minimum standard of “rights” and thus avoiding a direct breach of obligations, yet arguably at the expense of children and the environment. And, if there is

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162. Draft Declaration, *supra* note 161, Principles 1-2.

163. The United Nations Convention on the Rights of the Child was opened for signature Nov. 20, 1989. See UNCRC, *supra* note 7.

164. *Id.*

165. *Id.*

limited obvious or explicit reference to environmental measures and standards within the Convention, many States may opt through interpretation, to avoid environmental commitments.

However, the opposite is also true and the relevant provisions of the UNCRC may be interpreted in a convincing and strong environment-oriented manner by world nations. It is my recommendation that this should be the case. Such interpretation may well impact on the extent to which the environmental rights of children are recognized or given validity through the UNCRC. The extent to which the UNCRC articles identified above create environmental obligations for the State is examined herein.

Article 24 offers the strongest environment and sustainable development-related right of the whole Convention through the declaration that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health . . . ." <sup>166</sup> This is considerably enhanced by Article 24(2) which establishes that States Parties shall pursue the full implementation of this right, through, *inter alia*, "the application of *readily available technology and through the provision of . . . clean drinking water, taking into consideration the dangers and risks of environmental pollution.*" <sup>167</sup>

It is clearly arguable here that Article 24 requires that certain environmental standards be achieved, or environmental protection goals be attained, in order to protect the human right of children to health. This in turn would also demand that the pre-conditions to the right to life be fulfilled. Environmental protection goals can thus clearly lead to the protection of human rights. <sup>168</sup>

Paragraph 2(e) further provides that States Parties shall take appropriate measures "to ensure that all segments of society, in particular parents and children, *are informed, have access to education and are supported in the use of basic knowledge of child health and . . . environmental sanitation and the prevention of accidents.*" <sup>169</sup>

While the content of each Convention article is open to the interpretation of each international signatory, there is *explicit* reference to clean drinking water, environmental sanitation and environmental pollution. <sup>170</sup> This places a strong obligation upon the international

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166. *Id.* art. 24.

167. *Id.* art. 24-2(c) (emphasis added).

168. An argument supported by Desgangne, *supra* note 10, at 264.

169. UNCRC, *supra* note 7, art. 24-2 (e) (emphasis added).

170. See UNCRC, *supra* note 7.



community to afford some level of environmental protection to children.

Article 16(1) states that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence . . .” and has the right to legal protection against such interference.<sup>171</sup> This right has been codified in several regional and national human rights instruments.<sup>172</sup> It can be applied to children in the context of environmental pollution and the “unlawful interference” thereof, as is illustrated in the *Lopez Ostra*<sup>173</sup> case, discussed below.

Under Article 27(1) of the UNCRC, “States Parties shall recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”<sup>174</sup> Article 29(1)(e) specifically requires States Parties to educate children in “the development of respect for the natural environment.”<sup>175</sup> Other environment-related rights may be identifiable as in Article 6(1) whereby “States Parties recognize that every child has the inherent right to life” and Article 6(2), “States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>176</sup> Additionally, Article 32(1) requires States Parties to protect children “from performing any work that is likely to be hazardous . . . or to be harmful to the child’s health or physical . . . development.”<sup>177</sup>

### *B. Making the Judicial Link*

In order to further advance the argument for environmental rights of children there have been several cases which can be recalled in order to illustrate the link between sustainable development, human rights and children’s environmental rights.

171. *Id.* art. 16(1).

172. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), available at <http://www.unhcr.md/article/conv.htm>; Human Rights Act, 1998, c. 42 (Eng.) art. 8, (Nov. 9, 1998), available at <http://www.opsi.gov.uk/ACTS/acts1998/80042--a.htm#8>.

173. *López Ostra*, App. No. 16798/90, 20 Eur. H.R. Rep. 277.

174. UNCRC, *supra* note 7, art. 27(1).

175. *Id.* art. 29(1)(e).

176. *Id.* art. 6(1), 6(2).

177. *Id.* art. 32(1).

1. Öneriyildiz v. Turkey<sup>178</sup>

The applicant, who brought the case in his own name and on behalf of his three surviving children, claimed that Turkish authorities were responsible for the death of 13 members of their families and for the destruction of their property in a slum area as a result of a methane-gas explosion at a municipal landfill.<sup>179</sup> The positive obligation in Article 2 of the European Convention on Human Rights, for Turkey to uphold the right to life, was held to have been breached on the grounds “that a violation of the right to life can be envisaged in relation to environmental issues relating not only to the spheres mentioned by the Government . . . but also to other areas liable to give rise to a serious risk for life or various aspects of the right to life.”<sup>180</sup> What is clear from this case is that the applicants and the deceased were poor, marginalized individuals, who resided in a slum area near an environmental hazard. This further illustrates the link between poverty and environmental hardship, for adults and children. Experts concluded that the landfill site “exposed humans and animals and the environment to every form of danger.”<sup>181</sup> It can also be argued here that the right to be free from inhuman or degrading treatment also depends on certain basic environmental standards being achieved. In a Chamber Judgment of June 18, 2002 the Court held by five votes to two that there had been a violation of Article 2.<sup>182</sup> The Grand Chamber of the European Court of Human Rights subsequently upheld the applicants’ claim. The Grand Chamber also upheld a violation of Article 1, Protocol 1, and Article 13.<sup>183</sup>

2. López Ostra<sup>184</sup>

The *López Ostra* case does not offer much by way of human/environmental rights theory but more of a practical insight into the application of environmental rights to children. This environ-

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178. Öneriyildiz, *App. No. 48939/99, initial opinion*, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=%D6neriyildiz&sessionid=10064242&skin=hudoc-en>.

