CONVENTIONAL DEVELOPMENT OF ENVIRONMENTAL PREOCCUPATIONS

Claudia ANDRIȚOI[*]

Abstract

A great number of the conventions referring to nature, even if they do not refer ton particular species, were limited from the point of view of geography and territories: we may give as example here a convention for the protection of flora, fauna and panoramic beauties of America, the African convention for nature and natural resources… By the Stockholm conferences, from the 5th of June 1972, we entered in a "dynamic of globalization". Article 1 of the Declaration that followed the conference is important for the global awareness: "Human beings have the basic right for freedom, equality and conditions of a satisfying life, in an environment with a quality that allows him to live with dignity and well being. He has the solemn duty to protect and improve the environment for the present and future generations (...)". This article proclaims a right for the environment. A new law seems to have arisen with the apparition of this convention: the right of a healthy human being and of a healthy environment. This law is bipolar because it associates the human beings to nature. Human beings have the right to live in a healthy environment and this is why he has to protect nature. This does not represent a right of the human beings from a strict point of view. This is a right that has a universal value. The right to a healthy environment can not be put in the same category as the right to live or the right to be healthy, because this right contains the latter.

Keywords: *the principle of precaution, globalization, cultural patrimony, natural patrimony, international ecological order.*

Introduction

A brief history of environmental law allows the situation of an idea of universal interest in a conventional context. Only a few decades ago has the human being been aware of the nefarious consequences that could influence the environment. In the beginning, the environmental conventional instruments did not aim but at the salvage of certain animal or vegetal, only a few conventions from the beginning of the 20th century were more global. Environmental international law was at its origin "*a sector discipline"*. Nowadays, it tends to *"adopt a global vision of the biosphere and of its multiple components"*.

• An international ecological order?

The Rio Conference took into consideration the global risks representing climate changes and the disappearing of biodiversity[1].

[*] Lecturer, PhD, Eftimie Murgu Univeristy Resita, (email: c.andritoi@uem.ro, andritoiclaudia@yahoo.com.)

[1] BEURIER (J.-P.), Le droit de la biodiversité, RJE 1-2 /1996, p. 5-28.MALJEAN-DUBOIS (S.), Biodiversité, biotechnologie, biosécurité : le droit international désarticulé, JDI 2000 (4), p. 949-996. LONDON (C.), Nouveau millénaire, nouveaux impératifs environnementaux ? , Droit de l'environnement mai 2002, n° 98, p. 129 et s. et

The globalisation of environmental risks results thus in the multiplication of environmental international conventions. We assist at "a globalisation of problems"[2], at a "universal mobilisation"[3]. This conventions are most often, conventions-cadre[4], which are easy adaptable to difficulties. The ozone layer was, first of all, the preoccupation of scientists and international organisations. The Framework convention regarding the protection of ozone layer was signed in Vienna on the 22nd of March 1985[5].

This first text determines the judicial principle of a progressive elimination of substances that damage the ozone layer without any constraining obligation being edited regarding the states. The Montreal Protocol (16 September 1987) establishes a term for this lagoon and shows at what point the earth atmosphere, the air that every species breathes is at the hearth of international preoccupations. The framework convention of the United Nations regarding climate changes (entered into force in March 1994) has aided the adoption of the Kyoto Protocol[6] in December 1997. This Protocol aims at the fight against the earth warming due to the emission of gases with a greenhouse effect.

If it seems difficult to assert the existence of an international ecological order, it wouldn't be too hard to sustain that the establishment of a psychological and sociological connection, that unites people, limits the frame of a construction of an order of the environment. The technological evolution, the scientific discoveries and the economic and social transformations, that affect the life of people, wake the feeling of their interdependence and the urgency of forming a true international ecological order.[7] The formation of an international ecological order is connected to the raising of an ecological conscience. But, the state of tensions that surrounds international relations doesn't agree to the eviction of an awareness of common interests in almost every domain. This general awareness results from the constant degradations of the planet Earth, the only space in the universe where there life is possible, until the contrary happens. The awareness is presented as a live factor of evolution of the international ecological order that is underlined by some basic ideas. This order is built around referential principles and protector norms of the environment[8].

