

OTHER INTERNATIONAL DEVELOPMENTS

Common Concern of Humanity

by Dinah Shelton*

Alexandre Kiss believed deeply in the interdependence of all persons and humanity's dependence on nature and its processes. In his lifetime, and partly through his work, he saw these beliefs spread and environmental protection emerge as a fundamental value of society. He concluded that, like other fundamental values in a society, environmental protection must be recognised as a common concern, and ensured through law, especially superior norms of constitutional or international law. While he was sceptical of the concept of *jus cogens* as it has been expanded by writers,¹ he accepted the need for recognition of fundamental substantive rules to protect the global environment in the common interest. This paper explores briefly the origin, recognition and legal consequences of the notion of a "common concern of humanity".

Why and What is a Common Concern?

The phrase "common concern of humanity" is rich in implications. As an international law term, it is notable, first for what it does not include, which is a reference to states. It is rather humanity as a whole, the multitude of individuals whose concerns are at issue.² Justice Weeramantry, in his separate opinion in the *Gabcikovo/Nagymaros* case,³ speculated that "we have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.... International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole".⁴ In fact, there are long-standing precedents reflecting the notion of common concerns or a global set of values and interests independent of the interests of states. The entire subject of "humanitarian" law rests on the concept of humans protected as such, and not by and because of nationality. The Martens Clause in the Preamble to the 1907 Hague Convention (IV)⁵ is perhaps the best known early example of this idea, referring to "the laws of humanity, and the dictates of the public conscience" as the sources of principles of the law of nations. The development of human rights law to protect individuals beyond the context of armed conflict, and international criminal law, in which individuals are prosecuted for the most serious crimes against the international community, can also be seen as reflections of some common concerns of humanity.

What makes a concern "common" in this sense? Alexandre Kiss suggested it was the importance of the values at stake. This idea is also implicit in the Martens Clause and in the ICJ's recognition that *erga omnes* obligations arise "by their very nature" "in view of the importance of the rights involved".⁶ Supporting this notion, it is suggested later in this paper that issues of common concern are linked to the recognition of *erga omnes* obligations and also to the formation of collective compliance institutions and procedures that reinforce the *erga omnes* obligations imposed in the common interest. Indeed, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ implicitly recognised the existence of *erga omnes* environmental obligations on the part of states:

*[T]he environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*⁷

Certainly, the importance of an issue may make it a concern, but it does not necessarily make it "common" to humanity. Instead, it may be suggested that issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action in response; no single state can resolve the problems they pose or receive all the benefits they provide. Harm to a matter of common concern is often widespread and diffuse in origin, making it difficult if not impossible to rely on traditional bilateral notions of state responsibility to enforce international norms. When that harm is mitigated, all or at least large parts of the community benefit.

Common concern is related to, but different from, the concepts of common areas and the common heritage of mankind. International law has long recognised that there are common areas, like the high seas, Antarctica and outer space, which lie outside national boundaries, are not reducible to national or private appropriation, and where coherent and comprehensive regulation must be international. International law also recognises certain resources, such as those on or under the deep seabed, as belonging to the common heritage of mankind by virtue of their location in common areas.

Common concerns are different because they are not spatial, belonging to a specific area, but can occur within or outside sovereign territory. The 1972 World Heritage

* Manatt/Aht Professor of International Law, George Washington University Law School, USA. This paper was presented as part of the Alexandre Kiss Memorial Conference in Budapest (EPL Vol. 39, No.1, p. 50) under the sponsorship of CEDE.

Convention uses the term “heritage” in reference to cultural and natural resources, but treats them as a common concern, not as common heritage. The preamble declares that certain natural areas or sites should be “preserved as part of the world heritage of mankind as a whole” but the Convention is primarily concerned with ensuring the duty of “the international community as a whole to participate in the protection of ...natural heritage of outstanding universal value”⁸ within the territory of states parties.

Environmental issues are common to all humanity, in the sense that they often cannot be managed effectively by national or regional efforts; moreover, environmental benefits and burdens are shared by all persons. The climate, the stratospheric ozone layer, the oceans, and indeed the entire physical world form an interdependent ecological system, much of which can only be protected at the global level, making them individually and collectively matters of common concern for all humanity. The modalities of protection and preservation are formulated in law and policy and enforced by national and international institutions.

Recognition of the Common Concern

During the second half of the twentieth century, states sought to create a universal political organisation to maintain international peace and security and improve the wellbeing of all humanity. This ambitious effort could only proceed by defining domains of common concern. The international recognition of human rights and fundamental freedoms constituted a first step of paramount importance in building an international community upon the fundamental values of humanity. Similarly, knowledge that the biosphere is the only known place in the universe where life is possible led to the emergence of protection of the human environment as a common concern of humanity.

The term “common interest” appeared early in international treaties about the exploitation of shared natural resources. The International Convention for the Regulation of Whaling (Washington, 2 December, 1946) recognised in its preamble the “*interest of the world* in safeguarding for future generations the great natural resources represented by the whale stocks” and that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible. Soon thereafter states began to recognise that it was in their common interest to take conservation measures to protect exploited fish stocks. The 1952 Tokyo Convention for the High Seas Fisheries of the North Pacific Ocean (9 May, 1952) expressed the conviction of the parties that it would best serve the “common interest of mankind”,

as well as the interests of the contracting parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean.

Further international recognition of the environment as a “common concern of humanity” came with conclusion of the 1959 Antarctic Treaty (Washington, 1 December, 1959). Its preamble affirms that “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes”. Article IX authorises the adoption of measures for the preservation and conservation of living resources in Antarctica “in furtherance of the principles and objectives of the Treaty”. The Antarctic Treaty system further developed with adoption of the Canberra Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) which made express reference to the “interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only”.⁹ The most recent addition to the Antarctic Treaty system, the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty,¹⁰ achieved full recognition of the common interest. Its preamble expresses the conviction that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole and for this purpose it denominates Antarctica a nature reserve, devoted to peace and science.¹¹

Such evolution must be seen as reflecting awareness of the general depletion of natural resources and of the



Courtesy: Africare

threats to the environment, awareness that is increasing the pressure to adopt broad measures in the interest of present and future generations. Even before the 1972 Stockholm Conference, the 1968 African Convention on the Conservation of Nature and Natural Resources had expressed the desire of the contracting states to undertake individual and joint action for the conservation, use and development of natural resources by establishing and

maintaining their rational use for the present and future welfare of mankind.¹² With the words “future welfare” the temporal dimension of the common interest of humanity has appeared.

Other international environmental treaties similarly recognise the common concern of mankind. The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals recognises in its preamble that “wild animals in their innumerable forms are an irreplaceable part of the earth’s natural system which must be conserved for the good of mankind . . . [E]ach generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely”.¹³ The Bern Convention on the Conservation of European Wildlife and Natural Habitats, adopted several months after the Bonn Convention, joins the concepts of general interest and future humanity by recognising that wild flora and fauna constitute a natural heritage that “needs to be handed on to future generations”.¹⁴ Similarly, the World Charter for Nature states that the preservation of the species and of the ecosystems should be ensured “for the benefit of present and future generations”.¹⁵ The World Charter opened the door for the 1992 Convention on Biological Diversity (CBD) which explicitly proclaims the principle of common concern of humanity¹⁶ by stating “the importance of biological diversity for evolution and for maintaining life sustaining systems in the biosphere”, and by “affirming that the conservation of biological diversity is a common concern of humankind”. The UN Framework Convention on Climate Change similarly affirms in the first paragraph of its preamble that “change in the Earth’s climate and its adverse effects are a common concern of humankind”.

