

**Role of the Developing Countries in the Development of
International Environmental Law**

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Dr. Parvez Hassan^{}**

A. A Personal Statement

The title of this paper was inspired by two (2) articles, one published in the American Journal of International Law in 1962 and the second in the International Comparative Law Quarterly in 1966 by my friend and fellow-student, R. P. Anand, at the Yale Law School in the early 1960s. His scholarship resonated globally to question the universality of public international law without the participation of the Asian-African, Latin American and other developing countries. He addressed these concerns in the background of the tumultuous period in human history when, post World War II, the global map was changing with the advent of numerous colonies in Asia and Africa as newly-independent countries and as full and equal members of the international community in the United Nations.

I was first introduced to the subject of environment and environmental protection, as it was then known, in 1977 and have spent the last almost four (4) decades in pursuing this as a hobby on a pro bono basis at the national, regional and international levels. The opportunity included the attendance of numerous conferences and the writing of several articles. Throughout this journey, Anand's classic formulation of the need for universal participation in the development of any international body of law remained a part of my conviction. Time and again, over the years, I identified this "universality" as the greatest strength of the new body of international environmental law that started emerging after the Stockholm Conference on the Human Environment in 1972.¹

In 2013 and 2014, I got an opportunity to visit Anand's Jawaharlal Nehru University in New Delhi as a guest speaker and I decided to share the impact of his scholarship on the development of international environmental law. In a lifetime that included numerous opportunities, it was inevitable that I would have covered some of the themes of this paper in speeches at other international conferences and in other articles. I have liberally borrowed from these to construct the present narrative.

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¹ Parvez Hassan, (1) Toward an International Covenant on the Environment and Development, an address at the Annual Meeting of the American Society of International Law in 1993, ASIL Proceedings 513-522 (1993), (2) Moving Towards a Just International Environmental Law, in S. Bilderbeek (ed), Biodiversity and International Law, 72-75 (IOS 1992), and (3) The Political and Legal Dynamics of the Implementation of the Convention on Biological Diversity in the Asian and Pacific Region, in Biodiversity Conservation in the Asia and Pacific Region: Constraints and Opportunities, 391-401 (ADB/IUCN 1995), and (4) Environment and Sustainable Development: A Third World Perspective, in 31 Environmental Law & Policy, No. 1, at 36-42 (2001).

B. The Anglo-European Origins of Public International Law and its Challenge by the Newly-Independent Asian-African States

This paper suggests that one of the most durable strengths of international environmental law is that there was a universal participation of the global community in its origins and development. This contrasts with the challenge, credibly hurled, a half century, and more ago, by the newly independent Asian-African states that public international law originated in the practices of the European community and did not reflect the will of the developing, mostly formerly colonized, countries. This tension between the developed and developing countries played out, principally, in the United Nations in the debates leading to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (the “Decolonization Resolution”) and the 1962 Resolution on the Permanent Sovereignty over Natural Wealth and Resources (the “Permanent Sovereignty Resolution”). These two Resolutions (the “Resolutions”) empowered the newly-independent countries to participate effectively in the international political and economic orders. They set the stage for, and, in fact, dominated the North-South dialogue on practically all issues before the global community including the emerging international concerns for environmental protection in the early 1970s. As international environmental law beginning generally in Stockholm in 1972, followed these Resolutions, its development has, right from the beginning, benefited from a full participation of all the states, developed and developing, north and south, to its widest acceptance and ownership.

R.P. Anand, in 1962, wrote a penetrating review of the European origins of public international law and how its norms had to meet the challenge of the newly independent Asian-African states that had not participated in their adoption.² He included the Latin American states that had similarly not participated in the development of the corpus of public international law at that time. To borrow his analysis:

After the Second World War, in 1945, when a second effort was made to establish a universal world order, the whole balance of forces had changed. The United Nations reflects this revolutionary change on the international scene. We have, for the first time in history, a general international organization which, for all practical purposes, is of a worldwide character. With the emergence and participation of Asian-African countries, international society has become a true world society with already more than a hundred members, and some more coming in.

... the present international law was developed during the last four centuries and specially consolidated and systematized during the last part of the nineteenth and the beginning of the present century. Asian and African countries had very little to do with it because they were conquered and colonized and made to serve merely the interests of the metropolitan states and their masters.... Therefore, though as a science international law can be traced back several centuries, it was only the sixteenth century which witnessed the birth of modern international law, and the Asian countries, in spite of their rich

² R.P. Anand, Role of the “New” Asian-African Countries in the Present International Legal Order, 56 AJIL 383-406 (1962).

heritage, were unable to contribute anything to its development because of their subordinate positions.³

With respect to Latin American countries, Anand contends:

Moreover, the protest against some rules of international law is not confined to Asian and African states. We find that even the Latin American countries, which have the same cultural, social and religious heritage as the European countries-in other words, which are part of the same Western Christian civilization, have challenged the present system of international law in a number of places. Thus we have seen earlier a statement by the Mexican member of the International Law Commission. The Calvo and Drago doctrines that emerged from the Latin American countries are also challenges to the traditional international law which is against the interests of debtor states. Even today we find some of these countries trying hard to change international law in order to make it more equitable.⁴

Anand went on, in 1966, to reiterate the emerging importance of the Asian-African states in dealing with certain issues of international law in another trail-blazing article:⁵

During the nineteenth century, as the European countries came to develop their power, however, under the influence of positivism, they began to question the legal personality of the Asian States. At the Congress of Vienna in 1815 a few great Powers established an exclusive club in the Concert of Europe and appointed themselves as guardians of the European community and executive directors of its affairs. They assumed the authority to admit new member States or to readmit old members who did not participate in the foundations of this closed club. They claimed to “issue, or deny, a certificate of birth to States or governments irrespective of their existence.”⁶

With the emergence and participation of so many Asian and African States international society has become, for the first time in history, a true world society.... The existence of an international forum, such as the United Nations, where they can make their voices heard and where they have some scope for concerted action, enhances their power and helps them in pursuing their purposes. They are further helped by the rivalry between the big Powers, since it has incapacitated the “potential directorate of the five permanent members of the Security Council” and has shifted the power to the General Assembly, the stronghold of the small countries, where they enjoy complete formal equality with the big Powers and, of course, numerical superiority.⁷

It is well known that although five (5) Asian States participated in the Hague Peace Conferences, which number increased to twelve (12) Asian-African countries during the League of Nations period, except for Japan none of these countries had any effective voice in international affairs

³ *Id.*, at 384-385.

⁴ *Id.*, at 389.

⁵ R.P. Anand, *Attitude of the Asian-African States toward Certain Problems of International Law*, 15 *Int Comp LQ* (No.1), 55-75 (1966)

⁶ *Id.*, at 58.