These conventions present all the spaces that represent our planet: water, air and earth. Thus, by desiring to reign over these spaces, that once did not belong to anyone and which weren't assigned any right of property (air doesn't belong to anyone and neither the inaccessible sea

spécialement p. 131-134. HERMITTE (M.-A.), La convention sur la diversité biologique, AFDI 1992, p. 844-870. STONE (D. C.), the Rio Convention from 1992 regarding biologic diversity. http://www.unige.ch/sebes/textes/1996/96_CDS.html

[2] KISS (A. C.), La protection de l'atmosphère : un exemple de la mondialisation des problèmes, AFDI 1988, p. 701 et s.

[3] BOISSON DE CHAZOURNES (L.), *Le fonds pour l'environnement mondial : recherche et conquête de son identité,* AFDI 1995, p. 612 : « La conférence de Stockholm avait sonné le glas en appelant à une mobilisation universelle en faveur de la protection de l'environnement ».

[4] VAN DEN HOVE (S.), *La globalisation des risques environnementaux rend nécessaire un renforcement des régulations internationales,* in *Le nouvel état du monde. Les idées-forces pour comprendre les nouveaux enjeux internationaux*, sous la direction de Serge Cordellier, deuxième édition actualisée, La découverte, Paris, 2002, p. 74-76.

[5] SAND (P.), *Protecting the ozone layer : the Vienna convention is adopted,* Environnement 1985, n° 27, p. 19 et s.

[6] MOLINIER (M.), *Le principe de précaution dans le dossier climatique,* Droit de l'environnement n°108, mai 2003, p. 90-93.

[7] Abraham Yao GADJI, *Liberalisation du commerce international et protection de l'environnement,* Thèse de doctorat, Limoge University, Faculty of Law and Economic Sciences Crideau, p.117 and the following.

[8] Abraham Yao GADJI, op.cit.

waters); man breaks away from the idea of res nullius[9]. These properties still have a "universal destination" and we also can observe the terms "common goods" and " res communis". Nature in all its diversity will remain a common good for all humans, a common patrimony of humanity[10].

Humans become more and more aware of the existence of global risks and establish, in order to prevent or eliminate, contravention elements that are also global. This globalisation of problems and solutions is the one that represents the seeds of universe interest and thus of the universal action.

This globalisation that aids at the raising of new goods, also helps the writing of a new law adequate for environmental preoccupations newly appeared: the right to a healthy environment[11]. This law seem to be consecrated to different international instruments articles 22, 25 and 27 of the Universal Declaration of Human Rights, articles 1, 6, 7, 11, 12, 13 and 15 of the International Pact regarding the social and cultural rights, articles 11 and 14 of the Convention regarding the elimination of all forms of women discrimination… This law isn't only the object of application, but it has also offered to all state the right to a healthy environment, as for example the Rio Declaration, the Beijing Declaration… France applies this law in its constitutional law starting with the 1st of March 2005 regarding the Environment Charta[12]. In its first article, it proclaimed that "Each person has the right to live in an equilibrated environment and to respect its health". Each framework convention insists on the human's obligations to protect nature, but it also announces a few rights. Thus, it will be easier to approach this problem due to human rights because these are, in reality, tied to the right to a healthy environment et mainly because the right to a healthy environment isn't yet clearly defined. In fact, the deterioration of the environment affects a great number of other rights: the right to health, the right to work, the right to an education and the right to life[13].

In addition, the degradation of the environment, cased by the economic activities often results in the violation of civil and political rights. The human right to a healthy environment possesses a part of humanity nuanced by the idea of the environment or of nature: the nature is "what is spontaneous in the universe, without the intervening of humans". The environment "encompasses the elements that don't have anything natural, mainly in the urban space"[14]. The human right to a healthy environment doesn't just represent the right to live in a preserved nature, but also the right to live in human infrastructures where nature is respected.

