

## MARINE PLASTIC POLLUTION AND THE NORMATIVE PRECEPTS OF 'COMMON CONCERN OF HUMANKIND'

*Francisco Gutiérrez Figueroa\**

### Abstract

*'Common Concern of Humankind' (CCH) is an essential tool to combat marine plastic pollution, a global challenge associated with marine environmental degradation. The article stresses upon the importance of the concept of CCH as a cornerstone in the development of the law in environmental issues. It looks for the supporting norms in already existing higher principles of international environmental law and argues, that as a mutually complementary set of ideas, principles related to environmental law can be useful in the concretization of CCH as an overarching guideline for State conduct.*

### I. Introduction

A healthy marine environment provides a range of benefits essential for human wellbeing and prosperity, including climate stability, food security, transportation and recreation. Presently, there is no specific global endeavor dealing with marine plastic pollution. Hence, a dedicated legal framework is required to secure a sound oceanic ecosystem for the benefit of present and future generations.

In the last few years, calls for actions to specifically address marine plastic pollution have been growing.<sup>1</sup> For instance, during the first two meetings of the ad hoc open-ended expert group on marine litter and microplastics, held May 29-31, 2018 in Nairobi and on December 3-7,

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\* *IMO International Maritime Law Institute, Malta.*

<sup>1</sup> According to the UN Environment Programme (UNEP), 'marine litter' means 'any persistent, manufactured or processed solid material discarded, disposed of or abandoned in the marine and coastal environment', including plastics; while 'microplastics' are 'tiny plastic particles up to 5mm in diameter'. Microplastics, UNEP (Dec. 12, 2020, 10:50 AM), <https://wedocs.unep.org/bitstream/handle/20.500.11822/12079/brochure-microplastics.pdf?sequence=1&isAllowed=>.

2018 in Geneva,<sup>2</sup> many representatives suggested that a legally binding instrument is required to address the deleterious effects of a large-scaled and complex - marine litter.<sup>3</sup> Also, as per Our Ocean Conference 2019, hosted on October 23-24 in Oslo, the government of Norway pledged to work for a global agreement on marine plastic litter and microplastics by 2023,<sup>4</sup> an initiative that was supported both- by States (Grenada and Sweden) and non-State actors. In fact, following the Norwegian initiative, the World Wildlife Fund (WWF) committed to activating its global network to help formulate a new international treaty on this matter.<sup>5</sup>

While the number of States supporting the creation of a new legally binding instrument to regulate marine plastic pollution is still modest, it can be argued that these proposals reflect an emerging engagement of governments and private stakeholders towards responding to marine plastic pollution at the global level. In this regard, a growing consciousness of the negative effects of marine plastic pollution expressed through statements, declarations and other soft-law sources are being shaped by some members of the international community; paving the way for broader and deeper discussions about the relevance of creating a new and dedicated global mechanism on the matter.

The United Nations Convention on the Law of the Sea (UNCLOS, 1982) does not provide a complete and effective governance scheme to prevent, reduce and control plastic litter. While it offers the global legal framework for addressing marine environmental protection, it sets such

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<sup>2</sup> Established at the third session of the United Nations Environment Assembly of the United Nations Environment Programme (UNEA) on 4-6 December 2017 in Nairobi; Marine Litter and Microplastics, ¶10, UNEP/EA.3/Res.7 (Jan. 30, 2018).

<sup>3</sup> REPORT OF THE FIRST MEETING OF THE AD HOC OPEN-ENDED EXPERT GROUP ON MARINE LITTER AND MICROPLASTICS, ¶65, UNEP/AHEG/2018/1/6 (19 June 2018); REPORT OF THE SECOND MEETING OF THE AD HOC OPEN-ENDED EXPERT GROUP ON MARINE LITTER AND MICROPLASTICS, ANNEX (¶5,11.d), UNEP/AHEG/2018/2/5 (Feb. 21, 2019).

<sup>4</sup> MINISTRY OF FOREIGN AFFAIRS OF NORWAY, OUR OCEAN 2019: LEARNING, SHARING, ACTING, at 23 (2019).

<sup>5</sup> *Id.* at 29.

general obligations that they do little to encourage the creation of specific commitments to regulate plastic pollution.

It is thus important to appreciate that some treaty proposals prepared by intergovernmental<sup>6</sup> and non-governmental organizations<sup>7</sup> have appeared in recent years, trying to analyze the most relevant aspects related to the subject. Even though these recommendations are valuable since they might help outline a potential legally binding agreement, this article suggests that a step back should be taken to define the conceptual framework on which the prospective global regime will be based. In other words, a normative legal matrix capable of being implemented by subsequent and more specific norms must be evolved in order to perform an 'architectural function' within the decided system.<sup>8</sup> As will be examined in the following sections, this concept is the 'Common Concern of Humankind' (CCH). In this article, it is argued that CCH is innately associated with core principles of international environmental law, which in turn can guide the actions of the international community while it decides on marine plastic pollution.

This work reviews CCH through the lens of history. It is followed by the exposition of its legal significance vis-à-vis protection of the marine environment. Lastly, the prominent international legal principles

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<sup>6</sup> COMBATING MARINE PLASTIC LITTER AND MICROPLASTICS: AN ASSESSMENT OF THE EFFECTIVENESS OF RELEVANT INTERNATIONAL, REGIONAL AND SUBREGIONAL GOVERNANCE STRATEGIES AND APPROACHES, UNEP, at 89-99 (2017).