⁷ *Id.*, at 55.

and Europe continued to remain the world's stage. It was only after the Second World War, in fact only since 1955, most of these countries acquired independence and became full-fledged members of the international society. More important, because of their numerical superiority in the United Nations, they have come to acquire an exceptional influence in international affairs. Soon, the criterion of “civilised nation” as a basis for participation in the community of nations and the meaning of “civilization” as synonymous with the “Christian-Western civilization”, or the notion of “civilised nation” as corresponding to “advanced, industrial, commercial nation”, were rejected.⁸

Once independent and having been granted equality in the General Assembly, the Asian-African states set out to question the “colonial” orientation of international law. The socialist bloc, fuelled by the cold war, became an important ally to this new challenge. However, these protests against some parts of international law were neither confined to the Asian-African States, nor were they the first to demand the modification of their legal rights. In fact, most of the developing States of Asia, Africa, Latin America and even those of Europe, joined in demanding that international law should be more equitably responsive to their needs. The Calvo and Drago doctrines, that emerged from the Latin American countries, for example, challenged the traditional international law as against the interests of the debtor States.

C. The Adoption of the Resolutions before Stockholm 1972

The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) had generated hopes and euphoria for a new international order anchored on the sovereign equality of states and the respect for the fundamental human rights and the dignity and worth of the human person. The newly independent members of the international community started clamouring for a voice and recognition and the United Nations General Assembly became a natural forum for such efforts. The adoption of the Decolonization Resolution in 1960 and the Permanent Sovereignty Resolution in 1962, both immensely facilitated by the contemporary cold war dynamics, was to imprint the future work and the dialogue at all the fora of the United Nations.

1. The Decolonization Resolution (1960)

This Resolution declared that the “subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation” and “all peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. It recognized that “colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace”.

Immediate steps shall be taken, the Resolution proclaimed, that:

⁸ *Id.*, at 60.

all ... territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Importantly, it was recognized from the outset that political independence is inextricably tied to the right of each nation to its natural wealth and resources. It was important to express in unequivocal terms that “peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law”.

The die had been cast for an emerging role of the newly independent Asian-African countries in the international legal order in which they sought redress against colonial imperialism on the basis of equality, equity and justice.

2. The Permanent Sovereignty Resolution (1962)⁹

The validity of the traditional international law of responsibility of states for injuries to aliens had been questioned by many of the newly-independent countries. The Socialist countries had taken the lead to emphasize the change in the world context which necessitated revitalization and revision of rules of international law. The change referred to was the emergence of a new socialist system and the attainment of independence by about forty (40) countries after World War II. Expressing these sentiments, the Soviet representative at the United Nations argued that present-day international law could not be a system of legal rules imposed by states belonging to one economic system on states belonging to another; world-wide international law could not contain rules which were incompatible with the principles of one of the two main systems the countries on whom international law had formerly been imposed in order to facilitate their exploitation were now called upon to partake in its formulation. The further development of international law should be on the basis of peaceful competition and collaboration between all states, irrespective of their political, economic or social systems.¹⁰ Emphasizing the same aspect, a Latin American diplomat referred to the fact that the vast majority of the states had taken no part in the creation of many institutions of international law.¹¹

As early as in 1958, the General Assembly established the Commission on Permanent Sovereignty over Natural Resources to “conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries”.

⁹ For a comprehensive background of the debates, sometimes most acrimonious, leading to the adoption of this Resolution, see Parvez Hassan, Permanent Sovereignty over Natural Wealth and Resources, unpublished paper submitted during the LL.M Program at Yale Law School in 1963.

¹⁰ 1957-Year Book of International Law Commission, 165.

¹¹ *Id.*, at 155.

In 1960, the General Assembly recommended “that the sovereign right of every State to dispose of its wealth and its natural resources should be respected”.

In 1962, the Permanent Sovereignty Resolution considered that any measure “must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States” and declared that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.
4. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.
5. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

D. The Development of International Environmental Law¹²

1. Stockholm (1972)

While much of what was accomplished at the United Nations Conference on the Human Environment at Stockholm in 1972 had its beginnings in the earlier experiences and policies of several countries, this Conference is generally perceived as the catalyst that focused international attention and action on the importance of the environment in the global system. The inspiring Declaration adopted there¹³ proclaimed that environmental concerns transcend national boundaries. Almost a quarter century earlier, in 1948, the UN General Assembly had proclaimed an equally visionary Universal Declaration of Human Rights that pioneeringly brought the

¹² Some parts of this Section have drawn from the author’s presentation at the 1993 Annual Meeting of the American Society of International Law, *supra* note 1.

¹³ 11 ILM 1416 (1972).

protection of human rights within the legitimate concern of the international community. The Stockholm Declaration of 1972 has had a similar impact in the field of the environment.¹⁴

The Stockholm Declaration recognized many concepts that would orient future developments in this area. Let us briefly consider four (4) of them.

(1) At the outset, the importance of development was recognized. Thus, environment was perceived as not the only conduit for attaining an appropriate quality of life; it was recognized that it is through the process of development, when properly planned, that the quality of life is ensured. The essential interdependence between environment and development was thus acknowledged (Preamble, Principle 8).

(2) The concept of the environment being a sacred trust to be appropriately used for present and future generations was importantly highlighted (Principles 1 and 2).

(3) Equity was sought in the international economic system, and the need for international cooperation to raise resources to assist the developing countries was duly emphasized. The Declaration went even further, stressing the obligation of industrialist countries to make efforts to reduce the economic gap between themselves and the developing countries (Preamble). These obligations specifically encompassed transfer of technology and financial assistance (Principle 9), fair pricing for the commodities and raw materials of the developing countries in the international system (Principle 10), resource allocation and international technical and financial assistance to developing countries (Principle 12) and free flow of technology and experience from the developed to the developing countries on terms “which would encourage their wide dissemination without constituting an economic burden on the developing countries” (Principle 20).

(4) Perhaps the most important principle that emerged at Stockholm was Principle 21, which proclaims, lest Stockholm be perceived as anti-development, the sovereign right of all states to “exploit their own resources pursuant to their own environmental policies”. Importantly, Principle 21 also sought to “codify” the international law principle that emerged in cases like *Trail Smelter*¹⁵ and *Island of Palmas*,¹⁶ whereby states are held responsible for activities carried out within their boundaries if such activities have an adverse impact on the territory of other states.

It would be appropriate here to clarify the “sovereign right to develop” principle incorporated in Principle 21. History and the Southern mindset explains the inclusion of this principle in the Stockholm Declaration. Exactly a decade earlier, in 1962, the newly independent Asian-African countries, with the pivotal support of the Soviet Union, had carved out the United Nations Declaration on Permanent Sovereignty. If one were to review the drafting history of this Declaration,¹⁷ one would note the acrimony that was generated between the emerging South and

¹⁴ See generally Alexandre Kiss and Parvez Hassan, *General Environmental Concerns*, in Peter H. Sand, *The Effectiveness of International Environmental Agreements*, at 28-58 (1992).

¹⁵ UNRAA, p. 1905.

¹⁶ 2 UNRAA, p. 281. See also the *Corfu Channel* case, ICJ Rep. 1949, at 4.