The formulations of the last two instruments are significant. It is neither biological diversity nor the climate in isolation that are common concerns. It is rather the conservation of biological resources, and climate change and adverse effects therefrom, that are a common concern. The theme of sovereignty and sovereign rights remains important to both conventions, but the language suggests recognition that international cooperation is necessary to address loss of biodiversity and climate change.

The inclusion of smaller areas in the common concern is seen in the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted several months after the CBD. It recognises that “the marine environment and the fauna and flora which it supports are of vital importance to all nations”.¹⁷ More recently, the UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa referred to “the urgent concern of the international community, including states and international organizations, about the adverse impacts of desertification and drought”, although only some parts of the world are directly concerned.¹⁸

The Legal Implications of Recognising the Environment as a Common Concern of Humanity

The notion of common concern leads to the creation of a legal system whose rules impose duties on society as a whole and on each individual member of the community. Almost all national constitutions proclaim fundamental human rights and freedoms and require the government to respect and ensure those rights. Increasingly, similar provisions are included to secure environmental protection. National regulatory systems are built upon this foundation. Again, common interest may be contrasted with common ownership.

National legal systems and international law have long recognised common ownership of or equitable interests in shared resources. The concept of *res communis* is a form of common ownership that precludes individual appropriation but allows common use of a resource. It contrasts with *res nullius*, which most systems extend to wild animals and plants. *Res nullius* belongs to no one and can be freely used and appropriated when taken or captured; it is the absence of a common interest. The concept of common heritage of mankind, which emerged in the 1960s, is distinct from both earlier concepts, in part because inclusion of the word “heritage” connotes a temporal aspect in the communal safeguarding of areas or resources incapable of national appropriation. Based on this concept, special legal regimes have been created for the deep seabed¹⁹ and the Moon.

The nature of the common heritage is a form of trust, whose principal aims include restricting use to peaceful purposes, rational use in a spirit of conservation, good management or wise use, and transmission to future generations. Benefits derived from the common heritage may be shared through equitable allocation of revenues, but this is not the essential feature of the concept. Benefit sharing can also mean sharing scientific knowledge acquired in common heritage areas like Antarctica.

In contrast, the common concern, *l'intérêt général*, is a general concept which does not connote specific rules and obligations, but establishes the general basis for the concerned community to act. The conventions cited imply a global responsibility to conserve disappearing or diminishing wild fauna and flora, ecosystems, and natural resources in general in danger. Language to this effect can be found in the 30 October 1980 Resolution of the UN General Assembly on the draft World Charter for Nature, which asserts the “supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations”.²⁰

The right and duty of the international community to act in matters of common concern must be balanced with respect for national sovereignty. States retain sovereignty subject to the requirements of international law developed to ensure the common interest. Other domains of international law, including trade and diplomatic relations, are instrumental in achieving this common interest of humanity. They do not constitute in

themselves the ultimate goals of international society but are means to improve the moral and economic wellbeing of humanity as a whole. The terms of the United Nations Charter indicate that international peace and security must be coupled with economic and social advancement of all peoples and individuals, to ensure overall advancement of humanity. Respect for human rights, economic development and environmental protection have been unified in the concept of sustainable development as a common concern of humanity.

One avenue to explore is the link between common concern and *erga omnes* obligations. Both concepts relate to matters which touch the interests of people throughout the world. It may very well be that one of the consequences of denoting a subject a common concern of humanity is that it gives rise to *erga omnes* obligations that may be pursued by any party. At the same time, it must be recognised that traditional dispute settlement mechanisms are unlikely to be used to enforce such obligations. States rarely use them to pursue their own interests, and it may be idealistic to assume they will litigate in the broad public interest. Instead, cooperation in law making is sometime coupled with innovative compliance mechanisms.

The various treaties that refer to common interest have much in common. They do not establish explicit rules of conduct, but do limit states' freedom of action, even when other states rights are not directly implicated. Certain environmental harm is identified as of concern to all, widening the scope of *erga omnes* obligations and imposing a duty to cooperate, a duty that has shown itself to be enforceable. In the *Mox Plant Case* (Ireland v. United Kingdom), the International Tribunal on the Law of the Sea, in its order on provisional measures issued 3 December, 2001, *reprinted* 41 ILM 405 (2002), opined that the duty to cooperate is a fundamental principle in general international law, as well as one contained in the relevant treaty provisions, and that rights may arise therefrom which the Tribunal may protect. The ITLOS provisional order mandated that the parties cooperate to exchange information about the environmental consequences of the project and devise measures to prevent harm resulting from proceeding with it.

In general, institutional and procedural arrangements are required to implement the duty to cooperate on matters of common concern. And indeed, various treaty regimes today reflect the specific requirement to cooperate and take action. Treaty regimes establish principles, norms and procedures that evolve over time to ensure collective action and can be considered the institutional dimension of the common concern of humanity. They ensure that scientific knowledge, the views of non-governmental organisations and the business sector, and input from other technical bodies are taken into account. The participatory and transparent processes that exist in the best of the treaty regimes enhance legitimacy and the possibility of adopting effective responses to common concerns. The norm-creating process is supplemented by innovative compliance mechanisms and dispute settlement procedures. As Jutta Brunnee has described it, "cooperative

facilitation of compliance is the primary objective of the majority of existing compliance procedures".²¹ This is certainly clear in the Montreal Protocol procedures.

Conclusions

The emergence of environmental protection as a common interest of humanity has altered the traditional role of state sovereignty, what Louis Henkin calls the "s-word". At the very least, agreement that a topic is a common concern of humanity must mean that it is no longer in the reserved domain and under the exclusive domestic jurisdiction of states. By definition, a common concern requires international action and necessitates new forms of law making, compliance techniques and enforcement. Other consequences include the importance of participation by non-state actors and management of environmental resources at all levels of governance. As international law continues to struggle with collective action in the face of sovereignty concerns, treaty regimes provide examples of practical action in the common interest to further those fundamental values that Alexandre Kiss held so dear.