179. *Id.* ¶ 17.

180. *Id.* ¶ 64 (citations omitted).

181. *Id.* ¶ 12.

182. Öneriyildiz, *App. No. 48939/99*, 39 Eur. H.R. Rep. 12, ¶ 4 (2004) (chamber judgment).

183. *Id.* ¶ 176.

184. *López Ostra*, *App. No. 16798/90*, 20 Eur. H.R. Rep. 277.



mental pollution case was brought by Mrs. López Ostra because fumes, smells and contamination emanating from a waste treatment plant had caused health problems and nuisance to many residents in a Spanish town. The plant was 12 meters away from the home of the complainant, her husband and significantly, her two children.

An expert opinion from a pediatrician noted that gas levels emitted from the plant exceeded permitted levels and were the likely cause of health problems for the applicant's daughter and nephew. It was recommended to move the children away from the area.<sup>185</sup> As paragraph nineteen of the judgment indicates:

The investigation file contains several medical certificates and expert opinions concerning the effects on the health of those living near the plant. In a certificate dated 12 December 1991 . . . a paediatrician stated that Mrs López Ostra's daughter . . . presented a clinical picture of nausea, vomiting, allergic reactions, anorexia, etc., which could only be explained by the fact that she was living in a highly polluted area. He recommended that the child should be moved from the area. In an expert report of 16 April 1993 the Ministry of Justice's Institute of Forensic Medicine in Cartagena indicated that gas concentrations in houses near the plant exceeded the permitted limit. It noted that the applicant's daughter and her nephew . . . presented typical symptoms of chronic absorption of the gas in question, periodically manifested in the form of acute bronchopulmonary infections. It considered that there was a relationship of cause and effect between this clinical picture and the levels of gas.<sup>186</sup>

Consequently, the European Court of Human Rights upheld a breach of Article 8 of the European Convention on Human Rights, holding that "everyone has the right to respect for his private and family life, his home and his correspondence."<sup>187</sup>

The link between property, health and environmental rights is easy to establish. In this case, the right to private and family life is undermined on account of invasive environmental pollution, which

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185. *Id.* at 283.

186. *Id.* at 283, ¶19.

187. *Id.* at 287, ¶42.

infiltrates living quarters and so forth, from which there is no escape other than to leave the property, and the environment is adversely affected. In turn, health is adversely affected. Further, it is likely that children would be more vulnerable to the adverse effects of such incidence of pollution, particularly on account of their physiology. Environmental harm can occur and victims arise every day. It was fortunate that Mrs López Ostra was a persistent and effective guardian.

### 3. Gabčíkovo-Nagymoros<sup>188</sup>

Although the Case Concerning the Gabčíkovo-Nagymoros Project litigated between the governments of Hungary and Slovakia in 1997, was not a human rights case specifically, the separate opinion of Judge Weeramantry focused largely on the concept of sustainable development with reference to the human/environmental rights debate. Referring back to the link between children and future generations discussed *supra*, Judge Weeramantry also reflected particularly on the arguments for sustainable development and environmental rights in the context of inter- and intra-generational equity: the “[R]ight to development and the right to environmental protection – are important principles of current international law.”<sup>189</sup> He commented further that the applicants were “entitled to development for the furtherance of their happiness and welfare” as they were “likewise entitled to the preservation of their human right to protection of their environment.”<sup>190</sup>

Moreover, Judge Weeramantry added credibility to the environmental rights debate by acknowledging that “the protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself.”<sup>191</sup> He emphasized that “it is scarcely necessary to elaborate on this, as *damage to the environment can impair and undermine all human rights spoken of in the Universal Declaration and other human rights instruments*,”<sup>192</sup> further adding that the components of the principle of sustainable de-

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188. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. LEXIS 2 (Sept. 25).

189. *Id.* at 89 (separate opinion of Vice-President Weeramantry).

190. *Id.* at 90 (emphasis added).

191. *Id.* at 88 (emphasis added).

192. *Id.* at 89 (emphasis added).



velopment “*come from well-established areas of international law – human rights, State responsibility, environmental law, economic and industrial law . . . [and], abuse of rights, . . . to mention a few.*”<sup>193</sup>

#### 4. Minors Oposa (The Philippine Children’s Case)<sup>194</sup>

This case of the Philippine Supreme Court gave legal recognition to the concept of intergenerational standing. Insightful not only in the sense that it was a case *brought* by children (“minors”) as the principal petitioners (although represented by their parents), it also sought to achieve recognition of the rights of children, of both current and future generations (“generations yet unborn”) for “pre-vent[ing] the misappropriation or impairment” of the remaining Philippine natural forests and halting the progress of timber-cutting by government licensees so that forests might remain in order to fulfil the right to a balanced and healthful ecology.<sup>195</sup>

The petitioners alleged among other things that the “defendant’s act [i.e., cutting down forests] [was] contrary to the highest law of humankind – natural law – and violative of plaintiff’s right to self-preservation and perpetuation.”<sup>196</sup> The case found that children have the right to represent their generation and future generations and sue on their behalf in preserving the right to a balanced and healthful ecology.

Every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for generations to come.<sup>197</sup>

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193. *Id.* at 92 (emphasis added).

194. Antonio et. al v. Factoran, et. al, G.R. No. 101083 (S.C. July 30, 1993), available at <http://www.supremecourt.gov.ph/> [hereinafter Minors Oposa].