This right also exceeds what our biosphere contains in order to incorporate human activities. The human right to a healthy environment is understood as the right to nature that needs to be respected. Thus nature could become the subject of law, as humanity did[15]. Humanity can be the

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[9] LAROCHE (J.), *Politique internationale*, 2ème édition, LGDJ, Paris, 2000, p. 510.

[10] BARDONNET (D.), *Le projet de convention de 1912 sur le Spitsberg et le concept de patrimoine commun de l'humanité, in Humanité et droit international*, Mélanges René-Jean Dupuy, Pédone, 1991, p. 13-34.

[11] LAMBERT (P.), *Le droit de l'homme à un environnement sain,* RTDH 2000, p. 556-580.

[12] FELDMAN (J.-P.), *Le projet de loi constitutionnelle relatif à la Charte de l'environnement,* Dalloz 2004, chroniques, doctrine, p. 970-972.

[13] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* Thèse de doctorat, UNIVERSITÉ DE LIMOGES FACULTÉ DE DROIT ET DE SCIENCES ÉCONOMIQUES, p.448 et suiv.

[14] UNTERMAIER (J.), *Droit de l'homme à l'environnement et libertés publiques. Droit individuel ou droit collectif. Droit pour l'individu ou obligation pour l'Etat,* RJE 4/1978, p. 337.

[15] CHEMILLIER-GENDREAU (M.), L'humanité peut-elle être un sujet de droit international ? , in Droit et humanité, Les cahiers de l'action juridique, septembre 1989, n°67-68, p. 14-18 et notamment p. 14 : « L'absence de débats autour de la véritable portée juridique de l'humanité masque une difficulté insurmontable. Comment faire la synthèse entre l'unité du genre humain et la diversité des peuples qui a donné naissance aux nations et conduit à leur attribuer une souveraineté ? La souveraineté nationale, expression et protection de la diversité est beaucoup plus construite théoriquement et techniquement que l'humanité, expression de l'universel ».

victim of international penal crimes (crimes against humanity) and it disposes of a patrimony (the common patrimony of humanity)… If this reasoning applied to the nature of NGOs an environmental vocation it would open new perspectives because these could defend the interests of nature. The preservation of an international ecological order is justified by the existence of a common interest that all the other interests and connections between the states and humans with a common destination. The concrete manifestation of an international ecological order, the notion of a common interest isn't one of a general interest in internal law. The first one would be the continuation of the latter at an international level.

The recognition of a human right to a healthy environment doesn't have to be considered the advent to an nth human right. Its more than that: this right represents the symbiosis that exists between humans and the environment that surrounds us and mainly the respect that humans must manifest towards nature. The rights of nature are, probably, the supreme expression of human rights, their universal expression.

• The World Charta of Nature of the United States

International law transcends the context of its formation rapports were mainly politic in order to integrate the new needs of a mutating world and answer at the same time the people's profound and numerous aspirations. The subjective element underlines the will of the state of living in common in spite of division factors. In fact, there is, at a state level, a general identity of moral and ethic s conception, the feeling of justice, a general aspiration to peace and security, an economic interdependence, a protection of the environment and a social ell-being. This subjective element is the connection of an international community. The notion of international community is more developed than the one of international society, because an international community supposes an identity of rights and obligations of people and puts an accent on international solidarity[16].

The World Charta of Nature was adopted and proclaimed by the General Assembly of the United Nations in 26 October 1982. And if nature seems to be its first preoccupation this Charta is in reality more oriented towards the protection of humanity (of humans) than nature. Nature is in reality the mediate. It's true that it addresses to all states, but it also addresses to each in particular in order to remember them their duties in this domain and it advocates their participation in the elaboration of decisions that affect directly their environment. It insists on the necessity of having means of rescue that insure victims of environment degradations of the possibility of obtaining reparation, regardless their nationality or place of residence. This Charta, being transparent, deserves of being studied because it points out what we should avoid (the protection of humanity and not of universality) and what to conserve (the implication of natural and legal persons) in the perspective of establishing an universal action, a convention consecrated more to humanity than universality: the World Charta of Nature doesn't have to be mistaken by the concept of the Earth Charta enounced by M. Alain Renaut.