Notes

- 1 See, e.g., Kornicker Uhlmann, E.M., (1998), "State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms", *Geo. Int'l Envt'l L. Rev.* 11(1): 101.
- 2 Contrast the definition of *jus cogens*, as set forth in the Vienna Convention on the Law of Treaties, as a norm recognised and accepted as such by "the international community of states as a whole". Vienna Convention on the Law of Treaties, Art. 53 (emphasis added).
- 3 Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) 1997 ICJ Rep. 7 (25 Sept.). (See article, page 97.)
- 4 *Ibid.* Separate opinion of Vice-President Weeramantry, at 115.
- 5 Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations (The Hague, 18 Oct., 1907), 36 Stat. 2277 (1911).
- 6 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 ICJ Resp. 3, para. 33.
- 7 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep. 226 at para. 29.
- 8 Preamble, Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO 1972). See Francioni, F., (2004), "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity", *Mich. J. Int'l L.* 25: 1209.
- 9 20 May, 1980, preamble, 19 I.L.M. 837 (1980). See also Vignes, D., (1996), "Protection of the Antarctic Marine Fauna and Flora, The Canberra Convention and the Commission Set up by It", in: Francioni, F. and Scovazzi, T. (Eds), *International Law for Antarctica*, at 159.
- 10 4 October, 1991, 30 I.L.M. 1461 (1991). See also Pineschi, L., "The Madrid Protocol on the Protection of the Antarctic Environment and its Effectiveness", in: Francioni and Scovazzi, *op.cit.*, at 261.
- 11 See also the UN General Assembly Resolution on the Question of Antarctica, 6 December, 1991, G.A. Res 46/41, UN GAOR, 46th Sess. Supp. No 49 at 83, UN Doc. A/46/49 (1992) which implicitly expresses that Antarctica constitutes a common concern for all the states.
- 12 Algiers, 15 September, 1968, 1001 U.N.T.S. 3.
- 13 23 June, 1979, 19 I.L.M. 15 (1980).
- 14 Bern, 19 September, 1979, E.T.S. 104, EMuT 979:70.
- 15 28 October, 1982, Res. 37/7, UN Doc. A/37/51.
- 16 See, on the replacement of the concept of "common heritage of mankind" by "common concern", Schrijver, N., (1997), *Sovereignty over Natural Resources, Balancing Rights and Duties*, at 246, 389.
- 17 22 September, 1992, 32 I.L.M. 1069 (1993).
- 18 Paris, 17 June, 1994, 33 I.L.M. 1328 (1994).
- 19 See UN, Division for Ocean Affairs and the Law of the Sea, (1996), *The Law of the Sea, Concept of the Common Heritage of Mankind*.
- 20 G.A. Res. 35/7 on the Draft World Charter for Nature, UN GAOR, 35th Sess., Supp. No 48 at 15, UN Doc. A/35/7, 5 November, 1980, 20 I.L.M. 462 (1981).
- 21 Brunnee, J., (2007), "Common Areas, Common Heritage, and Common Concern", in: Bodansky, D., Brunnee, J. and Hey, E. (Eds), *Handbook of International Environmental Law*, at 571.



New Technologies and Law of the Marine Environment

by Said Mahmoudi*

Alexandre Kiss was a man with a great and genuine interest in many fields of science. Unlike that of most of his colleagues, his expertise and enthusiasm were not limited to law in general or any specific section of international law. His deep engagement in and vast knowledge of art, culture, the social sciences and the natural sciences were well known to his friends and students. A few months before he passed away, he enthusiastically discussed with me an article on the relation between science and law that he had published some years earlier in a Dutch international law periodical. He also told me his planned article about the relationship between physics and environmental law.

Given this background, it was not surprising that during 1996 and the early part of 1997 a great part of the work of the European Council of Environmental Law (Conseil Européen du Droit de l'Environnement (CEDE)) – the important academic forum Kiss established in 1974 and of which he was president until his death in 2007 – was devoted to the then very new subject of the legal status of the recently discovered genetic resources around seabed hydrothermal vents. The deliberations of lawyers and marine scientists in this forum resulted in an important report, published on 17 May 1997.¹ This was one of the first studies, if not the very first, on the legal aspects of this new scientific discovery and an inspiring source for many scholarly studies.

When the CEDE was invited to arrange an international conference in the International Year of the Oceans (1998), in the light of its earlier activities, the subject “New Technologies and Law of the Marine Environment” was a natural choice. The conference was held in Lisbon on 18–19 September 1998, and dealt with many issues relating to new technologies and the management of the marine environment. The proceedings were published in 2000.²

For the purposes of this Memorial Conference, I shall touch upon recent developments concerning the legal issues of deep-seabed genetic resources in areas beyond national jurisdiction. It should be noted that even the legal status of these resources in certain marine zones under coastal State jurisdiction needs further study and clarification. This is particularly the case – not addressed here – for seabed genetic resources in the outer continental shelf.

General Concepts

Knowledge of the genetic resources of the seabed beyond national jurisdiction was almost non-existent during the negotiations in the 1970s for the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Hence that convention lacks any specific provision on the exploration and exploitation of these resources. During the 1980s and 1990s, important scientific projects

were carried out in the Pacific and the Atlantic Oceans. They resulted in the discovery of new living organisms, particularly around certain hydrothermal vents. Some of these organisms depend for their survival on warm water produced by hydrothermal vents and bacteria existing there at depths of up to 4000 metres. Their unique features, and particularly their ability to survive in extreme cold or heat, have prompted speculations about their enormous importance for science, great economic value and immense potential in pharmaceutical and biological sectors. The general understanding is that, compared to deep-seabed mineral resources, these genetic resources are of immediate economic interest, and their exploitation is technically and financially more viable.

The 1997 CEDE report outlined some of the main legal aspects of the management of these new resources. One such aspect was the legal status of the said organisms. They live under the seabed, are in frequent contact with the seabed and at times float in the water column. UNCLOS has differing regimes for living resources in the water and those considered to be sedentary. The same applies to the bacteria that are vital to life-support systems and reside in the columns thrown up from the seabed. They can also be regarded as part of the seabed or as organisms in the water column.³ The 1997 report considered the legal status of these genetic resources, bacteria and their habitats to be unclear. One concern expressed at that time was that, if patent issuance for such resources was uncoordinated among countries, it might jeopardise their rational and sustainable use and limit the possibility of access by other countries for marine scientific research purposes.

To assess whether there was a need for new legal rules regulating access to these resources and protecting the very fragile environment surrounding them, the CEDE report analysed some relevant provisions of the UNCLOS and the 1992 Convention on Biological Diversity (CBD). As regards the former, it argued that in addition to the general obligation in Article 192 to protect and preserve the marine environment, several other provisions were potentially relevant. In this regard, mention was made of the Part XI provisions relating to use for peaceful purposes, marine scientific research, and duties in relation to other activities in the marine environment. Some provisions in Part XII were also mentioned. They concerned measures relating to protection of the ecosystem, use of technologies, and the introduction of alien species.

The report noted that the CBD did not address the questions of access to, and benefit sharing of, genetic resources in areas beyond national jurisdiction. The report concluded that no rules in force clearly controlled and regulated the new activities relating to genetic resources in seabed areas beyond national jurisdiction. It proposed the adoption of concrete measures, possibly in the UN General Assembly, the International Seabed Authority (ISA) or the Conference of the Parties to the CBD, to ensure that

* Professor of international law, Stockholm University. This paper was presented as part of the Alexandre Kiss Memorial Conference in Budapest (*EPL* Vol. 39, No. 1, p. 50) under the sponsorship of CEDE.

these genetic resources and their habitats are protected, to encourage scientific research on these resources, and to ensure that the resources are used equitably for the benefit of the international community as a whole.

Developments in Recent Years

Now, over ten years after the publication of this pioneering and seminal report prepared by Alexandre Kiss's group within CEDE, legal aspects of activities relating to these genetic resources have gained increased attention both at intergovernmental level and in academic debate. As the report predicted, the issue has been touched upon by the Conference of the Parties of the CBD and debated in the UN General Assembly. Notwithstanding this increased attention, it cannot be claimed that the legal aspects of such activities are clearer today than in 1996. The most serious and comprehensive deliberations on the legal aspects have taken place within the framework of the General Assembly.