195. *Id.*

196. *Id.*

197. *Id.*

5. The Horinko Case: State of New York, State of Connecticut, State of New Jersey and Commonwealth of Massachusetts v. United States Environmental Protection Agency and Marianne L. Horinko, Acting Administrator<sup>198</sup>

This domestic complaint for declaratory and injunctive relief by the plaintiffs against the Environmental Protection Agency (EPA) concerned an alleged failure by the EPA to comply with statutory obligations imposed by the Food Quality Protection Act (FQPA) regarding permitted levels of chemical pesticide residue levels in food.<sup>199</sup> The EPA allegedly failed to apply an additional tenfold safety margin to account for the special susceptibility of infants and children to pesticides, including alachlor, chlorthalonil, methomyl, metribuzin and thiodicarb, as required by the FQPA, and so allegedly endangered the health of infants and children.<sup>200</sup>

Though the case is not an explicit human rights or environment case, it serves to illustrate how State actors can bring an environmental rights-related action as *parens patriae* on behalf of children in their jurisdiction.

VI. DO CHILDREN HAVE ENVIRONMENTAL RIGHTS?: ENFORCEMENT AND IMPLEMENTATION – SOME LIMITATIONS AND SOLUTIONS

There are clearly demonstrable judicial links between environmental protection and the rights of children, and clear bases in international law to support our arguments. However, though reasons for advancing the environmental rights of children, and possible ways of undertaking this have been offered, this does not constitute a totally conclusive or viable option for advancing sustainable development, environmental protection goals, or for improving the lives of children. How then do we guarantee the environmental rights of children? Clearly, problem areas still remain, such as whether existing rights are *themselves* precise enough on environmental standards and protection, or, alternatively whether there should be explicitly newly defined standards and thresholds.

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198. Physicians Comm. for Responsible Med. v. Horinko, 285 F.Supp.2d 430 (S.D.N.Y. 2003) [hereinafter Horinko Case].

199. *Id.*

200. *Id.*



The counter argument here is, however, quite convincing. Current national legislation and that which is particularly influenced by the standards set in international environmental law and elsewhere, along with the international goals espoused at the WSSD and other sustainable development goals, can provide benchmarks that can be applied or aimed for in the absence of such explicitly defined standards and thresholds in terms of the contents of rights *per se*.

The arguments presented in this article provide a means and a solution, by which to advance the environmental rights of children: a starting point for action, rather than inaction on account of waiting for a right to environment *per se* to be codified either at the national or international level. The international instruments discussed herein are the vehicle for expressing the obligation and providing the detail about the way in which the human right to environment is to be guaranteed. “[A]n interaction of demands by various actors, and state practice [can thus lead to the] generation of norms and the expectation of compliance”<sup>201</sup> in relation to the environmental rights of children.

To further determine the extent to which children can have environmental rights, allusion to the WSSD is once again required, concurrent with a critique of the above-identified environment and sustainable development-related provisions of the UNCRC in order to demonstrate how the environmental rights of children might be articulated and how the obligations might be framed and delivered.

Several of the Johannesburg Principles on the Role of Law and Sustainable Development (the “Principles”) and the preambular paragraphs in general can be interpreted in terms of “rights” and are framed in rights-based language. Further explicit commitment to human rights and sustainable development, and thus reinforcement of the link, are found in preambular paragraph three of the Principles,<sup>202</sup> which states: “We emphasise our *commitment* to the Universal Declaration of Human Rights and the UN Human Rights Con-

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201. Luis E. Rodriguez-Rivera, *Is the Human Right to Environment recognized Under International Law? It Depends on the Source*, 12 *COLO. J. INT’L ENVTL. L. & POL’Y* 1, 4 (2001) (quoting the Honorable Rosalyn Higgins, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*, 98-99 (1994)).

202. Memorandum from the Global Judges Symposium on The Johannesburg Principles on the Role of Law on Sustainable Development (Aug. 20, 2002), 1, available at [http://www.iucn.org/themes/law/pdfdocuments/Johannesburg%20Principles%20\\_english.pdf](http://www.iucn.org/themes/law/pdfdocuments/Johannesburg%20Principles%20_english.pdf). (emphasis added).

ventions and recognize their close connection with sustainable development and upholding the Rule of Law.”

Paragraph eight of the preamble is also significant in framing the rights-based sustainable development nexus:

We emphasise that the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to . . . *implement and enforce* applicable international and national law, which in the field of environment and sustainable development will assist in alleviating poverty. . . and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.<sup>203</sup>

Further support is found in preambular paragraphs ten and fourteen:

We express our conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the *implementation, development and enforcement* of laws, regulations and international instruments relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment.

We recognize that the people most affected by environmental degradation are the poor, and that therefore, there is an urgent need to *strengthen the capacity* of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy their right to live in a social and physical environment that respects and promotes their dignity.<sup>204</sup>

These paragraphs reaffirm that there is a recognized universal commitment to human rights and acknowledge the need for *implementation and enforcement* of the environment-related provisions of

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203. *Id.* (emphasis added).

204. *Id.* at 3 (emphasis added).



human rights law if progress is to be made in meeting the goals of sustainable development. These elements are thus central to achieving the environmental rights of the children.

Capacity strengthening is also acknowledged in these paragraphs cited from the Principles as a means by which sustainable development and the fulfillment of the environmental rights of children can become a reality. Capacity strengthening or building would entail working with governments, people, communities and organizations in order to assist in achieving and implementing the goals of sustainable development and awareness raising. It could entail infrastructure development, skills training, technology transfer and other assistance. The fact that capacity strengthening needs to take place and is elicited here as a goal also illustrates the commitment to sustainable development.