¹⁷ See, generally, *supra* note 9.

the North (industrialized nations) over who owns and controls the natural resource base of a country. Statistics galore were marshaled by the South to demonstrate how the North, as a colonialist, had reaped and raped the natural resource bases of former colonies. It was against this background that the developing countries felt the need to fight for the acknowledgment of their right over their natural resources. So important was this to the South that it carried its mistrust of the developed nations, in 1966, into Articles 1(2) of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights to acknowledge that all “peoples may, for their own needs, freely dispose of their natural wealth and resources”. This was included in the Articles dealing with the right to self-determination. Having accomplished this, the South was not about to throw away this gain in the contemporary concerns of environmental protection in the 1970s.

Stockholm, therefore, represented an appropriate synthesis of the emerging dichotomy between the interests of the developed world and the developing countries.

Stockholm was the first international conference on the environment and the emerging principles of the nascent international environmental law. It is remarkable also for the wide participation of the newly-independent Asian-African states that got a chance from the very beginning to shape the principles that would develop international environmental law. In fact, the representation from the South was impressive in the leadership provided to the Conference. Prime Minister Indira Gandhi of India, for example, captured international attention as the most prominent face for the South, comprising Asian, African and Latin American countries.

2. World Charter for Nature (1982)

A decade after Stockholm, on the initiative of the International Union for Conservation of Nature and Natural Resources, or IUCN – The World Conservation Union, as it is now called – the UN General Assembly adopted the World Charter for Nature.¹⁸

It is not generally known that the seed of the World Charter for Nature was sown in the South. It was to be found in the inaugural address of General Mobutu Sese Seko, President of Zaire, at the twelfth General Assembly of IUCN in Kinshasa (September 1975). Mobutu held out both a challenge and an offer:

The seas, the oceans the upper atmosphere belong to the human community.... One cannot freely overuse [such] international resources. People of good will... are looking to you for positive results from this Assembly.... That is why, if I had any advice for you, I would suggest the establishment of a Charter of Nature.... Insofar as Zaire is concerned, we are ready to help you succeed.... If we were asked to be a pilgrim for environmental protection, this we would be willing to be.¹⁹

The IUCN took up the challenge through its Commission on Environmental Law, which I had the privilege of heading from 1990-1996, and set up a task force which, using the UN

¹⁸ The United States was the only country that voted against the World Charter in the 111 to 1 vote.

¹⁹ Quoted in Wolfgang E. Burhenne & William A. Irwin. *The World Charter for Nature* 14 (1986).

Declaration of Human Rights as a model, developed the first draft of the World Charter. The World Charter also emphasizes sovereignty of states over their natural resources (paragraph 22). While the Charter postulates general principles for implementation and cooperation among the states, it is weak on the requirement by the South that a fair international economic system is essential to the attainment of its goals and principles.

3. Rio (1992)

The Stockholm Declaration had identified the North-South divide over environmental matters. The World Charter was strong on general principles but weak on emphasizing the South's right to development. The discussions in the various Preparatory Committees (Prepcoms) of the UN Conference on Environment and Development (UNCED) held in Rio in 1992 were characterized by conflicts between developed and developing countries. Each issue and each proposal that went into the preparatory work²⁰ for the Rio Earth Summit was overshadowed by the difference of perceptions between the North and the South.²¹

Even the basic motives behind the North's global agenda on the environment and development was suspect in the South. The South generally believed that these initiatives were clever ploys by the North to exercise control over the development of the South. The South, time and again in the Prepcoms, argued that the chief villain in the overall global degradation was the industrial North.

Reminiscent of the debates in the General Assembly before the UN Declaration on Permanent Sovereignty, the delegates of the developing countries tabled several statistics to show that it was the North that had brought about the critical environmental hazards of the present times. Highlighting the wasteful consumption patterns of the North, it was pointed out, for example, that 80 percent of the world's resources are being utilized by the 20 percent of the world's population that lives in the industrial states. The world GDP increased by 520 trillion during 1972-1992. Only 15 percent of this increase accrued to developing countries; 70 percent went to the already rich countries. Mention was also made of the annual flow of more than US\$ 50 billion from the South to the North. It was persuasively contended that the crippling debt burden of the South, constraints on the transfer of technology, the trade barriers, discriminatory subsidies and other inequitable economic policies of the North handicapped the Southern countries to achieve their developmental potential. In the last analysis, the arguments continued, it was exceedingly important that financing mechanisms be put in place to alleviate poverty levels in the South.²² So overwhelming was this quest by countries of the South for equity in the international system that, at one stage, the success or failure of Rio looked as if it would hang on the response of the North to this critical demand.

²⁰ The Proceedings of the Rio Conference and the Prepcoms have been compiled in Nicholas A. Robinson, Parvez Hassan, and Francoise Burhenne Guilmin, *Agenda 21 the UNCED Proceedings* (1992).

²¹ UNCED saw the emergence of a third category of interests beyond the political blocks of North and South. This was "countries in economic transition", comprising the former socialist countries.

²² See generally Sir Shridath Ramphal, *Our Country, The Planet* (1992). This is one of the most eloquent expositions of North-South issues that framed the international debates in the 1990s.

In spite of prophecies of doom, Rio demonstrated the inherent resilience in the international system whereby views as conflicting and opposed as those that emerged during the preparatory process and at Rio were synthesized in the global partnership and alliance that was proclaimed in the Rio Declaration, Agenda 21, and the opening for signatures of the Conventions on Biological Diversity and Climate Change. The adoption of the Forest Principles, however unsatisfactory to the North, also contributed to the perception of the Earth Summit's success.

The Rio Declaration, with its twenty-seven (27) Principles, represented the compromise statement on both environment and development. Its essential elements are:

- (1) Acknowledgment of the interdependence of environment and development (Principles 1, 2, and 3).
- (2) Recognition of the needs of both present and future generations (Principle 2).
- (3) Establishment of poverty alleviation as an indispensable instrument for sustainable development, and the stipulation that this must be handled among all states and all peoples on a cooperative basis (Principle 5).
- (4) Agreement that special needs of developing countries shall be given special priority (Principle 6).
- (5) Access to information and justice for all citizens (Principle 10).
- (6) Recognition of the need for an equitable international economic system with fairer prices and trade policies (Principle 12).
- (7) Application of the precautionary principle according to the capabilities of a State (Principle 15).

The Rio Declaration 1992 moved beyond the Stockholm Declaration 1972 almost to the extent of requiring an "affirmative action" in favour of the developing countries. This obligation was further reinforced in the adoption of the ambitious and comprehensive Agenda 21, which calls for special responsibilities of the developed countries to finance and support its various components.²³

The journey to Rio 1992 involved a preparatory process almost unprecedented in human history. Did UNCED succeed or was it a failure? What lessons were learned there? Undoubtedly, there were both triumphs and failures at Rio. The final perception will, however, depend on whether one sees the bottle as half-full or half-empty. I recommend that we see the bottle half-full. The world community has a Convention on Climate and a Convention on Biodiversity, however modest their reach when compared with the original expectations. There is better appreciation of the respective positions of the developed and the developing countries on their national forestry resources. A comprehensive Agenda 21 seeks to guide this planet's future into the next millennium. Ad, of fundamental importance to all these is the Rio Declaration on Environment and Development.