States' concern about the problem of unregulated access to and use of marine genetic resources beyond areas of national jurisdiction increased during the early 2000s. The General Assembly therefore decided in 2004 to establish an *Ad hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (hereinafter referred to as the *Ad hoc* Working Group).⁴ It also the same year requested the Secretary-General to prepare a report on this issue to assist the Working Group in preparing its agenda.⁵ The Secretary-General's report, published in 2005,⁶ dealt with general issues relating to all marine genetic resources beyond national jurisdiction, including the difficulties in differentiating marine scientific research from commercial activities involving genetic resources, commonly referred to as bioprospecting. It reiterated that there was no internationally agreed definition for either marine scientific research or bioprospecting.⁷

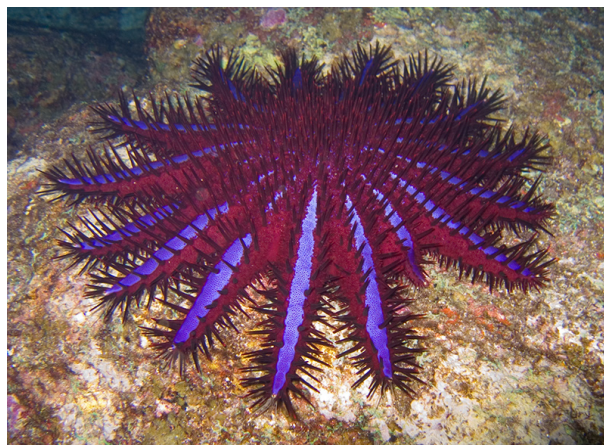
The *Ad hoc* Working Group had its first session in 2006.⁸ For a number of UN Member States and relevant NGOs, active in the international oceans fora, this was the first time that they had discussed issues relating to all aspects of the management of all genetic resources in areas beyond national jurisdiction. Many delegations in this session expressed the view that the UNCLOS provided the legal framework for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. Several delegations pointed out that the CBD only complemented the UNCLOS because its jurisdictional scope did not extend to the conservation and sustainable use of components of marine biological diversity beyond areas of national jurisdiction.

Much of the discussion relating to the legal aspects was focused on marine scientific research. A number of delegations pointed out that if marine scientific research were not conducted with due care, it could itself have adverse effects on biodiversity. These delegations stressed that such research should be conducted in conformity with the provisions in Part XII of the UNCLOS. Other delegations emphasised the freedom of scientific research

and cautioned against any effort to impose restrictions on this freedom. They favoured self-regulatory codes of conduct to be adopted by the scientific community over international rules on scientific activities.

Other delegations emphasised that marine scientific research should conform with the provisions of Part XIII of the UNCLOS, in particular Article 240 on general principles for the conduct of marine scientific research and Article 241, which provides that marine scientific research activities shall not constitute the legal basis of any claim to any part of the environment and its resources.

The main disagreement over legal issues was between the Group of 77 and delegations from industrialised countries. Developing countries generally maintained that according to the principle of the common heritage of mankind, access to deep-seabed genetic resources beyond areas of national jurisdiction should (like the mineral resources in the Area) in principle be subject to equitable sharing of benefits. To emphasise this point of view, they noted the symbiotic relationship of genetic resources with non-living marine resources and other living resources in the surrounding water column. They contended that a regulatory mechanism, including the adoption of improved norms and/or an implementing agreement to the Convention, may become necessary to clarify such matters as the relationship between marine scientific research and bioprospecting. A regulatory mechanism could also



Crown of Thorns (*Acanthaster planci*). Koh Similan, Boulder City, Thailand
Courtesy: Wikipedia

address the question of access to those resources and legal options for benefit sharing, including non-monetary benefits, international cooperation in marine scientific research through the exchange, sharing and dissemination of information on research programmes, their objectives and results, and cooperation in the transfer of technology. The mandate of the International Seabed Authority, which under Article 145 of the UNCLOS covers the protection of the marine environment and biodiversity, could – according to this group of States – potentially be expanded to deal with all issues relating to deep-sea biodiversity, including genetic resources. The group opposed any provisions purporting to grant free access or unrestricted freedom of exploitation of genetic resources beyond areas of national jurisdiction.

The industrialised countries, on the other hand, argued that the resources are covered by the regime of the high seas under Part VII of the UNCLOS. According to them there is no legal gap with respect to living resources in areas beyond national jurisdiction since freedom of the high seas applies to these resources too. On this basis, they saw no need for a new regime to address the exploitation of marine genetic resources in areas beyond national jurisdiction or to expand the mandate of the Authority.

Still other delegations opined that clarification was needed with regard to the legal status of the genetic resources named. They acknowledged the problem that the genetic resources in question, unlike mineral resources, exist on or under the seabed as well as in the water column. When in the water column, they may arguably be under the regime of the freedom of the high seas.⁹ But most of the time they are under the seabed or have a sedentary character.

Both the advocates of the freedom of the high seas and those who felt the need for an innovative approach cautioned against an ideological confrontation like the one during the 1970s negotiation for the regime of deep-seabed mining. A criticism that the opponents of an ISA-like mechanism directed against the G-77 approach was that the international community should not make the same mistake as it did in the case of deep-seabed minerals, *i.e.*, to establish a very detailed legal regime and regulate an industrial activity that did not yet exist. For these critics, the core legal issue was patents rather than legal status. They believe that the named resources are at any rate subject to the regime of the freedom of the seas, their management subject to patents issued by interested States, perhaps somehow anchored to an international arrangement. The idea is not new and reminds us of similar proposals during early stages of negotiations for the legal regime of deep-seabed mining.

Further to the first session of the *Ad hoc* Working Group, the General Assembly requested the Secretary-General to prepare a new report with due regard to the views expressed in that session. The report, which was published in March 2007,¹⁰ focused on basic scientific information. One part dealt with micro-organisms such as enzymes, viruses and picoeukaryotes, which are genetic resources of actual or potential value.¹¹ The new genetic resources are found, according to the report, in various areas of the oceans associated with coral reefs, oceanic islands, seamounts and other hydrographical areas. Some occupy unique and often extreme habitats in the ocean and display adaptation to these environments. Examples of these environments are salt ponds, coral reef crests and hydrothermal vents. The report further underlined the symbiotic relationship of micro-organisms with deep-sea minerals and other non-living resources.¹²

The Secretary-General's report stresses that the dual character of marine genetic resources as tangible and information resources requires the application of measures for their conservation and sustainable use as well as for the flow and management of the information they embody. It reaffirms the relevance of the UNCLOS and its applicability in areas beyond national jurisdiction, and of

the CBD to activities and processes carried out under the jurisdiction or control of coastal States. More importantly, it indicates that the regulations adopted by the International Seabed Authority to govern the impact of prospecting and exploration activities on the environment of the Area may also apply to genetic resources.¹³

The eighth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP), held in June 2007, was devoted entirely to the question of marine genetic resources in general. As regards resources beyond areas of national jurisdiction, the discussions in the meeting were influenced by the Secretary-General's report published only three months earlier. The ICP Report¹⁴ describes in detail the divergent views of the developing countries and the industrialised countries on the legal aspects of marine genetic resources located in areas beyond national jurisdiction.

The second session of the *Ad hoc* Working Group was convened in April–May 2008 and ended with the co-chairpersons' joint statement reporting the main results of the discussions.¹⁵ The common denominator again was the recognition of the UNCLOS as the legal framework for all activities in the oceans and seas. The divergence of opinions between States that consider genetic resources in areas beyond national jurisdiction as common heritage of mankind and hence in principle under the regime of Part XI, on the one hand, and those which consider these resources as part of the regime for the high seas, remained. Nevertheless, some delegations repeated the proposal put forward in the ICP meeting in June 2007, namely elaboration of a new comprehensive regime for the named genetic resources within the UNCLOS framework. Even in this session, the opposite view was that such a new regime may impede scientific research and would be difficult to monitor and enforce.¹⁶ The previously touched-upon issue of intellectual property rights was raised in this session. Some delegations proposed that practical measures relating to benefit sharing for access and use of genetic resources should be adopted. Generally the achievements of this session were meagre, and much of the discussion seemed more like an intellectual exercise rather than a constructive and purposeful search for solutions to the actual problems. The fate of the *Ad hoc* Working Group is not clear, and depends very much on whether the General Assembly will consider it meaningful to continue international negotiations on this issue.