Evaluating existing human rights in terms of environmental “goals” and interpreting what practical obligations then need to be met can be a means of prioritizing which sustainable development objectives to aim for first. This can then result in the attainment of the environmental rights of children. However, it is important to anticipate potential obstacles to such attainment and offer some solutions.

### *A. Potential Obstacles*

#### 1. The UNCRC, Capacity and Governance

What is very clear from the examination of environmental and human rights law is that most children can “have” environmental rights (even if this is a culturally relative concept and something that some cultures may not acknowledge – this poses a different challenge beyond the scope of this article). Giving children environmental rights is something supported by the jurisprudence of the courts and the provisions of the international law instruments examined, and there is clearly international commitment to sustainable development. There is also an obvious consciousness of the need by the international community to make progress in these areas. What is also apparent, however, is that full application of the environmental rights rests on the shoulders of others.

The UNCRC attempts to promote an idea that a basic quality of life, as a social, second generation right, should be the right of all children, rather than a privilege enjoyed by a few. Owing to the flexible nature of the Convention, the interpretation of provisions in

an environment-related manner is left to the discretion of the States Parties, and hence, by default, so is the application of the environmental rights of children. Such an interpretation of social rights in terms of the environment could, for example, relate to the right to health or the right to clean drinking water.

There are, however, some potential obstacles that need to be overcome. O'Neill summarizes the dilemma in the context of the IDRC:

Many of the rights promulgated in international documents, including the International Declaration on the Rights of the Child are perhaps not spurious, but they are patently no more than "manifesto" rights, that cannot be claimed unless or until practices and institutions are established that determine against whom claims on behalf of a particular child may be lodged. Mere insistence that certain ideals or goals are rights cannot make them into rights: but a proleptic rhetoric of rights may be politically useful in working to set up institutions that secure positive rights that constitute (one possible) realization of fundamental imperfect obligations.<sup>205</sup>

What is very clear is that national legislation must be adopted along with the need to take other measures as necessary so that the environmental rights of children become a reality.<sup>206</sup>

In this regard Article 4 of the UNCRC provides:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of *their available resources* and, where needed, within the framework of international cooperation.<sup>207</sup>

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205. O'Neill, *supra* note 68, at 460-61.

206. This is explicitly stated in some human rights agreements. *See, e.g.*, San Salvador Protocol, *supra* note 16, Obligation to Enact Domestic Legislation, art. 2 ("If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.").

207. UNCRC, *supra* note 7, art. 24 § 2(e) (emphasis added).



Here there are two potential obstacles to fully achieving the environmental rights of children. The first concerns whether States Parties can or will actually fully implement and enforce the rights of children at a national level. The second revolves around whether they actually have the resources (administrative, infrastructural, economic and so on) to do this. However, the latter caveat of Article 4 goes some way to offering a solution to these potential obstacles in recommending that, where needed, the international community provide assistance and cooperation, which is discussed further below.

A further obstacle arises in UNCRC Article 24(2)(c) which requires States Parties to provide the highest attainable standard of health, through, *inter alia*, “the application of readily available technology and through the provision of . . . clean drinking water, taking into consideration the dangers and risks of environmental pollution.”<sup>208</sup> If the standards are not attainable on account that the technology is not available or affordable, or the environmental criteria are not high enough, clean water cannot be provided and the right may potentially be breached or non-existent.

The differences in economic, financial, administrative and developmental situations thus impact upon the way in which a State and proponents of the environmental rights of the child are able to enforce and implement the rights of the UNCRC. This in turn affects whether children would be regarded as having rights or not. The basic needs of children may depend upon the economic resources available. A solution here, however, would be to engage in international cooperation in order to achieve technology transfer, improvements in infrastructure, development and so on, as necessary. This could be in the form of capacity building arrangements or development and aid packages or assistance from non-governmental organizations or other actors.

A lack of available technology and so forth need not thus be a precursor to not realizing the environmental rights of children. In this regard, the goals of the WSSD, if fulfilled, may go some way to achieving compliance with this element of Article 24 as they are hinged upon international co-operation through financial and other assistance.

Article 24 of the UNCRC also places a strong direct obligation upon the States Parties to undertake some environmental protection

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208. *Id.* at art. 24 § (2)(c).

measures to ensure that the rights of children are met. However, paragraph 2(e) indicates that it is only required that States Parties take “appropriate measures.”<sup>209</sup> What precisely constitute “appropriate measures,” therefore, stands as a potential obstacle to successful implementation owing to decision-maker discretion.

The extent to which “appropriate measures” are deemed appropriate will be open to interpretation by each government. Interpretation may well vary depending on a variety of factors including construal and interpretation of the UNCRC articles, the means available to the States Parties to take such measures including both financial means and in terms of capacity, education and insight, the priority accorded to such measures, the willingness to take such measures and external influences.

For example, installing one drinking well instead of two in a large village may be deemed an “appropriate measure” and is one entirely at the discretion of the parties, or, moreover, as a prohibiting factor, “the political influence held by global economic investors constitutes a formidable bulwark that prevents the realization of the claimed environmental human rights.”<sup>210</sup>

To illustrate this further, two problems encountered by Belize in providing adequate drinking water to children, and adults, reported under the UNCRC in 2003,<sup>211</sup> include a decrease in functional water pumps between 1992-1999 on account of construction of the Hummingbird Highway<sup>212</sup> and a “decrease in water quality monitoring and associated increase in faecal coliform largely due to the 1995 closure of the Rural Water Supply and Sanitation Program, and the onset of rust and deterioration of equipment”<sup>213</sup> as government priorities were changed.