We have to mention that belonging to the first category, the principle of the Rio Declaration which is the same, besides two words, with the principle 21 of the Stockholm Declaration: it confirms the suzerain power of the States to exploit their own resources and to remember to them their duty of acting in such a manner that their activities are exercised in the limits of their jurisdictions or under their control do not cause any damage to the environment of the other member states or in area that do not show any national jurisdiction. Often presented by the doctrine and by literary texts "soft law", this principle has received the conventional confirmation

[16] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* Thèse de doctorat, UNIVERSITÉ DE LIMOGES FACULTÉ DE DROIT ET DE SCIENCES ÉCONOMIQUES, p.460 and the following.

of an universal plan through article 3 of the Convention on the biologic diversity, but also from the International Court of Justice in its consultative note from the 8 of July 1996 regarding the Legality of the threat or use of nuclear weapons and by the Decision from 25 September 1997 presented in the Project Gabcikovo-Nagymaros case which refers to the precedent note[17].

For Alexandre KISS, the obligations regarding the environment are basically connected to the common interest of humanity and this build and important part of it. No counterpart results, for the contracting states, from obligations prescribed by treaties to not pollute the oceans, to respect the species to be extinct, to protect the ozone layer and to preserve biological resources. This common interest of humanity that leads member states to accept these obligations without any immediate advantage or reward because these obligations are necessary to avoid ecological catastrophes that affect the entire humanity[18].

Maurice Strong[19], general secretary of the Rio de Janeiro Conference says we talk more easily of the Rio declaration that of the Earth Charta. The Rio declaration, in the same manner as the Charta for nature from 1982, doesn't have a compulsory force. The Charta for nature is held 10 years after the Rio declaration. In the first one we only find premises of the precaution concept[20], the second one is almost exclusively destined to durable development.

The World Charta for nature has as its primal weakness its title. The idea of nature seems to exclude all human investment. What is nature isn't touched by human action. Thus, the place of man in this Charta isn't seen as positive.

In addition nature (because this is the title chosen) seems, according to this Charta to be subordinated to man. M. Alain Renaut wrote, explaining the Lévi-Strauss argument that "two phenomena are indissoluble connected: on one side the affirmation the man as supreme value (…) on the other side, the reduction of nature to raw material, lacking of significance and value, a simple instrument offered, as such, to the indefinite process of exploitation realized by men for men"[21]. And it seems that this convention is a little bit too tempted by humanism and no enough by universalism. But, everywhere we see that nature has to be respected and that its processes don't get, at any prise, altered; that nature must be preserved from all sorts of degradations. Thus we believe that nature must be protected for itself and not for the people that live in it. Another phase speaks about the preservation of "species and ecosystems in the interest of present and future generations"[22] and not for themselves. The interest of humans is primal, even dissimulated behind the instauration of universal ecologic norms.

The World Charta for nature is deceiving because it uses nature for the safety of humans, but by recognizing that these two entities are connected and without seeing them as equal: "humanity is a part of nature and life depends on the continuous functioning of natural systems which represent the source of energy and nutritive materials" and "civilisation has its roots in nature, which modelled human culture and influenced all artistic and scientific works (…)". The

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[17] Alexandre-Charles KISS, *Tendances actuelles et développement possible du droit international conventionnel de l'environnement, http://www.cidce.org/pdf/livre% 20rio/rapports%20g%C3%A9n%C3%A9raux /kiss.pdf*

[18] Alexandre KISS*, Introduction au droit international de l'environnement* , in Programme de formation à l'application du droit international de l'environnement, Institut of United Nations for Formation and Research (UNITAR), Genève, 1999. pp. 110-111.