Assessment

As predicted in the CEDE report, discussions so far have taken place at a rather low international level, mainly within the framework of the General Assembly even though delegations in the recent *Ad hoc* Working Group expressed the wish that similar negotiations should take place in other fora including of course the Conference of the Parties of the CBD. Negotiations so far recall similar deliberations during the 1970s for the legal regime of deep-seabed mining. Although "genetic resources in the marine areas beyond the limits of national jurisdiction" refers to a very broad range of resources under the seabed, on the seabed and in the water column, the point

of departure for the majority of the delegations in the *Ad hoc* Working Group has mainly been the unique resources discovered on the seabed around hydrothermal vents, that are of great scientific significance as well as having commercial potential.

There are, however, many differences between these resources and the manganese nodules regulated in Part XI of the UNCLOS. In addition to substantial differences between the world's political climate in the 1970s and that of today, the very fact that these resources can at times float in the water without constant attachment to the seabed immediately makes them potentially subject to the regime of the high seas. By merely calling them "common heritage of mankind", we cannot expect that a legal regime similar to the one created by the political bloc structure of the UN in the 1970s for deep-seabed minerals will be established for the new resources.

Irrespective of how they are qualified, legal arrangements for the conservation of, access to, and sharing benefits of marine genetic resources have to accommodate the common interests that exist in them. Countries with the necessary technological capabilities and particular scientific or commercial interests will probably not resist the pressures that exist for registration of national patents. The ultimate goal of international negotiations should therefore be to safeguard the objectives of conservation, access and benefit sharing by harmonising national legal measures through internationally agreed arrangements.

New technologies in this case, like in almost all other similar cases, have two facets. On the one hand, they open new opportunities, enhance the quality of life, and contribute to scientific and economic development. On the other hand, they may have some adverse and hitherto unknown effects on environments that have been at peace for millions of years. As in the case of the manganese

nodules of the deep seabed, the initial discussions about marine genetic resources and their legal aspects are more focused on their use. The issue of environmental impact does not seem to have been covered equally as well in the deliberations. It is therefore not surprising that questions relating to patents and benefit sharing have so far occupied much space and time. If we agree with the wise statement that technology is a good servant and a bad master, it is important not to neglect the negative effects of improper use of advanced technologies on very sensitive organisms of the deep seabed and their habitats. This requires careful and stringent regulation of access for all purposes.

Notes

- 1 "Legal Problems Concerning Bio-Propecting for Genetic Resources Located in Marine Hydrothermal Vents beyond National Jurisdiction", rapporteur: Professor Patricia Birnie; the report is reproduced in Beurier, J.-P., Kiss, A. and Mahmoudi, S. (Eds), (2000), *New Technologies and Law of the Marine Environment*, pp. 229–237, Kluwer Law International.
- 2 *Ibid.*
- 3 Leary, D., (2008), "International Law and the Genetic Resources of the Deep Seabed", paper presented at a conference entitled "The World Ocean in Globalization: Challenges for Marine Regions", Oslo, 21–23 August 2008.
- 4 UN Doc. A/RES/59/24, para. 73.
- 5 *Ibid.*, para. 74.
- 6 UN Doc. A/60/63/Add.1.
- 7 *Ibid.*, pp. 50–51.
- 8 Outcome of the meeting of the *Ad Hoc* Working Group is published as UN Doc. A/61/65. Legal and institutional issues are discussed in pages 7–9 of this report.
- 9 Cf. Pisupati, B., Leary, D. and Arico, S., (2008), "Access and Benefit Sharing: Issues Related to Marine Genetic Resources", *Asian Biotechnology and Development Review* 10(3).
- 10 UN Doc. A/62/66.
- 11 *Ibid.*, p. 53.
- 12 *Ibid.*, p. 55.
- 13 UN Doc. A/62/66/Add.2, p. 61.
- 14 UN Doc. A/62/169, see especially paras 71–75.
- 15 UN Doc. A/63/79.
- 16 *Ibid.*, p. 9.



Environmentally Displaced Persons not Protected – Further Agreement Required –

by Marei Pelzer*

Scientific research has shown for more than 20 years that environmental harm and natural disasters are forcing increasing numbers of people from their homes. The UN estimates that over 50 million people will leave their home region in the next few years, on the move due to desertification, floods or other ecological disasters. Despite alarming additions to the reasons why people take flight, no serious initiatives are underway to obtain international legal recognition for these new forms of forced migration.

Experts on international law have only tentatively debated the need for a convention to protect "Environmentally Displaced Persons" (EDPs). Such a convention would

* Jurist Marei Pelzer is a legal policy specialist at the Pro Asyl refugee organisation in Frankfurt, Germany.

make a useful addition to the Geneva Refugee Convention (GRC), providing recognition for this relatively new form of forced migration. In the absence of a specific convention to protect EDPs, existing international conventions should be examined for potential solutions. In Europe, refugees can invoke the GRC and the Convention for the Protection of Human Rights and Fundamental Freedoms (otherwise known as the European Convention on Human Rights or ECHR). What would happen if an environmentally displaced person fleeing, for example, the 2004 tsunami in India were to apply for asylum under the GRC and the ECHR?

The Geneva Refugee Convention was created in 1951 in response to national socialist barbarity and the international community's failure to provide widespread

protection to the persecuted. The definition of the term “refugee” is central to the GRC. Anyone classified as a refugee under the convention has a legal right not to be returned to the persecuting state. Such individuals may not be turned away upon reaching the border of a host state. It is not only opposition activists or those subjected to racist persecution who may be classified as refugees under the GRC. Religious or nationalist persecution is also recognised. While gender-related persecution is not explicitly referred to in the convention, case law nevertheless covers persecution of this type which it considers to be a result of “membership of a particular social group”.

Refugee law is, therefore, characterised by the existence of discriminatory motives leading to persecution. In order to be identified as a “particular social group”, the group in question must stand out from the rest of the population as discriminated against and particularly disadvantaged. Applying this particular criterion to EDPs would rule out the GRC, as the environmental destruction caused by a natural disaster affects all inhabitants of a given region and is therefore inherently non-discriminatory in nature. One can, however, imagine exceptions to this rule of thumb; *i.e.*, if a state only provides protection or assistance to certain groups of the population, and not to others, then it is perfectly possible for that state’s conduct to be defined as persecution under the GRC.

The hypothetical example of an Indian national fleeing the 2004 tsunami and applying for asylum in Europe may be used to illustrate this point. Following the 2004 tsunami, many aid organisations reported that members of the Dalit caste, also known as the “untouchables”, received less assistance from the Indian state or were excluded from aid altogether. At the same time, fishing communities belonging to higher ranking castes did receive assistance. Thus, certain population groups were discriminated against and denied state aid. Members of the Dalit caste form a particular social group within the meaning of the GRC. Here, the lack of aid, or its insufficiency, can be deemed persecution under international law. Theoretically, then, the GRC could be made to apply to EDPs in special circumstances. However, it provides no opening for someone reacting directly to a natural disaster by taking flight. If an entire region’s inhabitants end up in another country in order to escape flooding, say, or earthquakes, they have no chance of GRC refugee status.