²³ See, generally, Chapter 33. Articles 20 and 21 of the Convention on Biological Diversity are also good examples of the consensus in the international community that the developed countries have special obligations with respect to financing environmental efforts in the developing countries. The Tokyo Declaration on Financing global Environment and Development, reprinted in 22 *Environmental Policy & L.* (265-66) (1992), is yet another typical statement of such obligations of the developed countries.

We can anticipate that history will well judge the entire UNCED process. For the first time, it demonstrated that environmental and developmental concerns spanning North and South, East and West have made us truly an interdependent world. The process itself was a healthy one, allowing free debate and open dialogue. It was democratic in that it enabled universal participation. The welcome and pioneering access – however limited – offered to the nongovernmental organizations made it the most transparent negotiating process to date. The discussions involved issues vital to the viability of the Earth. The polarization and acrimony between the North and the South may have discouraged several amongst us, but the fact that the process enabled a frank and candid dialogue was its most important contribution.

In a way, Rio 1992 was a triumph for the imprint of the South on the global environmental agenda. India, through its Prime Minister Indira Gandhi, had lent much visibility to the South at Stockholm in 1972. Rio 1992 provided an excellent opportunity for Pakistan’s leadership as the Chair of Group 77 to lead the South.²⁴ Ambassador Tommy Koh from Singapore emerged as an important global leader on sustainable development.

4. IUCN Draft Covenant (1995)

The present body of international environmentally relevant instruments contains the seed of universally recognized principles of international environmental law. This was at first particularly evident in procedural matters related to trans-boundary environmental interferences, such as requirements for prior notification and consultation between the states concerned. It has since become visible for a growing number of substantive issues, such as the obligations to refrain from harming the environment of other states and areas outside national jurisdiction, to carry out environmental-impact assessments, to cooperate, and to conserve both the environment and natural resources for the benefit of present and future generations, to name but a few. These and more are particularly recognized in the milestone documents – the Stockholm Declaration, the World Charter and the Rio Declaration.

The emergence of “soft” environmental law principles at Stockholm, World Charter for Nature and Rio provided the foundation for a new global convention. The IUCN Commission on Environmental Law has for several years been engaged in the elaboration of a blueprint for such a global convention and has prepared several successive drafts of a proposed International Covenant on Environmental and Development.

In 1988, the IUCN General Assembly approved a resolution mandating that the IUCN Commission on Environmental Law prepare a global instrument embodying general environmental legal principles. The 1987 report of the World Commission on Environment and Development (WCED) had underlined the need for such a global instrument, and its Legal Experts Working Group prepared a corresponding first set of principles.

An ad hoc Working Group was constituted by the IUCN Commission on Environmental Law. Many of its members were experts who had already participated in the elaboration of the World

²⁴ For Pakistan’s stellar leadership at Rio 1992, see, generally, Parvez Hassan, (1) U.N Summit on Environment: The Rio Declaration, The Nation, 15 May 1992, (2) Rio ’92 – Prospects and Challenges, The Nation, 9 June 1992, (3) Environment: Time for Action, The Dawn, 24 August 1992, and (4) The Rio Summit: An Assessment, The Nation, 25 August 1992

Charter for Nature. The instrument was designated “Covenant” in order to reflect its similarity of character to the United Nations achievements regarding human rights principles and international agreements.

The ad hoc Working Group first met in Bonn in November 1989, under the chairmanship of my predecessor, Dr. Wolfgang Burhenne. I was privileged to lead the effort since 1990 to the formal launch of the IUCN Draft International Covenant on Environment and Development at the U.N. Congress on Public International Law in 1995.²⁵

Addressing the opening session of the International Environment Law Conference at the Peace Palace in The Hague in 1991, preceding Rio 1992, I had stated that:

The time has come when the international community must acknowledge and accept environmental rights and obligations in the same manner as it has acknowledged and accepted the international protection of human rights. A few decades ago, it seemed revolutionary to assert that human rights could be protected at the international level. “Domestic jurisdiction” and “sovereignty of states” were then pleaded as iron curtains that barred international efforts to promote and protect the human rights of individuals across state boundaries. But the collective voice of the international community which first manifested itself in the Universal Declaration of Human Rights adopted by the United Nations in 1948 brought about, “overnight”, a virtual global acceptance of the internationalization of human rights. I believe that, today, we stand at the threshold of an equally promising era: an era where the international community should move to accept and acknowledge the basic and fundamental rights of individuals and states to be free from environment degradation. The draft Covenant ... drafted by the (IUCN) Commission on Environmental Law, incorporating 44 Articles ranging from fundamental principles to their implementation, has since been provided by us to UNCED.

The IUCN redesignated World Commission on Environmental Law, with the co-operation of the International Council of Environmental Law, is in the process of updating the effort to reflect emerging trends and judicial precedents on the environment. A fifth edition, with a detailed commentary on each Article prepared principally by Professor Dinah Shelton, followed the meeting of a small group of experts in 2015.²⁶ It is our hope that governments can use this draft as a basis for the negotiation of a global covenant on environment and development.

The present 5th edition of the IUCN Draft has eight-three (83) Articles, each of which has been crafted out of existing international environmental declarations and other legal instruments. A particular orientation of the post-1992 Working Group was to pick up where the Rio Declaration left off. We even attempted to include in our membership the principal players in the Rio and post-Rio processes. The IUCN Draft declares the fundamental principle that the global environment is a common concern of humanity (Article 3). It contains provisions not only on the rights and duties of states (Article 14) but also of individuals (Article 15). There are detailed obligations on states with respect to their natural resources in Articles 20-28 and on

²⁵ UN Doc. A/Conf. 151/PC/WG. 111/4.

²⁶ On the background of the Draft Covenant, see Parvez Hassan, The IUCN Draft International Covenant on Environment and Development: Background and Prospects, in A. Kiss and F. Burhenne-Guilmin (eds), A Law For The Environment: Essays in Honour of Wolfgang E. Burhenne, 39-42 (IUCN 1994)

transboundary environmental effects (Article 41). There are provisions on the precautionary principle (Article 7), intergenerational equity (Article 5), environmental-impact assessment (Article 46), education, training and public awareness (Article 54), and military and hostile activities (Article 40). Also covered are issues such as poverty eradication (Articles 12 and 35), the sovereign right to development (Articles 11), trade and environment (Article 38), development and transfer of technology (Articles 51) and financial mechanisms (Articles 55 and 56).

The experience in the drafting of the Covenant was no different than the North-South divide in other international fora. I led the effort in the last five (5) years to the launch of the Covenant in 1995. The contribution of this Southern leadership was reflected in (1) the enlargement of the drafting group to include an effective representation of members from the south, (2) the introduction in the Covenant of issues of waste trade (Article 32), the need to regulate the activities of transnational economic entities (Article 39),²⁷ and the strengthening of the clauses on transfer of resources (Article 56) and technology (Article 51) as some examples of the reorientation of our work to the concerns of the developing countries. And, I must confess that when I proposed, and the Working Group accepted, to anchor the Covenant on “Fundamental Principles” (Part II), I did so because of my familiarity and experiences with “Fundamental Rights” in the Constitutions of Pakistan, India, Bangladesh and Sri Lanka.