There are many case scenarios that may emerge through international interpretation of Article 24 of the UNCRC. A government for example, may be forced through economic restraints or political upheaval to only provide clean drinking water in certain regions or areas at the expense of others or other projects.

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209. UNCRC, *supra* note 7, art. 24 § (2).

210. HANCOCK, *supra* note 12, at 6.

211. Convention on the Rights of the Child, Committee on the Rights of the Child, Consideration of the Reports Submitted by the State Parties art. 44, 66, U.N. DOC CRC/C/65/Add.29 (July 13, 2004) [hereinafter CRC].

212. *Id.* ¶ 207.

213. *Id.* ¶ 208.



Additionally, interpreting the education provisions of Article 24 broadly so as to be inclusive of *environmental* education may not be a government's interpretation or even a priority area in which to educate children, particularly if it is deemed more appropriate to teach such fundamental skills as reading and writing or basic hygiene. However, based on a cursory inspection of State Reporting under the UNCRC Committee, several States Parties<sup>214</sup> do appear to take commitments to environmental education seriously. For example, Egypt, in part 6, "[i]nculcating an awareness of environmental issues and sustainable development," of its State Party Report of 1999 to the UNCRC committee, paragraph 182 reports that:

The Egyptian Government is eager to encourage participation by children in environmental protection programmes and activities and to make children aware, beyond the local level, of the environmental problems that affect the planet as a whole and concern all nations: dangers due to human activity, global warming, climate change and natural disasters affecting the continent of Africa, Egypt in particular.<sup>215</sup>

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214. See State Party Reports, Committee on the Rights of the Child, <http://www.unhchr.ch/tbs/doc.nsf> (follow "CRC - Committee on the Rights of the Child" hyperlink; then follow "State Party Report" hyperlink). Examples of other State Parties that have environmental education-related policies include Canada. Under Saskatchewan Policy "[T]he Department of Environment and Resource Management provides educational material on ecosystem-related topics, such as fish, birds, wildlife and forests. 'Wildlife in your Backyard' and 'Helping the Environment' are materials that are distributed on request to school teachers and school libraries. Presentations to classrooms and youth groups are provided on wildlife, habitat, and forests. The 'Clean Cat' mascot travels to schools to inform students and teachers about the 4 R's (reduce, reuse, recycle, recover)," Canada State Party Report, CRC/C/83/Add.6, 147 ¶ 880 (2003), available at <http://www.unhchr.ch/tbs/doc.nsf> (follow "By Country" hyperlink; then follow the "Canada" hyperlink dated 12/03/2003); see also Ukraine State Party Report CRC/C/70/Add.1, 26 ¶ 146 (discussing the ratification of the 1998 Aarhus Convention and its relation to children), available at <http://www.unhchr.ch/tbs/doc.nsf> (follow "By Country" hyperlink; then follow the "Ukraine" hyperlink; then follow the hyperlink dated 18/05/2001).

215. Egypt State Party Report, CRC/C/65/Add.9, 60 ¶ 182 (1999) available at <http://www.unhchr.ch/tbs/doc.nsf> (follow "By Country" hyperlink; then follow the "Egypt" hyperlink; then follow the hyperlink dated 11/11/1999).

Hence, there is a growing consciousness of the need to advance the environmental rights of children for their own intrinsic well-being and for that of the broader environment. However, while it has been effectively demonstrated that there are environmental human rights that can apply to children, it has also been shown that implementation and enforcement of such rights is ultimately dependant on the government of the day, and the particular political and economic will.

As has been pointed out, interpretation in an environment-related manner of the relevant provisions of the UNCRC, which consider children in the application of environmental laws, and the financial, administrative and other significance afforded to this is very much at the discretion of the State. There is no explicit requirement related to environmental protection or enhancement under the UNCRC which would meet a standard traditionally accepted in customary international environmental law. If there were, this may also be subject to varying levels of discretion. Any attempt to hold a Party in "breach" via the monitoring committee and reporting system of the UNCRC may well prove difficult if the environmental obligations are not explicit. However, this is again a matter of interpretation and it could well be the case that the monitoring committee could and would actually go some way in advancing the environmental rights of children, as they have the ability to do so as the UNCRC does clearly give environmental rights to children. If this is not a solution, political embarrassment in the international community may suffice, as Brice quotes Cohen: "no nation wants to be known as a child abuser."<sup>216</sup>

In order to advance the implementation and enforcement of the environmental rights of children, Brice<sup>217</sup> comments here that the UNCRC identifies two other groups, the Committee on the Rights of the Child, and NGOs that can work to raise the profile of the UNCRC and generate publicity and support for its role in environmental protection. Thus, if the environmental aspects of the UNCRC are more strongly publicized, States may well be more likely to implement the provisions in a manner more conducive to the goals of sustainable development. Further, if States fail to act

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216. Brice, *supra* note 40, at 601 (quoting C. Price Cohen from a 1994 telephone interview).

217. *Id.* at 602.



completely, then NGOs<sup>218</sup> may well work independently through their own programs for the environmental rights of children.

## 2. International Environmental Law – Interpretation and Application

Several of the international environmental instruments that afford environmental rights, examined previously in this article, are soft law, such as the Rio Declaration. While, on a positive note, such instruments can assist hugely in improving the lives of children in terms of the environment, there are cases when they may be redundant, particularly as they have to be implemented in good faith rather than being forcibly binding, and interpreted in a manner that advances the environmental rights of children.