Like the GRC, the European Convention on Human Rights protects against deportation when individuals are at risk of having their human rights violated in their country of origin. Unlike the GRC, however, the ECHR is not concerned with discriminatory practices in a given state. At first sight, this appears advantageous for EDPs, since they would normally find discrimination difficult to prove; however, protection from deportation is guaranteed on human rights grounds only if violations are particularly

grave. The ECHR provides protection if there is a threat of torture, or inhuman or degrading treatment (Article 3) and if other ECHR rights are seriously violated.

Legally speaking, one could certainly make a case that the destruction of people’s livelihoods is inhuman or degrading treatment. While the European Court of



A camp in Guinea for refugees from Sierra Leone

Courtesy: Wikipedia

Human Rights has never actually been asked to deliver a judgement on a situation of this kind, parallels can be drawn with judgements concerning entire villages razed to the ground by state security forces. Environmental destruction certainly has a comparable impact on people’s lives. Another conceivable approach would be to claim protection on the grounds of harm to health caused by a natural disaster. A further option would be to extend Article 8 (private and family life) case law to situations of environmental devastation. Such considerations serve to illustrate that, used creatively, refugee law and European human rights could be made to apply to EDPs. The fact that these options are not taken up in practice is symptomatic of this strategy’s shortcomings. The legal arguments are complex, since neither the GRC nor the ECHR expressly recognise environmental destruction as a human rights violation. Furthermore, the limiting discrimination factor in the GRC frequently makes it inappropriate for EDPs.

A further reason why EDPs are not granted international protection status is the fact that, very often, they do not cross any external border. Thus, they are internally displaced persons and do not have a legal right to protection by the international community. This means that international protection would have to be extended in order to include the internally displaced. To sum up: the international community should recognise the existence of new forms of forced migration not covered by the GRC refugee definition. For that reason and in order to give individual rights to those affected, a new international convention is required in order to protect environmentally displaced persons.



Local Governments in International Negotiations

by Monika Zimmermann*

The implementation of UN Conventions has impacts on local governments although they are not (yet) a party to these Conventions. However, over the past years, local governments have increased their voice in various international fora, especially in the UN climate change negotiations. One example of this is the parallel municipal leaders' meetings which ICLEI-Local Governments for Sustainability (ICLEI) has been organising for many years during the annual United Nations Climate Change Conferences (the United Nations Framework Convention on Climate Change Conferences of the Parties or UNFCCC COPs). In 2008, local governments began similar initiatives in the field of biodiversity, one example being the "Mayors Conference: Local Action for Biodiversity", which was organised during the High-level Segment of COP-9 of the Convention on Biological Diversity (CBD). It is interesting to compare these developments and to observe how they influence each other.

Local Governments at UN Climate Negotiations

Since the beginning of the 1990s,¹ local governments, in conjunction with ICLEI,² have been working together in order to develop energy-saving options, new mobility concepts, environmentally responsible procurement, and other actions that address climate protection. As global warming impacts have become increasingly visible at a community level, climate protection has grown to be recognised as an explicit action in many cities and towns. Local governments are often able to act considerably faster than national governments in confronting such new challenges.

In parallel with local climate action, a global advocacy process consisting of local governments and cities has developed in recent years, beginning at a time when climate protection was not yet mainstream. Cities and local governments have monitored and attended the international climate conferences since they began. Since 1995,³ they have followed a new tradition: when nations meet for the global climate change debate, key representatives of local governments also come together, traditionally on invitation from the city hosting the UN Conference. These meetings are timed to ensure that local government representatives can address national government ministers in the high-level segments that normally occur towards the end of UN Climate Change Conferences. In this way, they are able to present key messages to the attendees.

The main message at all these events is that "Local governments are active, and the same is requested from

The following local government climate conferences have been organised in parallel with UN Climate Change Conferences:

- 1995: The Second Municipal Leaders Summit on Climate Change, held alongside COP 1 in Berlin, Germany.
- 1995: The Third World Mayors' Summit, held in Saitama, Japan, in preparation for COP 3 in Kyoto (1997).
- 2002: Mayors' Meeting organised alongside COP 8 in New Delhi, India – the first one in a developing country.
- 2004: Mayors' Meeting held alongside COP 10 in Buenos Aires, Argentina.
- 2005: The Fourth Municipal Leaders Summit on Climate Change alongside COP 11 and the first MOP in Montréal, Canada.
- 2007: Local Government Climate Sessions at COP 13, Bali, Indonesia.
- 2008: Local Government Climate Sessions at COP 14, Poznan, Poland.

Planned for 2009: Copenhagen Mayors' Summit in parallel with COP 15, Copenhagen, Denmark.

national governments". Linked to this is a second important message, namely that "local governments can/could do much more for climate protection, but require improved structural conditions to act even more effectively". Such conditions mean, among others, supportive legislation, positive financial and tax mechanisms, direct financial support and formal designation of responsibility (*i.e.*, a mandate). Due to limited responsibilities and means, local governments in most countries still address climate protection on a purely voluntary basis.

Local Government Climate Roadmap

The Local Government (LG) Climate Roadmap was launched in Bali, Indonesia in December 2007 at the Local Government Climate Sessions held in parallel with UNFCCC COP-13. It is designed to accompany the international negotiations leading up to COP-15 in Copenhagen, Denmark in December 2009, where the post-2012 (post-Kyoto) climate agreement will be negotiated and hopefully adopted. The global partners in the LG Climate Roadmap are:

- ICLEI;
- United Cities and Local Governments (UCLG);
- World Association of Major Metropolises (Metropolis);
- the C40 Cities Climate Leadership Group (C40);⁴ and
- the World Mayors Council on Climate Change (WMCCC).

* Monika Zimmermann has led ICLEI's International Training Centre since its establishment in 1992 and has been responsible for ICLEI's global conferences, including events organised in parallel with major UN events (*e.g.*, UNFCCC COPs, CBD COP-9, and the World Summit on Sustainable Development). She is currently coordinator of ICLEI's biodiversity activities and co-coordinator of the Local Government Climate Roadmap.

These organisations are involved in the process and work in conjunction with their regional and national associations, networks and partners. ICLEI acts as international Roadmap facilitator and is the Focal Point for the Local Government and Municipal Authorities (LGMA) constituency in their dealings with the UNFCCC, where it acts on behalf of local government, facilitating dialogue with national governments and the UNFCCC Secretariat.

The main messages of the LG Climate Roadmap thus far (early 2009) have been the following:

- Local climate action must become part of national climate strategies to achieve coherence and reach climate protection goals;
- Municipal leaders and local governments can implement effective action on climate change as the closest level of government to citizens;
- When equipped with supportive and enabling framework conditions and corresponding funding, cities and local governments would strive to be integral actors and therefore have a substantial role in the post-2012 climate actions.

Mayors worldwide are committing themselves to reducing, by 2050, municipal greenhouse gas (GHG) emissions by 60% from 1990 levels for developing countries, and by 80% in industrialised countries. One element of this commitment is signing the World Mayors and Local Government Climate Protection Agreement.⁵

The LG Climate Roadmap is the first initiative of its kind to lead a global movement connecting local actions to the international negotiation process, and to gain a mandate, responsibility and resources, so that local climate mitigation and adaptation work can be strengthened.

