THE IUCN DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT

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Abstract

The IUCN Draft International Covenant on Environment and Development has influenced the Earth Charter, environmental law education and the drafting of national environmental legislation. It may well prove to be the basis of a future international treaty on sustainable development.

1 Introduction

The Stockholm Declaration on Human Environment, 1972, the World Charter for Nature, 1982, and the Rio Declaration on Environment and Development, 1992 introduced norms of national and international behaviour in respect of the management of natural resources and sustainable development. Each of these visionary documents was, however, declaratory in nature and contributed to the development of what is called 'soft' law. But these norms are not considered binding on nation-states and the international community until they are adopted through a treaty, directly or indirectly, and into the national laws of a country. Such law making through treaties is referred to as 'hard' law.

2 The vision of the IUCN CEL

It was the vision in the late 1980s of the founder Chairman of the IUCN Commission on Environmental law (CEL), Wolfgang E. Burhenne, that the international community needs to move beyond declaratory norms to binding obligations if the quest for sustainable development at all levels was to be a reality. He was, of course, guided by the parallel developments in the field of human rights; the international community had by then moved from the declaratory principles of the Universal Declaration of Human Rights proclaimed in 1948 to the binding provisions of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, both adopted in 1966.

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In 1989, Wolfgang initiated the work on the first draft of a proposed Covenant on Environmental Conservation and Sustainable Use of Natural Resources. I succeeded Wolfgang in 1990 and continued as the Chair of the Commission of Environmental Law until 1996. During these years, I prioritised this flagship project of the Commission and I was happy to join Wolfgang in the launching of the Draft International Covenant on Environment and Development at the United Nations Congress on Public International Law in New York in March 1995.

The road to the drafting of this proposed global treaty on sustainable development was not easy.

Elsewhere,1 I have given a background of the drafting of the Covenant. But it needs to be highlighted that when I succeeded Wolfgang, the leadership of the IUCN Commission on Environmental Law had symbolically changed from the North to the South. Those familiar with drafting international agreements well know the tensions that readily appear between developed and developing countries. It was fortunate that, principally with the committed on-going support of Wolfgang through the International Council of Environmental Law (ICEL), a co-sponsor of the Draft Covenant, and my Deputy Chair, Professor Nicholas Robinson, we were able to resolve complicated and sensitive issues that had repeatedly surfaced in debates in Stockholm in 1972, and during the adoption of the World Charter for Nature in 1982, and during the Earth Summit in Rio in 1992. I also want to record my appreciation for the support that I received from the CEL membership and the various members of the Working Groups and the Drafting Groups of the Covenant.

An evolving document has to respond to the orientation of its membership and it was not surprising that being from the 'South', I would introduce issues and matters of particular concern to the Third World. It was at the second meeting of the Working Group, for example, that I proposed articles against the export of toxic wastes to the developing countries and against environmental degradation by multinational corporations in the Third World.

With the same orientation, I persuaded the Group to include certain Fundamental Principles, including in respect of the right to development, the need to eradicate poverty through a global partnership, the elimination of unsustainable consumption and production patterns, the promotion of appropriate demographic policies and detailed provisions on the transfer of technology and national and international financing mechanisms. To highlight that our effort was in harmony with international developments, I also successfully proposed that the title of our effort be changed to the Draft

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International Covenant on Environment and Development to accord with the title of the Rio Declaration. The inclusion of all these provisions, in my view, was important to the ultimate North-South harmony in the Draft Covenant.

3 The Draft Covenant

In our Foreword to the Draft Covenant, Wolfgang and I provide an overview of the provisions of the Draft Covenant which, in its final form, contains a Preamble and 72 Articles arranged topically in XI Parts. The Preamble articulates the scientific realities underlying the Covenant, as well as relevant social, economic and ethical rationales. It also mentions the main legal premise for the Covenant. Part I states the objective of the Covenant in a single Article. Part II contains the most widely accepted and established concepts and principles of international environmental law, as they have been proclaimed by numerous international texts. The remaining parts of the Covenant are founded on these “Fundamental Principles”. Part III creates the broad framework of the obligations of Parties in respect of the environment, towards each other, the international community collectively, and all persons individually. It integrates environmental and development and couples rights with duties. The provisions in this Part are applicable to all subsequent sections of the Covenant, in particular to the specific obligations of Parts IV, V and VI. Part IV provides the specific obligations of Parties respecting the conservation of the biosphere and its various components, including cultural and natural heritage. Part V concerns substances, technologies and activities that produce adverse effects on the environment. It articulates the duties of Parties to prevent, control and mitigate harm to the environment caused by such substances, technologies and activities. Part VI sets forth the obligations of Parties regarding broad structural issues and aspects of international relations that impact on both environmental protection and sustainable development: demography, armed conflict, patterns of international trade and resource utilization. Part VII contains and develops the traditional rules concerning problems of transboundary pollution and shared natural resources. Part VIII seeks to develop the national and international procedures necessary to assess, monitor and control environmental impact. It establishes duties to share environmental information and technology, provide international financing, and foster public awareness through training and education. Part IX deals with the legal consequences of environmental harm, especially responsibility, liability and the provision of remedies. Part X places the Draft Covenant in the broader context of international law, by speaking to potential conflicts with existing treaties and concurrent jurisdiction. It also provides for dispute avoidance and settlement mechanisms. Part XI creates the formal mechanisms available
to change the Covenant, details the means to adhere to it, its entry into force and other procedural matters.