Environmental and child rights are very much held in the balance of the State and the government of the day, along with the implementation of the concept of sustainable development. According to Hancock, “sustainable development is not just a change of economic policy, but in fact a planned social reform”<sup>219</sup> and such reform may or may not be on the agenda of some nations. If it is not currently, this should not or does not preclude it from being in the future. For those nations where it is such a “planned social reform,” this article has illustrated how this might be advanced so as to promote the environmental rights of children.

As for explicit rights-related provisions of an environmental treaty, if a government does not have the economic means, inclination, the political stability or priority to implement environmental rights, such as through the provision of clean drinking water or the management of toxic waste near slum housing, the recognition of the environmental rights of children and the concept of sustainable development could be rendered futile. However, as has been illustrated, international assistance is available and the fulfillment of sustainable development goals via the international community offers one solution.

On the other hand, the phrase and concept of “sustainable development” has often been criticized as an oxymoron through its reference to two conflicting goals – those of development and environmental protection.<sup>220</sup> It could therefore be assumed that if children

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218. DECLERIS, *supra* note 99.

219. HANCOCK, *supra* note 12, at 3.

220. See, e.g., Michael Redclift, *Sustainable Development (1987–2005): An Oxymoron Comes of Age*, 13 *SUSTAINABLE DEV.* 212–27 (2005) and Wolfgang

are to have environmental rights, there may be times when the rights have to be waived in order to meet the development goals of the sustainable development equation.

Environmental protection and sustainable development goals in some countries may not be achievable without serious compromise to the economy and jobs. The right of children to a clean environment is thus a potentially "intermittent" right and not one that can be fully guaranteed, at all times, under all jurisdictions, as an international, inalienable right.

According to Hancock, "existing legally recognized human rights presuppose a certain environmental quality and distribution of environmental resources. Yet this assumption is rarely explicitly stated."<sup>221</sup> One solution here then would be to "balance" economic and environmental concerns, and not necessarily to prioritize one over the other. This is central to sustainable development. Another solution is to regard children as significant future actors in the economic growth of a community and to ensure that their development is prioritized and invested in appropriately and that their environmental rights are fulfilled to as great an extent as possible.

The UNCRC demands considerable economic and material provision for children and rational interpretation irrespective of whether persons responsible have had adequate enough environmental and other education in order to appreciate and understand such demands of the Convention.<sup>222</sup> With these demands, it may be easier for some countries than others to achieve sustainable development and enforcement of the environmental rights of children. Hancock comments in this regard that "whereas the stipulated wording of international human rights law expresses a focus on social provisions for the basic needs of all, law has been implemented in ways that tolerate violations to accommodate the interests of the capitalist economy"<sup>223</sup> with potential impacts on the environment and children. This may well be the case in several countries. Though it is beyond

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Sachs, Sustainable Development and the Crisis of Nature: On the Political Anatomy of an Oxymoron, *in* LIVING WITH NATURE 23-42 (Oxford Press January 14, 1999).

221. HANCOCK, *supra* note 12 at 3.

222. It can even be argued that the UNCRC tends to focus its aims around the religious, moral and social norms of the Western world though an examination of the validity of such an argument is beyond the scope of this article.

223. HANCOCK, *supra* note 12, at 1.



the scope of this article to verify this claim it should be noted as a potential obstacle that perhaps needs to be addressed further.

### 3. Representing the Environmental Rights of Children

One additional barrier also requires evaluation. As noted above, Article 12 of the UNCRC gives children the right to express their views on, and participate in proceedings related to, the environment. By way of quick examination of the current position, Article 12 of the UNCRC<sup>224</sup> gives children the right to express their views in all matters affecting them, including the right to be heard or represented in any judicial/administrative proceedings:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>225</sup>

This above right can thus apply to environmental issues and concerns, and the use of the word "assure" implies that any nations who are "party" to the UNCRC should take every effort to afford children the right to environment-related proceedings and participation therein. However, the latter caveat of paragraph 2, "in a manner consistent with the procedural rules of national law" may impact upon the extent to which children are involved in the environmental judicial process and guaranteed their environmental rights, particularly if there are no procedures for this.<sup>226</sup>

Further, in light of such caveat, in jurisdictions where there are adequate procedures in place a problem that may be encountered here is that of determining at what age children have the capacity to

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224. See Freeman, *supra* note 59, at 288, for a commentary on Article 12.

225. UNCRC, *supra* note 7, art. 12.

226. *Id.* art. 12(1).

fully appreciate their environment in order to participate in its protection or to know when their environmental rights have been breached.<sup>227</sup> This will ultimately be a matter upon which the nation in question shall have to legislate though it may be possible to seek guidance from other legal disciplines, such as family law or criminal law in order to determine this, irrespective of the fact that “there is evidence to demonstrate that children wish to participate in proceedings that have a bearing on decisions affecting their lives, but not necessarily to have responsibility for those decisions.”<sup>228</sup>

There are case precedents, particularly from other areas of legal practice, that can assist countries in determining the capacity of children to participate in upholding their environmental rights, for example, *Dusky v. US*<sup>229</sup> and the *Gillick* “competency test” of the UK,<sup>230</sup> along with child developmental studies and other research,<sup>231</sup> and of course, the *Minors Oposa* case.<sup>232</sup>

One further issue that warrants mention is as follows: If children are to be afforded environmental rights, how should they proceed in order to vindicate the right? This raises issues, among others, of legal standing, particularly say, when it comes to determining the age at which children can provide evidence of a breach of their environmental rights in order to obtain enforcement. Noting this, however and precluded by space limitations, this article is largely prem-

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227. Though it is beyond the scope of this article to go into detail on these issues, some offer several theories as to why children *cannot* be rights holders that are relevant here: 1) Young children are presumed unable to know what is best for them so adults should make the decisions; 2) Children do not have the power of [mature] reason, based on Kantian theory; 3) Children develop slowly and unalterably. See Priscilla Alderson, *Can the Youngest Children be Rights Holders?*, 15 INT'L CHILD. RTS. MONITOR, 19, 19-20 (2003); see also, Antonella Invernizzi and Brian Milne, *Are Children Entitled to Contribute to International Policy Making? A Critical View of Children's Participation in the International Campaign for the Elimination of Child Labour*, 10 INT'L J. OF CHILD. RTS., 403, 403-431, (2002).