5. The Earth Charter (2000)²⁸

The Earth Charter is another important soft law document that has influenced the development of international environmental law. I was privileged to have been associated with its drafting and to join Maurice Strong, Mikhail Gorbachev and Steven Rockefeller in its launch at The Hague in 2000.

Inspirational documents have changed the course of events and impacted on human societies: the Magna Carta, the American Declaration of Independence, the French Declaration of the Rights of Man and of the Citizen, and the Universal Declaration of Human Rights, all stirred human imagination and changed the quality of life of peoples all over the globe. Today, we need a similar call to arms that will shake civil society to its very foundations and promote harmony between humankind and nature to protect the Earth. The Earth Charter is an eloquent response to this challenge.

²⁷ One of the first set of issues that I had raised after my election as the Chair of the Commission on Environmental Law of IUCN in Perth, Australia, in 1990 was “waste trade” and “harmful activities of transnational corporations”. I was privileged to address a stellar group of multinational corporations (MNCs) at the First Business and Environment Forum at the Sydney Convention Center, Sydney, Australia (7 December 1990), and I then commented:

Sitting here all morning, I have been fascinated with the description of corporate objectives to be “environmentally friendly”. The desire not to harm resource bases is both impressive and laudable but this has not only to be carried but perceived to be carried in the policies of these companies in the developing countries. An appropriate corporate environmental ethic might be a reality here (in Australia) but the perception is that multinationals have a headquarter ethic which is at best followed in the developed world and that they take advantage of the absence of laws or lower environmental standards in the developing world to ignore that ethic. The attempts to use developing countries as dumping grounds for hazardous wastes by multinational companies are also well publicized. If the partnership of the global business community with the environment is to be carried forward into the nineties and the next century to serve sustainable development, it would, in my view, be a mistake to not include the interests of the developing countries in your efforts. I urge such a dialogue.

²⁸ See, generally, Parvez Hassan, (1) *Earth Charter: The Journey from the Hague 2000*, 2002 *Pakistan Law Journal (Magazine)*, at 1-4, (2) *Earth Charter: An Ethical Lodestar and Moral Force*, in P. Corcoran, M. Vilela and A. Roerink (eds.), *The Earth Charter in Action: Toward a Sustainable World*, 29-31 (KIT Publishers, Amsterdam 2005).

The Earth Charter is an inspirational statement of lofty concepts as it builds on the essential human freedoms of expression, worship, dignity and security and adds the crucial freedom to live in a world which is in harmony with nature. It provides a richness of content that is impressive in its sheer breadth. There are four foundational principles, (1) Respect and Care for the Community of Life, (2) Ecological Integrity, (3) Social and Economic Justice and (4) Democracy, Non Violence and Peace²⁹, which are in turn supported by several subsidiary principles.

The purpose behind the Earth Charter, to provide a document that is intellectually and emotionally engaging and that commands the respect of diverse traditions, is well summed up in the Earth Charter Briefing Book (2000):

... the Charter should be ... a declaration of fundamental ethical principles for environmental conservation and sustainable development; composed of principles of enduring significance that are widely shared by people of all races, cultures, religions, and ideological traditions; relatively brief and concise; a document with a holistic perspective and an ethical and spiritual vision; composed in language that is inspiring, clear, and uniquely valid and meaningful in all languages; a declaration that adds significant new dimensions of value to what has already been articulated in relevant documents.

To achieve this ambitious task, the drafters of the Earth Charter left no source of knowledge and wisdom untapped; in the words of the Briefing:

In addition to international law instruments and NGO declarations, the ideas and principles in the Earth Charter are drawn from a variety of sources. The Earth Charter is influenced by the new scientific worldview, including the discoveries of contemporary cosmology, physics, evolutionary biology, and ecology. It draws on the wisdom of the world's religions and philosophical traditions. It reflects the social movements associated with human rights, democracy, gender equity, civil society, disarmament, and peace. It builds on the seven UN summit conferences on children, the environment, human rights, population, women, social development, and the city held during the 1990s. The Charter draws on the path breaking work done in the field of environmental and sustainable development ethics over the past fifty years. The Charter has also been developed in the light of the practical experience and insights of those groups that have successfully pursued sustainable ways of living and working.

6. Johannesburg (2002)³⁰

The World Summit on Sustainable Development (WSSD), Johannesburg, 2002, continued the legacies of Stockholm and Rio. The preparatory processes leading to the WSSD had highlighted the gains at Stockholm and Rio. The Stockholm Declaration and the Rio Declaration were already looked at as bench-marks for the conduct of states and societies for sustainable

²⁹ See, generally, the Earth Charter Briefing Book (2000) for an excellent introduction to the preparatory process of the Earth Charter.

³⁰ See, generally, Parvez Hassan, The Johannesburg Summit: Making it Happen, 2003 Pakistan Law Journal (Magazine), at 41-49

development. The WSSD highlighted the need to walk the talk in terms of identifying time lines for action. A Plan of Implementation prioritized five (5) areas, water, energy, health, agriculture and biodiversity (WEHAB) as a part of the over-arching goal of poverty alleviation.

The Political Declaration, the Johannesburg Commitment on Sustainable Development, tabled on behalf of President Mbeki of South Africa, reaffirmed the continuation of the Rio legacy and principles and pledged “from this Continent, the Cradle of Humanity, our responsibility to one another, to the greater community of life and to our children”. In its operative part, under the heading “Making it Happen”, it added: “We commit ourselves to act together, united by a common determination to save our planet, promote human development and achieve universal prosperity and peace”. Paragraph 17 of the Political Declaration will be cited in the years to come:

We welcome the Johannesburg Summit focus on the indivisibility of human dignity and are resolved through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of bio-diversity. At the same time, we will work together to assist one another to have access to financial resources, benefit from the opening of markets, ensure capacity building, use modern technology to bring about development, and make sure that there is technology transfer, human resource development, education and training to banish forever underdevelopment.

7. Rio + 20 (2012)

The United Nations Conference on Sustainable Development in Rio de Janeiro in 2012 (Rio +20) adopted the historic document “The Future we Want”. This document is remarkable for the endorsement of all the soft law documents, including those discussed in this presentation, that have shaped the development of international environmental law.³¹

8. The Contribution of Judicial Activism in the South

The judiciaries of the developing countries, particularly in South Asia, have played an enormous role in supporting, redefining and developing national environmental laws and policies which have impacted on the development of international environmental law. From intergenerational equity upheld in the Tony Oposa case in the Philippines to carving out the right to the environment as included in the constitutionally-proclaimed fundamental right to life by the Supreme Courts in India and Pakistan, mostly as public interest litigation or environmental public interest litigation, the judiciaries in the South have generally demonstrated vision and innovation in supporting the global goals of sustainable development. So much so that the leadership of Chief Justice P. N. Bhagwati of India and Justice Saleem Akhtar in Pakistan provided robust jurisprudence in environmental rights at a time when such concerns had not fully attained the attention of the legislatures and the executives in the South.³²

³¹ Several of these are listed in Paragraphs 16, 17 and 18 in Section II Renewing Political Commitment in the Annex to the Outcome Document of Rio+20.