After presenting the above overview, we summed up the three types of provisions in the Draft Covenant:

(a) those which consolidate existing principles of international law, including those ‘soft-law’ principles which were considered ripe for ‘hardening’;

(b) those which contain very modest progressive developments; and

(c) those which are further progressive than in (b) which we felt were absolutely necessary.

The value of the Draft Covenant is considerably enhanced particularly for the academic community by its comprehensive commentary on all its provisions. The Commentary identifies major issues under each Article and provides a discussion of relevant developments including national and international decisions by courts and tribunals.

The Draft Covenant was updated in May 1999 to reflect new developments in international law but this updating was limited to a few Articles whose provisions were overwhelmed by events after 1995.

It has been an important vision of the IUCN Commission on Environmental Law and the International Council of Environmental Law that the Draft Covenant will, one day, hopefully soon, become a negotiating document for a global treaty on environmental conservation and sustainable development. Unfortunately, the hope has not been realised and the international community is still without a global treaty on sustainable development. But I believe that we at IUCN and ICEL lit a candle and its glow is being increasingly recognized internationally. The Draft Covenant is already acknowledged as an important contribution to international environment law in the law schools and environmental law centres all over the world. We have found that it has even been used as a check list for the drafting of environmental legislation at national levels.

4 The Earth Charter

After we had finalized the IUCN Draft Covenant, the Earth Charter Commission contacted us in 1995 for the development of the Earth Charter and we decided to join the effort so that the Earth Charter and the IUCN Draft Covenant can support each other. With this objective, we participated in the mainstream work of the drafting of the Earth Charter and, happily, we were able to ensure that the final Earth Charter is in substantial harmony with the IUCN Draft Covenant. Our role in this success was underscored when the Earth Commission invited me, on behalf of IUCN, and along with Mikhail Gorbachev, Maurice Strong and Steven Rockefeller to be the
keynote speaker at the official launch of the Earth Charter at the Hague in June 2000. I then emphasized:

...I hope that it does not take the international community eighteen years to transform the principles of the Earth Charter into binding obligations of states and societies. We at the IUCN have tried to accelerate and jump-start the process beyond the Earth Charter by proposing a comprehensive draft Covenant on Environment and Development to follow and supplement the Earth Charter. It is only when the lofty principles of the Earth Charter become binding legal obligations and are implementable by people all over the world will the Earth Charter have achieved its full potential.

The penultimate paragraph of the Earth Charter reads:

In order to build a sustainable global community, the nations of the world must renew their commitment to the United Nations, fulfill their obligations under existing international agreements, and support the implementation of Earth Charter principles with an internationally legally binding instrument on environment and development (emphasis added).

During the drafting sessions, there were proposals specifically to reference the IUCN Draft Covenant in the above paragraph; indeed several earlier drafts did so but, in the end, we thought it best to make a general reference to ‘an internationally legally binding instrument on environment and development’. The travaux préparatoires of the Earth Charter will abundantly clarify that the IUCN Draft Covenant was the basis of this language.

The international community now prepares for the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa in September 2002. Many regional fora and bodies, at both governmental and non-governmental levels, are working to orchestrate a common united vision for next year. I note that at least two regional fora, the U.N. Regional Roundtable for East Asia and the Pacific Region held in Kuala Lumpur, Malaysia in July 2001 and the U.N. Regional Roundtable for Central and South Asia held in Bishkek, Kyrgyzstan on 30 July – 1 August 2001, identified a regional (see Part V of the Kuala Lumpur Roundtable) or international treaty on sustainable development as an important building block in sustainable development. Paragraph 74 of the Bishkek Roundtable was IUCN Draft and Earth Charter-specific:

Governments need to give serious consideration to launching a process leading to elaboration of an overarching international treaty on sustainable development that will provide an ‘umbrella’ to more specialized treaties and instruments dealing with specific environmental, social and economic issues. This work could build on IUCN’s Draft International Covenant on Environment and Development, and the Earth Charter elaborated by the Earth Council. The treaty could also encompass the use of sustainability criteria and indicators and the use of market based instruments.

The Asia Pacific Forum on Environment and Development (APFED) discussed the IUCN Draft Covenant at its inaugural meeting held in Tokyo, Japan in September 2001 and its relevance for a proposed regional treaty for sustainable development for the Asian and Pacific Region. I also know that Montevideo III which included many members of CEL who had participated in the development of the Draft Covenant discussed the need for an over-
arching global instrument on sustainable development. The candle, in effect, has been lit and I hope that the glow of the IUCN Draft Covenant on Environment and Development will continue to radiate light and provide some guidance at the upcoming WSSD.

5 Conclusion

As and when the international community is ready for an international treaty on sustainable development, the IUCN Draft International Covenant on Environment and Development may be used as the negotiating text in the inter-governmental process. If this text reduces the period of drafting and negotiation to less than the eighteen (18) years taken in the finalization of the 1966 Human Rights Covenants, the efforts and vision of CEL and ICEL would have served the international community well.