The Local Government Climate Sessions in UNFCCC COP-14 (Poznan)

Invited by the global roadmap partners, ICLEI and the Association of Polish Cities convened local governments during this meeting, in which representatives from cities and local governments worldwide flagged their request that any future multilateral agreement, decisions or agreed efforts on limiting global warming and combating climate change must highlight the need for partnership between national and local governments so as to facilitate consistent planning, implementation and reaching of agreed targets at appropriate authority level.⁶ In Poznan, the local government participants discussed the way forward and agreed a set of statements to be brought into the further climate negotiations, comprising:

- draft text for a **COP Decision** on Cities, Local Authorities and Climate (recognition of the role of local governments in a post-2012 climate agreement);
- Local Government **Positions** (positions on selected issues under negotiation);
- Local Government **Opinions** (joint opinions on further issues related to the current climate debate).

LG Climate Roadmap Activities in 2009

For 2009, the following activities are planned to encourage joint global advocacy by local governments:⁷

- Symposia, expert meetings and workshops to further develop and coordinate local government positions;
- Participation in at least four pre-COP negotiation Meetings of Parties in 2009;
- A series of national and regional events of many local government associations;
- Global events, such as the C40 annual meeting in Seoul in May 2009; a conference in Copenhagen in early June 2009; the ICLEI World Congress in mid-June 2009; and a Mayors Conference at UNFCCC COP-15 in Copenhagen, December 2009;
- Mobilisation of local governments around the world: updating them on the negotiations, encouraging them to interact with their national governments to demand their support for a strong post-Kyoto agreement, and using the momentum in 2009 to get more local climate action started;
- Implementation of other projects, including an ICLEI and UCLG⁸ project on mobilising local governments in emerging economy countries.

Local Governments' Advocacy for Biodiversity

At the urging of active member cities (especially Cape Town and Tilburg), ICLEI identified biodiversity as a priority in 2006, initiating a global pilot project "Local Action for Biodiversity" in which 21 cities from all continents cooperate. Through this initiative, cities seek to identify and exchange the best and most efficient practices for integrating biodiversity into local policy and decision making.⁹ Its goal was to collect and share experience, and to demonstrate to national and international actors the relevance of local action. It led to Curitiba, in Brazil, organising the first parallel event to a CBD COP in March 2007. In this connection, local governments have become a priority within IUCN's "Countdown 2010" initiative.

Development of "Cities and Biodiversity" advocacy process

- May 2005: ICLEI members' conference at Tilburg. First local governments sign "Countdown 2010". More than 280 local governments have signed at the time of writing.
- Summer 2006: Kick-off of "Local Action for Biodiversity" in Cape Town and Durban, South Africa. Twenty-one cities cooperate, managed by ICLEI.
- March 2007: the Curitiba Declaration on Cities and Biodiversity encourages cities to adopt biodiversity strategies and invites Parties to the CBD to work with cities.
- 2008: Pilot cities sign the "Durban Commitment".
- 2008: The CBD Secretariat initiates the "Cities and Biodiversity Initiative" to build capacity and to support programmes. It unites the cities of Curitiba, Bonn, Nagoya, Montreal and Johannesburg, with UNEP, UN-HABITAT, UNESCO, ICLEI, IUCN, Countdown 2010 and the World Mayors Council on Climate Change.
- May 2008: CBD COP-9 in Bonn. The City of Bonn, InWent and ICLEI organise the Mayors Conference

“Local Action for Biodiversity” at which committed mayors from around the world demonstrated with their presence their desire to be recognised as relevant actors in the field of biodiversity conservation.

- May 2008: The “Bonn Call for Action” documents the relevance of local activities. Cities and towns commit to contributing to global biodiversity conservation, and call for supportive framework conditions.
- May 2008: CBD COP Decision IX/28 on “Cities and Biodiversity”, formally recognising local governments within a UN Convention.
- October 2008: IUCN World Conservation Congress in Barcelona. A “Global Partnership: Cities and Biodiversity” officially launched, strengthening the CBD Initiative (above) through cooperation among city networks, UN agencies and scientists.

2009 is expected to see preparations for the next mayors’ conference in Nagoya, Japan at COP 10. ICLEI members intend to adopt a global ICLEI biodiversity programme, similar to ICLEI’s “Cities for Climate Protection Campaign”.

Concrete work at the local level is a crucial element in achieving the international goal of better management of biodiversity. From a policy perspective, however, the aspect of international recognition of local government’s role and work is even more interesting. Where previously, urban issues were not addressed within the biodiversity sector and cities generally did not recognise any urban component to biodiversity, the issue of “urban biodiversity” is now on both agendas. One of the best statements of the importance and value of local government involvement in this issue is found in the “Bonn Call to Action”,¹⁰ adopted in 2008.

As one result of this effort, the CBD COP adopted a critical decision on cities, local authorities and biodiversity, which notes, *inter alia*, the following reasons for promoting the engagement of cities and local authorities in the implementation of the Convention:

- The accelerated rate of urbanization, particularly in developing countries, increasingly concentrates decision-making and resources in cities, creating opportunities for managing better the consumption of resources that impact on biological diversity;*
- Urban experiences in ecosystem conservation and sustainable use can contribute to strengthening national policies, regional strategies, and global agendas on biodiversity;*
- Cities and local authorities play a critical role in designing and implementing land-use and zoning planning tools, urban development and infrastructure guidelines, investment promotion, and consumer awareness campaigns, all of which have direct effects on biodiversity, and in particular on water, climate change, protected areas, agriculture and forests, marine and coastal biodiversity and communication, education and public awareness;*

(d) Cities and local authorities are in direct contact with, and have direct influence on biodiversity managers and users at the local level;

and encourages Parties “to recognize the role of cities and local authorities in their national biodiversity strategies and action plans, to facilitate the adoption by cities and local authorities of practices that support the implementation of these strategies and action plans, and to support the development of local biodiversity strategies and action plans consistent with National Biodiversity Strategies and Action Plans”.¹¹

In 2009, the year between the CBD COPs in Bonn (2008) and Nagoya (2010), ICLEI and its members plan to continue the parallel efforts of local governments to anchor their role within the implementation of the CBD.

Other Global Commitments to Sustainable Development

There are, of course, numerous other initiatives in which local governments hope to take an appropriate role and support their implementation. Some of the most relevant are listed below:

UN Follow-up Process to the Rio Convention

The United Nations Commission on Sustainable Development (CSD) was established by the UN General Assembly in December 1992 to ensure effective follow-up to the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit. Since 2003 (one year after the World Summit on Sustainable Development in Johannesburg), it has operated under a multi-year programme of work consisting of seven two-year cycles, each focused on selected thematic clusters.¹²

ICLEI, in cooperation with UCLG, represents local governments at the CSD’s yearly meetings in New York.¹³ Their main aims are to present the local contribution to implementing the global sustainability agenda and to make nations aware of the improved power of the local level to be a major factor in implementing the CSD goals.

UN Convention to Combat Desertification (UNCCD)

Like biodiversity, desertification was seen as a “rural issue” in the past, so that no provision was made for inviting local governments to cooperate. In 1999, the City of Bonn and ICLEI began efforts to inform local governments, and also to start specific cooperation among local governments on desertification. The occasion was the UNCCD Conference of the Parties in June 1999 in Bonn, when the city again invited local leaders in conjunction with the meeting of nations it was hosting. Bonn’s Mayor Dieckmann promoted a “Cities against Desertification Programme” but unlike initiatives on climate protection and biodiversity, it did not provide for continuous follow-up within local governments.