³² There is extensive literature contributed by the author on the activism of judiciaries in the developing countries particularly South Asia in the field of environmental protection. This includes Parvez Hassan, (1) Environmental Rights as part of Fundamental Rights: The Leadership of the Judiciary in Pakistan, in A. Postiglione (ed.), The Role of the Judiciary in the Implementation and Enforcement of Environment Law, 135-159 (Bruylant Bruxelles 2008), (2) Chapter on Pakistan (with Jawad Hassan), in L. Kotze and A. Paterson (eds.), The Role of the Judiciary in

The scale and sophistication of Indian environmental case law arising through public interest litigation is truly impressive, and in this respect it remains the most exciting of the South Asian jurisdictions. Mature case law exists with respect to the public trust doctrine,³³ the precautionary principle and polluter pays principle,³⁴ intergenerational equity,³⁵ and incorporation of international treaties in domestic law. The recognized constitutional right to protect the environment certainly helped in the proliferation of such doctrines in the field, but it cannot be doubted that the liberal regime introduced by public interest litigation was the catalyst that created the pathways for the successful results achieved.³⁶

The Shehla Zia³⁷ case (1994), argued by me before a Full Bench of the Supreme Court of Pakistan, continues to dominate the environmental jurisprudential landscape of Pakistan. The Supreme Court of Pakistan broke down barriers to right to sue, entertained the application for relief, and accepted the petition, thus promulgating a historic judgment. What the lawmakers and the executive leadership of the country could not do over the course of several decades, the judiciary was able to catalyze with a single decision.

In terms of legal consequences, the first major result of the decision in Shehla Zia was that the right to a good quality of life was held to be guaranteed by the Constitution:

The word "life" has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person in a free country is entitled to enjoy with dignity, legally and constitutionally.³⁸

The Court's receptivity to the precautionary principle covered in Principle 15 of the Rio Declaration on Environment and Development, was another significant advance. I presented the Supreme Court with an extended personal report of Pakistan's leadership as the chair of the Group of 77, on behalf of the developing countries at the Rio Earth Summit in 1992, and in its role as one of the principal architects of Rio's success. The historical exposition became a part of the Court's judgment:

Environmental Governance: Comparative Perspectives, 381-409 (Wolters Kluwer 2009), (3) Securing Environmental Rights through Public Interest Litigation in South Asia, a paper presented at the Global Judges Symposium on Sustainable Development and the Role of Law, organized by the United Nations Environment Program, on 18-20 August 2002, at Johannesburg, South Africa, with Azim Azfar, in 22.3 Virginia Environmental Law Journal 216-236 (2004)), (4) Human Rights and the Environment: A South Asian Perspective, with Azim Azfar, in (5) Journal of Human Rights and the Environment (No.2), at 192-212 (2014), (5) Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region, 2012 Corporate Law Decisions, Journal, at 24-49, (6) The Greening of Judiciaries in South Asia, 2015 Pakistan Law Journal (Journal), at 23-44, and (7) Public Trust Doctrine and Environmental Issues before the Supreme Court of Pakistan, 2012 Pakistan Law Journal (Magazine), at 44-64. See also Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (Kluwer 2004), and Parvez Hassan, Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection, 2014 Pakistan Law Journal (Journal), at 25-40, Rule of Law and Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Pakistan, 2014 Pakistan Law Journal (Magazine), at 425-440, From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan, (2002) 6 Singapore Journal of International & Comparative Law 683-722.

³³ M.C. Mehta v. Kamal Nath. (1997) 1 S.C.C. 388.

³⁴ Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715.

³⁵ Rural Litig. & Entitlement Kendra v. State of U.P., A.I.R. 1987 S.C. 2426.

³⁶ People United for a Better Living in Calcutta v. State of West Bengal, 1993 A.I.R. 80 (Cat.) 215.

³⁷ PLD 1994 Supreme Court 693

³⁸ Id. at 712.

The concern for protecting environment was first internationally recognised when the declaration of United Nations Conference on the Human Environment was adopted at the [sic] Stockholm on [June 16, 1972]. Thereafter it had taken two decades to create awareness and consensus among the countries when in 1992 [the] Rio Declaration was adopted. Pakistan is a signatory to this declaration and according to Dr. Parvez Hassan although it has not been ratified or enacted, the principle so adopted has its own sanctity and it should be implemented, if not in letter, at least in spirit.³⁹

The Court readily accepted the thrust of these submissions. While recognizing the fact that the Rio Declaration was not a formal part of Pakistani law, the Court held that it commanded respect as a major international treaty of broad reaching significance for human progress:

The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was after negotiations between the developed and the developing countries that an almost consensus declaration had been sorted out. Environment is an international problem having to [sic] frontiers creating trans-boundary effects. In this field every nation has to cooperate and contribute and for this reason the Rio Declaration would serve as a great binding force and to create discipline among the nations while dealing with environmental problems.⁴⁰

The legacy of Shehla Zia has been remarkable in the environmental cases that it spawned in the superior courts of Pakistan.⁴¹

In a recent case, Imrana Tiwana vs. Province of Punjab Case⁴², certain environmental advocacy groups challenged the redesigning and remodeling of a seven (7) kilometer long road in central Lahore in a public interest environmental litigation before the Lahore High Court, Lahore. The contentions of the petitioners were that the EIA of the project was in total disregard of the law and without the approval of the Environmental Protection Authority (the “EPA”) under the relevant law. In this judgment, a 3-member Bench of the Lahore High Court, through its Green Judge, Mr. Justice Syed Mansoor Ali Shah, broadened its commitment of protecting the environment to the eloquently restated goals of environmental justice:

Protection of the environment is, therefore, an inalienable right and perhaps more fundamental than the other rights. It emerges from the right to life, liberty and dignity under Articles 9 and 14 of the Constitution..... The corpus of environmental laws have a singular purpose of protecting life and nature including the International Environmental Principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Our existing jurisprudence (led by the landmark judgment of Shehla Zia case) rests environmental justice on right to life (article 9) to mean a right to a healthier and cleaner environment. Time has come to move on. To us environmental justice is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our Objectives Resolution, the fundamental right to life, liberty and

³⁹ Id. at 710.

⁴⁰ Id.

⁴¹ See supra note 32. See also Parvez Hassan, Shehla Zia vs. WAPDA: Ten Years Later, 2005 All Pakistan Legal Decisions, Journal, at 48.

⁴² PLD 2015 Lahore 522.

human dignity (article 14) which include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has come to take center stage in the scheme of constitutional rights. Right to environment that is not harmful to the health or well-being of the people and an environment that protects the present and future generations is an essential part of political and social justice and even more integral to the right to life and dignity under our Constitution. (emphasis in judgment)⁴³

The decision of the Lahore High Court was set aside, on appeal, by the Supreme Court of Pakistan⁴⁴ but the Lahore High Court judgment will long resonate for its articulation of environmental justice.