228. Littlechild, *supra* note 66, at 404 (quoting Gillian Schofield and June Thoburn, *The Voice of the Child in Child Protection* (1996)).

229. 362 U.S. 402 (1960) (setting forth the standard for competency of juveniles to stand trial).

230. *Gillick v. West Norfolk and Wisbech Area Health Auth.*, [1986] A.C. 112 (H.L.) (setting the precedent for determining when a minor can be said to have achieved sufficient understanding and intelligence to enable him or her to fully understand the issues at hand).

231. See, e.g., Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 175-98 (2003).

232. *Supra* note 194.



ised on the claim that environmental rights should be afforded to children on account that children should receive a positive benefit of, or it is in the interests of children to have, environmental rights. This is contrasted with will or choice theory of environmental rights, which is limited to whether children would be in a position to make a choice about being a holder of environmental rights or not.<sup>233</sup>

Though the scope of this article does not permit complete analysis of these differing rights theories, this choice theory hurdle may be overcome if the choice to have environmental rights is exercised on behalf of children, say, by the State, a parent or other guardian, such as was the case in *Lopez Ostra*<sup>234</sup> and the “Horinko Case.”<sup>235</sup> Further, for national governments, strengthening the rules on *locus standi* in a manner similar to that of the UN Economic Commission for Europe 1998 Aarhus Convention (“Aarhus Convention”),<sup>236</sup> where, in certain cases, non-governmental organizations are afforded legal standing to obtain access to justice in certain environmental matters so as to represent others, may provide an answer. Such domestic legislation may well go some way to advancing the environmental rights of children and it should be noted here that the Aarhus Convention is open to signature by all UN members.

### *B. Potential Solutions*

The UNCRC clearly contains provisions that can be interpreted so as to confer environmental rights on children, a breakthrough that is

233. The focus of this article concerns the intrinsic benefit to be afforded to children in giving them environmental rights and not whether the rights would or could exist if the child had the will or choice to decide. It is beyond the scope of this article to critique in detail ‘benefit’ or ‘interest’-based theories of rights supported by proponents such as MacCormick and Raz, as opposed to ‘will’ or ‘choice’-based theories of rights supported by, among others, Herbert L.A. Hart. Compare Joseph Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 1-21 (1984), Neil MacCormick, *Children's Rights: A Test-Case*, in NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY, 154-166 (Oxford Press 1982), with HERBERT L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY (Oxford Press 1982).

234. *López Ostra*, App. No. 16798/90, 20 Eur. H.R. Rep. 277.

235. *Physicians Comm. for Responsible Med. v. Horinko*, 285 F. Supp. 2d 430 (S.D.N.Y. 2003).

236. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, U.N. Doc.ECE/CEP/43, 38 I.L.M. 517 (1999) [hereinafter Aarhus Convention], available at <http://www.unece.org/env/pp/>.

highly acceptable given the absence of a unique legal agreement on the environmental rights of children. The links between the aspirational sustainable development goals of the WSSD and the UNCRC rights are also clear: full implementation of the Johannesburg Principles and Agreement would greatly assist in meeting the environmental rights of children as promulgated under the UNCRC.

If the international community is true to its WSSD pledges, those of the Millennium Development Goals and those of previous environmental instruments such as the Rio Declaration and Agenda 21, the implementation of the environmental rights of children may become a reality, though this is perhaps only conceivably so, through rigid international cooperation of an economic, technological and capacity-building nature, something that is also called for under Article 4 of the UNCRC, that forms the backbone of sustainable development.

For those governments that pledge in the international arena to meet sustainable development goals, these should of course be executed with the environmental rights of children in mind as an explicit matter.

To support efforts in this regard, there is growing evidence of strong international commitment to children's environmental rights. In addition to continuing efforts by NGOs such as UNICEF<sup>237</sup> and organizations such as the WHO<sup>238</sup> and others that have ongoing programs related to children and the environment, May 2002 saw the five-day International Children's Conference (ICC) on the Environment held in British Columbia, Canada, attended by representatives of 75 countries.<sup>239</sup> A speech from this conference was presented to world leaders at the WSSD.<sup>240</sup> Other specific children's environmental rights efforts have also emerged as part of the Aarhus Convention with the creation of "Teen Planet Magazine - Know Your Environmental Rights."<sup>241</sup> Such initiatives significantly advance support for, and acknowledge the existence of, the environmental rights of children.

And where rights are accessible, if a child her/himself is not deemed to have the required capacity or standing, this should not

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237. UNICEF, available at <http://www.unicef.org/>.

238. World Health Organization, available at <http://www.who.int/en/>.

239. See The Canadian Chamber of Commerce Home Page, available at <http://www.icccanada2002.org/index.html>.

240. *Id.*

241. See Teen Planet, *supra* note 156.



mean that their environmental rights do not have to be, or cannot be, upheld by a representative, say a parent, guardian, school teacher or even a lawyer. Again, in these two areas, the scope for State discretion is broad and the interpretation of Article 12 of the UNCRC very much rests with the political and legal culture in question though the growing international drive towards the environmental rights of children will hopefully have a positive bearing in this regard.