With the benefit of hindsight, the following reasons can be identified for the failure of this programme to take off: (i) the entire global debate on environmental threats

was not as intensive then as it is today; the general public did not yet perceive desertification as a relevant issue nor did they link it to climate change. Cities were already suffering from desertification but not yet to the extent that they are today; (ii) the visible threats were most severe in southern areas, and predominantly in Africa – areas in which local governments did not (and still do not) have power and resources to easily organise themselves. Today, cities are concerned with growing desertification and realise the need to (re)act. The concept of “adaptation” is on everyone’s lips.

Millennium Development Goals

In 2000, the UN called for concerted action against poverty, and government leaders from all over the world adopted the Millennium Development Goals, a set of concrete plans and practical steps for action by 2015. Again, local governments pointed out that none of these goals could be reached in the agreed timeframe without local action and local implementation, especially with regard to goals on health, education, women’s rights and environment protection, areas where action at the level closest to local communities is the most effective.

UCLG has taken the lead in representing and especially mobilising the local government community to help implement the MDGs and, at the same time, to continuously remind governments not to forget their commitments.

Enabling Local Governments to be more Effective on the International Scene

The experiences of the past years and months have shown a lot of similarities between the global work of local governments for climate protection and for biodiversity conservation. Opportunities and challenges include:

- **The backing of their constituencies:** The local voice in international negotiations can only have strength if it is backed by local action and by awareness of political leaders, citizens and stakeholders at the local level.
- **The power of many:** Like other parts of civil society, effective organisational structures are needed in order to become involved in global processes. A handful of cities alone would not move the world, but within an association they are more powerful. It is even better if the committed organisations cooperate, such as with the global LG Climate Roadmap.
- **Resources:** Capacity (*i.e.*, staff time, money for travelling, *etc.*) is an essential prerequisite for gaining know-ledge of how these international processes work, for understanding the complexities of negotiations, for establishing contacts and gathering experience. Such advocacy work is a highly demanding challenge to local government associations and requires substantial staff capacity and quality.
- **Communication structures:** Strength can be enriched if local and global insights and actions are exchanged and coordinated. Most associations of local governments have limited resources for core work; taking part in global programmes or projects is often a key condition of partici-pating in the international

negotiation process. However, it is not easy to secure project funds that prioritise advocacy work and travel from one pre-COP to another.

- **Meaningful recognition:** One of the primary goals of local negotiation targets in recent years, “meaningful recognition” exists where national governments and international agencies not only express their recognition in words, but are prepared to empower local organisations by giving them responsibilities, resources, access to funding, *etc.*
- **Anchored in results of international negotiations:** A helpful model and relevant goal of local governments for UNFCCC COP-15 is found in the CBD COP-9 Decision IX/28 “Promoting engagement of cities and local authorities”.
- **Cooperation with international actors:** The foremost UN bodies have been very helpful and positive in the past years. ICLEI acts as a Local Authorities and Municipal Focal point and thus helps coordinate the six local government observers at UNFCCC COPs, and has gained observer status for CBD COP-9. In both, ICLEI has facilitated the registration of local participants at international COPs.
- **Cooperation with NGOs, science and media:** It is crucial not only to strengthen and coordinate advocacy, but also to ensure that global status reports in the future will address local policies, mechanisms and results.
- **Locally relevant indicators:** It is essential for countries to evaluate local action as critically as national activities. Local governments can only be perceived as key implementers of global agreements if their contribution can be measured. For this reason, ICLEI is aiming to establish a Global Reporting Centre on GHG emissions and support a municipal chapter in the global Renewable Energy Status Report from REN 21. It also strongly supports current work on *The Economics of Ecosystems and Biodiversity (TEEB)*,¹⁴ to dedicate a chapter to the inclusion of the local level in its policy initiatives.

2009 will be a very special year for local advocacy, presenting an interesting challenge for municipalities and the representatives of city and municipal networks and raising key questions such as:

- Will the various networks find enough common ground – *i.e.*, positions on the many relevant topics – including issues such as biofuels and nuclear energy?
- Will we be successful in incorporating the various stages of development from cities around the world – developed countries, emerging economies and less and least developed countries?¹⁵
- Will we find enough partners in national governments to address community concerns?
- Will local aims to profile local action alone become an issue that generates resistance from national governments?
- Will there be enough national governments, businesses, foundations and cities to co-finance this extensive discussion and advocacy process? ➔

The role of local governments in any global debate has significantly changed in the last 20 years. Within a short time many cities and towns have demonstrated their concern, commitment and action for sustainable development. Strongly supported through the mission of “Local Agendas 21” in chapter 28 of the Rio Convention, local governments, led by some of their international organisations, have gained substantive recognition for their contributions. However, this has not changed the hesitation of many national governments to transfer power to the local level together with the needed resources nor has it so far resulted in a formal recognition (as a “party”, or something similar) to UN agreements. At UN Conferences, local government representatives are still sitting on the NGO or “civil society” bench and quite a few of the major local governments feel that this is not appropriate, as they are a level of government as others are.

The current climate negotiations offer a unique opportunity for nations to acknowledge the local level, to empower this level and to help in unfolding its potential for solving global threats.

Notes

- 1 In 1992, ICLEI’s Cities for Climate Protection Campaign was launched. At the same time, “Climate Alliance” was founded.
- 2 ICLEI–Local Governments for Sustainability (ICLEI) is an international association of local governments as well as national and regional local government organisations that have made a commitment to sustainable development.

Its mission is to reach tangible improvements through cumulative local action. ICLEI was formerly known as the International Council for Local Environmental Initiatives.

3 In 1995, the ICLEI–Local Governments for Sustainability, with support from the German government, organised its “Second Municipal Leaders Summit on Climate Change” in Berlin parallel with the UN Climate Conference. The then German Environmental Minister, Dr Angela Merkel, welcomed them on behalf of the federal government, and Prof. Klaus Töpfer spoke as the General Secretary of the United Nations Environment Programme (UNEP).

4 C40 is a group of the world’s largest cities committed to tackling climate change. For more information, see: <http://www.c40cities.org/cities/>.

5 See www.globalclimateagreement.org.

6 Speakers included Yvo de Boer, UNFCCC Executive Secretary; Rajendra K. Pachauri, IPCC Chair and Nobel Peace Prize Laureate 2007; Penny Wong, Australia’s Minister for the Environment; Brice Lalonde, France’s Ambassador for Climate Change; Rohan Dissanayaka, Sri Lanka’s Minister for Environment; and Anna Tibajuka, Executive Director of UN-Habitat.

7 For more information, see: www.iclei.org/climate-roadmap.

8 UCLG (United Cities and Local Governments) is the global local government association and the “united voice and world advocate of democratic local self-government, promoting its values, objectives and interests, through cooperation between local governments, and within the wider international community”.

9 For more information, see: www.iclei.org/lab.

10 See http://www.iclei.org/fileadmin/template/project_templates/LAB-bonn2008/user_upload/Press/BonnCall_FINAL_29May08.pdf.

11 See more: <http://www.cbd.int/doc/decisions/cop-09/cop-09-dec-28-en.pdf>.

12 See more: www.un.org/esa/sustdev/csd/.

13 See more: www.iclei.org/index.php?id=1431.

14 A study organised by the European Commission and the German government, which has been compared to the Stern Report on the cost of climate change.

15 While in Europe, climate mitigation has a defined goal, cities in countries with emerging economies are concerned about securing more energy, and others cannot see climate politics as an issue other than poverty, and those who are at the limit of their capacity are primarily fighting with the necessary strategies of adaptation and have little capacity to serve the global climate.