The provisions of Environmental Tribunals and Environmental Magistrates in the Pakistan Environmental Protection Act, 1997 (the “1997 Act”)⁴⁵ recognized several realities. One, the growing importance of the subject was accepted in providing special courts for the specific and exclusive purpose of dealing with environmental matters. This was to comfort against the long list of cases in ordinary courts and the delays in their decisions. Two, the nature of environmental cases required a technical/professional input beyond the ordinary competence of a legally trained judge. The inclusion of a technical member in the Environmental Tribunals allows a broad-based expertise to be available for decision making. Third, the case law before the superior courts in Pakistan by 1997 had shown the need to involve experts, through commissions, in the resolution of environmental disputes. Fourth, Pakistan took notice of the world-wide trend to establish specialist tribunals for environmental matters.⁴⁶ The legislation in Pakistan has, resultantly, taken a step in the direction of including technical members in Environmental Tribunals but this has not gone as far as the recent law in India, National Green Tribunal Act, 2010, which has set up Green Tribunals to include, besides the Chairperson, as many as forty (40) members, half of whom are to be drawn from specialist fields⁴⁷.

Much like in Pakistan, the Constitution of Bangladesh does not expressly provide for environmental rights, but the Bangladeshi courts have also embraced these rights within the constitutional right to life. In Dr. Mohiuddin Farooque v. Bangladesh and Others, the Supreme Court of Bangladesh held in its consensus judgment that:

Article 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water and sanitation, without

⁴³ Id., at 565-566.

⁴⁴ Lahore Development Authority vs. Imrana Tiwana, 2015 Supreme Court Monthly Review 1739.

⁴⁵ The Eighteenth Amendment, in 2010, to the Constitution of Pakistan, 1973 provincialized the matters relating to environmental pollution and ecology. Article 270AA of the Constitution of Pakistan, 1973 enabled the continuation of the Federal legislation affected by the Eighteenth Amendment. The Provincial Governments have, since the passing of the Eighteenth Amendment, moved to adopt provincial environmental statutes mirroring, generally, the provisions of the 1997 Act.

⁴⁶ See, generally, the several articles on Environmental Tribunals in different national jurisdictions in 3 Journal of Court Innovation (2010).

⁴⁷ See, Bharat Desai and Balraj Sidhu, On the Quest of Green Courts in India, Id., at 79; see also the Interview of Bharat Desai, Id., at 361.

which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.⁴⁸

In this case, the writ petition was filed under Article 102 (1) and (2) of the Bangladesh Constitution by one of the country's leading environment NGO's, the Bangladesh Environmental Lawyers Association (BELA), in connection with irregularities regarding the country's Flood Action Plan. The objection as to standing was dismissed by the Appellate Division of the Supreme Court of Bangladesh:

“any person aggrieved” within the meaning of the Article 102 of the Bangladesh Constitution is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality, if an applicant bona fide espouses a public cause in the public interest he acquires the competency to claim hearing from the court....being a public sector subject, flood control and control of river and channel flows is a matter of public concern.⁴⁹

As in India and Pakistan, relaxation of standing and favourable rulings on the constitutional right to life permitted a boon of human rights and environmental petitions. In a public interest litigation concerning air and noise pollution, the Dhaka High Court ordered the Government to convert petrol and diesel engines in government-owned vehicles to gas-fueled engines; the same order also calls for the withdrawal of hydraulic horns in buses and trucks by 28 April 2002.⁵⁰ Another far reaching decision of the Dhaka High Court has called for the withdrawal of two-stroke engine vehicles from Dhaka city by December 2003, the cancellation of licenses for nine year old three-wheelers, the provision of adequate number of CNG stations, and the establishment of a system for issuing fitness certificates for cars through computer checks.⁵¹

BELA continues to be the driving force behind public interest litigation in Bangladesh. In Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Environment and Forests⁵², the Supreme Court of Bangladesh was petitioned to stop the diversion of a forest area and rich ecosystem in Sonadia Island from being diverted for commercial purposes. The ship-breaking industry, long used to operating without environmental considerations, became the focus of another BELA assault when the Supreme Court ordered the closing of ship breaking yards that were operating without safeguards (Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Shipping).⁵³

Although Sri Lanka's 1978 Constitution provides for a series of fundamental rights, it asserts in its Directive Principles of State Policy that the state shall protect, preserve and improve the environment for the benefit of the community, the same are not justiciable. This has not stopped the Sri Lankan courts from giving recognition to these principles by reading them in the light of international law. As Puvimanasinghe points out:

⁴⁸ 1997 BLD 17, 33; (1997), 49 DLR 1.

⁴⁹ *Id.*, at para 49.

⁵⁰ Sayed Kamaluddin, BD Judiciary Showing Increasing Assertiveness, DAWN, 4 April 2002.

⁵¹ *Id.*

⁵² www.elaw.org/node/2452 (Write Petition to Bangl. S.C Oct. 10, 2003).

⁵³ Bangl. S.C (2009), available at www.elaw.org/node/3747.

The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the Directive Principles by the judiciary can truly advance social justice.⁵⁴

The landmark judgment, Bulankulama v. The Secretary, Ministry of Industrial Development⁵⁵, brought the issues of sustainable development, inter-generational equity and fate of vulnerable populations to the fore. This case arose out of a joint venture between the Government of Sri Lanka and the local subsidiary of a multi-national for the aggressive development of a phosphate mine that would have displaced around twelve thousand people and depleted the mineral deposits in thirty years instead of perhaps a millennium at the previous rates of extraction. Just as the Pakistan Supreme Court had not allowed promulgation of domestic law to undermine the state's international environmental commitments, the Sri Lankan Supreme Court stated:

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. Rational planning constitutes an essential tool for recognizing any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration).

In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law' Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.⁵⁶

In Weerasekera et al. v. Keangnam Enterprises Limited⁵⁷ a mining operation, which had acquired an environmental license was alleged to be causing a public nuisance owing to the noise level of the operation. Although the lower court held that the license was an adequate defence, the Court of Appeal overturned the decision on the grounds that obtaining the environmental license was not a shield to legal injury.

⁵⁴ Shyami Fernando Puvimasinghe, Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest (2009) 1 (10) Sustainable Development Law & Policy, 41-49, at 44.

⁵⁵ Bulankulama vs. Ministry of Industrial Development, (Eppawala case), (2000) 3SLR 243 (SL) S.C. Application No. 844/99 (F.R).

⁵⁶ <http://www.elaw.org/node/6722> at 10.

⁵⁷ CA (PCH).Apn No. 40/2004 (dd. 2009.06.08).

The Sri Lankan judiciary has made innovative use of procedural rights as well, reading a right to information (missing in the 1978 Constitution) as part of the right to freedom of expression. Environmental Foundation Limited v. Urban Development Authority (2005)⁵⁸ concerned a clandestine agreement between the Government agency and private developers for turning Galle Face Green, a seaside promenade in Colombo, which had the status of a national heritage site into a leisure complex. The Supreme Court found the contract violative of the petitioner's right to information as well as the right to equality, and though this case concerns conservation of historic properties, the reasoning can easily apply to environmental cases as well.