[19] Voir à ce sujet sur le site des Nations-Unies : *Déclaration de Rio sur l'environnement et le développement. Principe de gestion des forêts,* http://www.un.org/french/events/rio92/rio-fp.htm

[20] CHAGNOLLAUD (D.), *Le principe de précaution est-il soluble dans la loi ? A propos de l'article 5 de la Charte de l'environnement*, Dalloz 2004, chroniques, doctrine, p. 1103-1107

[21] RENAUT (A.), *Naturalisme ou humanisme ? Discussion de Lévi-Strauss,* Philosophie politique 1995, no. 6, *La nature*, p. 57.

[22] Preamble of the World Charta of Nature.

protection of nature isn't considered as the end, but as a means of protecting humans. It would be more judicious to use humanity for universality. In fact, the protection of the environment doesn't have to be the means for the protection of human space but the end with the same subject for the survival of humans. Humans and nature must be considered equal and the protection of one should start the same mechanisms for the protection of the other. Universality must be protected and not humanity through the environment.

It seems that the Rio declaration from 1992 approaches this explanation. We see in its preamble the following phrase: "Earth, home of humanity, represent a whole marked by interdependency". A step towards universality is made through the World Charta for nature. The World Charta for nature lacked universality and the approach taken by the Rio declaration seems to be more accurate. The universal action doesn't have to be a print of humanity but of universality in order to allow an efficient protection of nature.

This convention also has a strong point: it encourages member states in offering natural and legal persons a proper place in the fight for the preservation of nature. The taking into account of an efficient role of natural and legal persons in the protection of nature: it's the 3rd Chapter of the Charta titled "implementation" which has to get our attentions. This it's about the use of principles that were presented in the convention, articles 23 and 24 that bring a certain innovation in this domain. These deserve to be present in this convention.

Article 23 says: "Every person will have the possibility, according to the legislation of his/her country, to participate, individually or with other persons, to the elaboration of decisions that regard directly his/her environment and in the case in which this is subject of damages or degradations, he/she will have access to means of rescue in order to obtain reparation". Article 24 mentions that "it offers responsibility to everyone to act according to the dispositions of the present Charta; each person acting on his-her own, in association to other persons or in participating at a political life, trying to ensure the realization of objectives and other dispositions of the present Charta". Besides the Convention on civil responsibility of damages resulting from dangerous activities for the environment (Lugano, 21 June 1993) which has a general application, there are numerous instruments treat specific aspects of the problem (International Convention on the responsibility and the compensation for damages regarding transport on the sea, from toxic substances and potentially dangerous, London, 3 May 1996).

These two articles contain the premises for a real taking into consideration of natural and legal persons in the domain of nature protection. It introduces, besides the member states, simple citizens constituted or not in associations. It is true that these articles are more references to national law than international law. But at the same time, it aids a development of individuals' participation in the national and international judicial process.

Article 23 of the World Charta for nature must attract our attention. The individual is admitted to participate at the elaboration of decisions that regard directly the environment and in the case of damages or degradations; he will be able to demand reparation to national judges. It isn't the national aspect of this affirmation that has to attract us. What is troubling is the quality of acting, or otherwise said, the individual is a victim of damage of the environment. The fact that the environment undergoes degradation doesn't seem to be enough; it has to bring a prejudice to human being[23].

We have to underline that an economic "globalisation" demands a general judicial frame, allowing the prevention of negative consequences that will be exercised on the environment. Thus it is indispensable codify the principle of international law of the environment which are now

[23] Isabelle SOUMY, *L'accès des organisations non gouvernementales aux juridictions internationales,* PhD Thesis, LIMOGES University, Faculty of law and economic sciences, p.454 and the following.

progressively recognised, but are also consecrated under the shape of a compulsory international pact, according to the proposition of IUCN. The primacy of these principles in comparison to other international rules must be affirmed, at the insertion of article 22 of the Convention on biologic diversity[24].