## VII. CONCLUSIONS

The foundations are clearly in place for a very positive approach to sustaining the environmental rights of children. A healthy, sustainable environment cannot be maintained without respect for human rights, and human rights are unattainable without a healthy, sustainable environment. Though this remains very much in the political balance and hands of the governments of the day, there is clear international scope for recognizing and implementing the environmental rights of children.

Interpreting the relevant provisions of the UNCRC from an environmental perspective in-line with sustainable development goals is a progressive means of attaining the environmental rights of children. This is a more practical step, say, than amending the UNCRC to include an explicit right of children to the "environment"<sup>242</sup> and one that is within the current grasp of the international community.

Along with ensuring that the goals of the WSSD Plan of Implementation are achieved and that the Millennium Development Goals are fulfilled, several additional recommendations can be made in order to advance the implementation and enforcement of the environmental rights of children.

Greater efforts to alert States Parties and the international world at large to the environment-related dimensions of the UNCRC need to take place. This can be undertaken by the States parties themselves through the UNCRC Article 43 Committee on the Rights of the Child, Article 44 reporting mechanism, through pressure exerted

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242. Brice recommends such an amendment though this may well not be without considerable difficulties as outlined in this article, such as reaching State consensus on the form and remit of such a right. *See Brice, supra* note 40, at 604-611.

through the United Nations and its subsidiary bodies<sup>243</sup> (particularly as articulated under Article 45 UNCRC), and through awareness raising and lobbying by NGOs and the public, for example. This can also be coupled with ground-level environmental awareness campaigns focused at children and at all other members of society as guardians of children and future generations, something that Article 42 UNCRC encourages. Full implementation of the Aarhus Convention or similar national legislation could greatly assist in this, particularly noting the Objective of the Convention:

[T]o contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, [requiring] each Party [to] guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of [the] Convention.<sup>244</sup>

Noting that little can be done in international law to “force” governments to take action, evidenced in the arguably weak enforcement provisions of the UNCRC, and some key international environmental law agreements are also testimony to this, the international political arena offers a venue for advancing the debate. Nations are in a position here to exert more pressure on each other to implement treaty provisions or to provide assistance with meeting such goals. This is where there is strong potential for the implementation of the environmental rights of children to become a reality and in turn for the concept of sustainable development to be advanced.

Concerted efforts by the international community and the United Nations to build capacity and provide technical and economic assistance in those countries where such issues are barriers to implementation and enforcement should also be considered. This could include poverty-reduction aid packages, provision of equipment to provide clean drinking water, training programs on health and environment, environmental infrastructure development projects and other practical assistance. This could also include Party-to-Party

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243. See generally, Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM.& MARY ENVTL. L. & POL'Y REV. 365 (2002).

244. Aarhus Convention, *supra* note 236 (though the Convention is open to signature by non-European countries), available at <http://www.unece.org/env/pp/>.



assistance under the UNCRC and related international environmental law agreements.<sup>245</sup>

In addition, and particularly for those nations that are party to the UNCRC and relevant international environmental law agreements that have the capacity, technology and the financial means to achieve full implementation, national efforts could be focused on ensuring that “general [environmental] guide and limit values should always aim at protecting the most vulnerable group(s).”<sup>246</sup> A continued, and potentially more, concerted effort should be put into making the goals of the WSSD, the Millennium Development Goals and other key international environmental law agreements a reality at the national level, through strong enforceable environmental laws, environmental programs and related health and other child/youth-focused schemes.

As for the role of children in enforcing a right to environment, nations should aim for a pro-active approach and strive to include or represent children in all elements of environmental and sustainable development advancement, prioritizing children in developmental terms and administrative terms. In addition to this, the judiciary can also play a strong role in advancing the environmental rights of children.

In situations where central governments may be reluctant or unable to recognize the environmental rights of children as articulated in this article, but noting that they are the “first port of call” for the adoption of international human rights norms, some alternative means of advancing the environmental rights of children are suggested, though the merits or otherwise of these require full analysis beyond the scope of this article. Potentially, a legitimate decentralized approach to advancing such rights may assist at the practical administrative level in “spreading” environmental rights into communities. Another alternative would be to advance environmental rights of children through the work of non-State actors,<sup>247</sup> particularly through the endeavors of non-governmental organizations and

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245. See UNCRC, *supra* note 7.

246. GERMAN FEDERAL ENVIRONMENTAL AGENCY, *supra* note 82, at 16.

247. See also Philip Alston, John Tobin & Mac Darrow, *Laying the Foundations for Children’s Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*, 56-82 (UNICEF Innocenti Research Center 2005) (elaborating further on the idea of decentralization and the potential roles of non-state actors as a means of advancing the rights of the child).

other social-oriented movements which advance human rights. Further, other non-state actors such as companies could engage in 'self'-environmental and ethical regulation as a means of advancing the environmental and other human rights of children in the absence of governmental support for international human rights and environmental norms and standards.

By way of final comment, there are realities in the law that enable us to improve the lives of children. If we aim to advance and sustain the environmental rights of children we can also strengthen environmental law itself, improve environmental standards and also contribute to advancing sustainable development, which in turn could well improve global society. It is hoped that the arguments put forward in this article can be used to assist in improving many environment-related conditions for children.

*We do not inherit the earth from our ancestors; we borrow it from our children.*<sup>248</sup>

Native American Proverb

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248. See, e.g., Bob Sipchen, *Call of the Wilds*, L.A. TIMES, Nov. 11, 1992, at E1.