In recent years, environmental jurisprudence has been expanded to include good environmental governance. Again, the southern judiciaries have innovatively used notions of rule of law to promote good environmental governance in the control and management of natural resources by public sector corporations.⁵⁹

E. Conclusions⁶⁰

In promoting international environmental law, the lessons in the evolution of universal international law should not be ignored. Over five (5) decades ago, all rules of traditional international law were under serious stress. The newly emerging and independent states of Asia and Africa, supported by the developing world in South America, questioned the validity and legitimacy of these norms of international law, in the formulation of which the developing world had not participated at all, on the ground that they served the exclusive interests of the developed Western nations. These rules were alien to the aspirations of the developing countries and therefore not acceptable to them.

International law, as it developed in the post-colonial era, fortunately showed the resilience to accept the viewpoint of these new participants in the global process. Whether it was the international protection of human rights, or the international law regarding the permanent sovereignty of nations over their natural wealth and resources, or the laws relating to diplomatic and consular immunities, or the law relating to the seas and oceans, or the law on treaties – each of these assimilated, to some extent, the impact of the interest of the developing countries.

In the field of human rights, for example, when the United Nations first internationalized the protection of human rights through the Universal Declaration of Human Rights in 1948, fewer than fifty states had voted for its adoption. The Human Rights Covenants – that is, the Covenant on Civil and Political rights and the Covenant on Economic, Social and Cultural Rights – which concretized the declaratory content of the Universal Declaration into binding treaty obligations, were adopted eighteen (18) years later in 1966. There was much disappointment among international scholars with regard to the slowness with which the Covenants were finalized. But

⁵⁸ S.C.F.R Application No. 47/2004 decided on 23 November 2005.

⁵⁹ See, generally, Parvez Hassan, (1) Good Environmental Governance: Some Trends in the South Asian Region, 18 *Asia Pacific Journal of Environmental Law*, at 169-192 (2015), (2) Elements of Good Environmental Governance, in 6 *Asia Pacific Journal of Environmental Law*, at 1-11 (Volume 6, 2001)

⁶⁰ This Section draws from the author's inaugural address, Moving Towards a Just International Environmental law, at the International Environmental law Conference, The Hague (12-16 August 1991). This is reproduced in Simone Bilderseck, supra note 1. See also the author's keynote addresses on Challenges and Prospects for a New Environmental Order in the Asian Region, delivered at the International Conference on Environment and Law at Katmandu, Nepal (6-8 March 1992), and on Rio '92: Prospects and Challenges, delivered at the International Symposium on law, the Environment and the Quality of Life at Bahia, Salvador, Brazil (26-29 May 1992).

I, for one, found an important redemptive feature in this delay: it enabled the participation of an additional sixty new countries, most of them developing countries, in the formulation of these human rights norms. The Covenants, in the drafting of which more than 110 countries participated, certainly represent the commonality of interests of all – the developed and the developing countries.

The codification of international law by the participatory processes of the UN General Assembly and the International Law Commission in the past three decades has also enabled the Asian-African countries to redress major biases of traditional international law.

As the ultimate sanction and strength of any international law is the commonality and synthesis of the interests of all the nation-states, rich and poor, agricultural and industrial, these were duly taken into account in the development of international environmental law. The developing countries did not get an opportunity to be a part of the founding of public international law. But they were a part of the founding of international environmental law and have played an effective role in its development in each of the international conferences including at Stockholm (1972), World Charter of Nature (1982), Rio (1992), Johannesburg (2002), and at Rio +20 (2012). This adds immeasurable strength to the future of international environmental law.

In my attendance of many of these milestone events starting with Rio 1992⁶¹, I developed a layman's guide to the respective positions and concerns of the developed and developing countries in the evolving global environmental agenda. To the developing countries, the important areas were (1) sovereignty over natural wealth and resources, (2) right to development, (3) eradication of poverty, (4) consumption patterns of the North, (5) capacity building, (6) waste trade, (7) reschedule/write off debts, (8) transfer of resources, (9) transfer of technology, and (10) harmful activities of transnational corporations.

The developed countries, on the other hand, sought focus on population stabilization, forests, intellectual property rights, and good governance.

The commonality of interest between the North and the South was, however, readily visible on the need for a global partnership and for empowering youth, women, and indigenous people.

From this pot pourri dialogue emerged durable principles and concepts such as sacred trust for future generations, inter-generational equity, intra-generational equity, polluter pays principle, principle of sustainable development, need for public participation, common but differentiated responsibilities, environmental impact assessment, principle of prevention, precautionary principle, principle of restitution/restoration of environment, principle of strict liability, public trust doctrine, and RRR (reduce, recycle, and reuse) in waste management.

This emerging global environmental order has, to generalise, developed a corpus of soft law and principles for national and international behaviour which have impacted on humanity and Planet Earth. There have been attempts to transform these soft law principles into binding treaty

⁶¹ I have been privileged to attend Rio (1992), Rio +10 (2002), Johannesburg (2002), and Rio +20 (2012). Additionally, I was a part of the launch of the Earth Charter, The Hague (2000) and attended Earth Charter + 10 at The Hague (2010). Also, I attended several Prepcoms and other preparatory meetings for these major conferences. All of them included the participation of the developing countries.

obligations of states. As Chairman, IUCN Commission on Environmental Law, 1990-1996, I led the most significant of such attempts in the launch, in the UN Congress on Public International Law in 1995, of the Draft International Covenant on Environment and Development. With Wolfgang Burhenne, my predecessor-Chair, and Nick Robinson, my successor-Chair, we in the IUCN Commission of Environmental Law, sought to fast track the development of “hard” international environmental law. The internationalization of the protection of human rights had provided some guidelines. It took sixteen (16) years to transform the declaratory content of the Universal Declaration of Human Rights in 1948 into binding commitments under the 1966 International Covenants on (1) Civil and Political, and (2) Economic, Social and Cultural Rights. We tried to progress the soft laws content of the Stockholm Principles on Human Environment (1972), World Charter of Nature (1982), Rio Declaration on Environment and Development (1992), the Johannesburg Declaration on Sustainable Development (2002), and the developing jurisprudence into a binding framework treaty on environment and development. Although the IUCN Draft Covenant, over two decades later, still remains a draft, there will, I hope, soon be the dawn that we have all been working for.

This is not to say that there was no progress on the ground. Stockholm, Rio and Johannesburg each inspired, mostly in the developed world, national initiatives, policies and legislation that were, sometimes, effectively mainstreamed through judicial interventions.

However, developing countries such as Bangladesh, India, Pakistan and Sri Lanka were slow to assimilate the issues of sustainable development in their policies and legislation. But it is a measure of the vision of the judiciaries in these countries that they did not wait for national or international hard law to provide protection against environmental degradation. This region was fortunate in the pioneering formulations of fundamental rights around the right to life as including a right to the environment by Justice P.N. Bhagwati in India. They soon resonated in Pakistan through an equally visionary Justice Saleem Akhtar⁶². Similar developments of judicial activism took place in Sri Lanka and Bangladesh. And, the region was all set to see its courts and the judiciary as the major facilitators, in implementation, of the changing global order.

⁶² I acknowledged the visionary role of Justices Bhagwati and Saleem Akhtar in South Asia at the UNEP Global Judges Symposium, Johannesburg, (2002); see Parvez Hassan, Judicial Activism Toward Sustainable Development in South Asia, 2003 Pakistan Law Journal (Magazine), at 39-41.