The concept of common patrimony of humanity is at the level of international law. It has appeared at the beginning of the 70's with the occasion of the United Nations Conference on sea law and was later finalized with the adoption of the Montego Bay Convention from the 10th of December 1982 on the sea law[25].

The common patrimony of humanity presents itself at the ensemble of goods belonging to humanity; it doesn't present any state suzerainty of which humanity is the owner of. The definition that allows us to distinguish the two ancient concepts: res nullius and res communis is the following: res nullius signifies a whole that contains wild animals and plants that don't belong to anyone, which can be used freely by everyone and that every person may own. Res communis is a part of international law and refers to the surface of the earth, the surface high from the sea, and the extra-atmospheric space in its ensemble, that no one can own because it belongs to the community of nations. Still, their resources may be used by everybody. In a general manner, certain regions as the bottom of the sea and the subsoil, the Artic, the Moon, the orbit represent particular interests. In particular, the bottom of the sea and oceans situated beyond the limits on national jurisdictions has been considered common patrimony of humanity and is thus excluded from the national appropriation and from a free use at the proposition made by PARDO, the representative of Malta in a speech at the General Assembly of UN in 1967. The massive adhesion of countries to the development of the United State has finalized with the universal consecration of the concept "humanity common patrimony" through the resolution of the UN General Assembly[26]. The Convention from Montego Bay on the sea law, in its Part XI, offers a precise content to the concept of "humanity common patrimony" by applying to sea bottoms and to the subsoil beyond the limits of national jurisdictions that represent the "zone". The instauration of the Zone results from the difference that is established between marine bottoms and their subsoil and the waters that surround them. These domains receive an autonomous judicial regime and distinct limits. The Zone is circumscribed by exterior limits of the state continental platforms, while the high sea starts where the exclusive economic zones end. The respect of liberty of navigation and the freedom to realize scientific in high sea may intersect with the need for exploitation of the Zone. Still, according article 147 of the Convention on sea law, the activities of the Zone must be exercised in a reasonable manner keeping in mind the other activities realized in these areas. The judicial regime applicable to the Zone doesn't concern the economic resources of the marine grounds and subsoil and neither all economic installations of the marine bottoms. The Convention from Montego Bay regarding the sea law, in its article 136, le paragraph 1 of the Declaration specifies that "the Zone and its resources represent humanity common patrimony"

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[24] Alexandre-Charles KISS, *Tendances actuelles et développement possible du droit international conventionnel de l'environnement, http://www.cidce.org/pdf/livre%20rio/ rapports%20g%C3%A9n% C3%A9raux/kiss.pdf*

[25] Alexandre KISS, *La notion de patrimoine commun de l'humanité*, Course of the Academy of International Law from Hague, 1982-II, vol.175,pp. 99-246 ; ONU, The law of the sea – The notion of common patrimony of humanity – history of the ellaboration of articles 113 to 150 and 311 (6) of the United Nations Convention on the law of the sea, New York, 1997.

[26] N'Guyen QUOC DINH, Patrick DAILLIER et Alain PELLET, *Droit international public*, op.cit.pp.1160-1161.

Conclusions

This approach seems questionable and not to far from the idea of universal interest. It seems more obvious to offer, as in the case of humanity, an international legal personality to world environment. Nature, in the same manner as human beings, must be able to obtain reparation once it is damaged. Of course reparation can not have an identical shape. The reparation of the prejudice suffered by the environment may leave room to state rehabilitation, to a developed protection, but not to a pecuniary counterparty. These remarks will be discussed, by the decisions of the EDH Court and its relations with the environment. National associations seem to find their place in nature law. It is possible to imagine that the same place belongs to NGOs in front of international jurisdictions in order to defend the rights of nature. It isn't the case that NGOs do not defend definite interests (individual or collective) nor common interests, but a universal interest, in other words, these ensure a perennial state of the universal individual. We mustn't just sustain that humans and nature are interdependent. We must put the two elements on the same balance by offering a place to individuals in national and international jurisdictions in order to recognize their values in environmental rights for them and for nature. In this view a universal action must be understood.

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