<sup>7</sup> See, inter alia, Torbjørn Graff Hugo, The Case for a Treaty on Marine Plastic Pollution, Norwegian Academy of International Law, 2018 (Dec. 5, 2020, 1:35 PM), <http://intl.w.uio.no/wp-content/uploads/2018/11/The-case-for-a-TMPP-Nov-2018-WEB.pdf>;

NILS SIMON & MARO LUISA SCHULTE, STOPPING GLOBAL PLASTIC POLLUTION: THE CASE FOR AN INTERNATIONAL CONVENTION 33-45 (Heinrich Böll Foundation, 2017); NILS SIMON ET AL., NO MORE PLASTICS IN THE OCEAN: GAPS IN GLOBAL PLASTIC GOVERNANCE AND OPTIONS FOR A LEGALLY BINDING AGREEMENT TO ELIMINATE MARINE PLASTIC POLLUTION 31-38 (Adelphi, 2018).

<sup>8</sup> PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 60 (CUP, 2<sup>nd</sup> ed. 2018).

connected CCH will be identified and their role in the future regime on marine plastic pollution will be accordingly assessed.

## II. Genesis of CCH

Although CCH formally emerged in the 1990s, similar ideas also existed around the beginning of the twentieth century. Common interests were reflected in the international humanitarian law, particularly in the Martens Clause in the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land.<sup>9</sup>

Other examples can be taken from the mid-twentieth century when international law related to the exploitation of shared natural resources started emerging. For instance, the 1946 International Convention for the Regulation of Whaling recognized ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’<sup>10</sup> and ‘the common interest to achieve the optimum level of whale stocks as rapidly as possible’.<sup>11</sup> Likewise, the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean expressed that the ‘common interest of mankind’, as well as the interests of the contracting parties, would be best served by ensuring the maximum sustained productivity of the fishery resources in the region.<sup>12</sup>

In the 1990s, treaties adopted at the 1992 United Nations Conference on Environment and Development (UNCED) explicitly proclaimed

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<sup>9</sup> The Preamble of the latter mentions that ‘[t]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience’. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land pmbl. ¶ 8, Oct. 18, 1907, 36 Stat. 2277.

<sup>10</sup> International Convention for the Regulation of Whaling, pmbl. ¶ 5, Dec. 2, 1946, 161 U.N.T.S. 72.

<sup>11</sup> *Id.*

<sup>12</sup> International Convention for the High Seas Fisheries of the North Pacific Ocean pmbl. ¶ 3, May 9, 1952, 205 U.N.T.S. 80.

CCH as the international norm in their respective Preambles. The Convention on Biological Diversity (CBD, 1992) affirms that 'the conservation of biological diversity is a common concern of humankind'<sup>13</sup> on the basis of three precepts: 1) its intrinsic value<sup>14</sup>; 2) its ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values<sup>15</sup>; and 3) its importance for evolution and for maintaining life-sustaining systems.<sup>16</sup> Consequently, CBD stresses that cooperation at all levels is important and required, not only among States but also among intergovernmental and non-governmental organizations.<sup>17</sup>

Further, the United Nations Framework Convention on Climate Change (UNFCCC, 1992) acknowledges that 'change in the Earth's climate and its adverse effects are a common concern of humankind',<sup>18</sup> because additional warming of the Earth's surface and atmosphere, caused by human activities, 'may adversely affect natural ecosystems and humankind'.<sup>19</sup> Therefore, recognizing the global nature of climate change, UNFCCC calls for the widest possible cooperation among States in order to address the issue appropriately.<sup>20</sup> The Paris Agreement (2016) was built upon UNFCCC and aimed at strengthening the global response to the threat of climate change.<sup>21</sup> It reiterated the proposition that climate change is a common concern of humankind.<sup>22</sup>

CCH was thus pitched as the idea of cooperation and common action if the world had to collectively deal with global environmental problems.

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<sup>13</sup> Convention on Biological Diversity (CBD), pmbl. ¶ 3, June 5, 1992, 1760 U.N.T.S. 79.

<sup>14</sup> *Id.* at pmbl. ¶ 1.

<sup>15</sup> *Id.*

<sup>16</sup> CBD, *supra* note 13, at pmbl. ¶ 2.

<sup>17</sup> *Id.* at pmbl. ¶ 4.

<sup>18</sup> United Nations Framework Convention on Climate Change (UNFCCC), pmbl. ¶ 1, May 9 1992, 1771 U.N.T.S. 107.

<sup>19</sup> *Id.* at pmbl. ¶ 2.

<sup>20</sup> *Id.* at pmbl. ¶ 6.

<sup>21</sup> Paris Agreement, art. 2.1., Dec. 12, 2015, FCCC/CP/2015/L.9/Rev.1, Annex.

<sup>22</sup> *Id.* at pmbl. ¶ 11.

It was increasingly realized that to cope up with the global environmental issues of such nature, the international community has to concede in principle that spatial boundaries are essentially artificial and that the bilateral and regional approaches are insufficient to treat those environmental challenges.<sup>23</sup>

### III. Legal Significance

Despite formal inclusion in international legal instruments, CCH may still be classified as a developing notion without enough support in State practice (for issues other than climate change or conservation of biodiversity).

Nevertheless, regarding UNFCCC, the Paris Agreement and CBD, it can be argued that CCH does involve a legal significance or in other words, a 'normative statement' (using the vocabulary of the International Law Commission.<sup>24</sup> In these agreements, the contracting parties agreed that collective commitments to address global issues are strongly needed, and so do encourage participation, collaboration and action.<sup>25</sup> Accordingly, the emphasis of CCH is on cooperation for the protection of the environment, without seeking either its joint management or establishing benefit-sharing rules based on the common exploitation of a particular resource.

Another legal implication of CCH is linked to the long-term environmental challenges that affect the rights and obligations of present and future generations. In this sense, it may cover matters that are not necessarily of immediate interest to some States; but do reflect general issues that sooner or later will have universal consequences.<sup>26</sup>

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<sup>23</sup> PATRICIA BIRNIE ET AL., INTERNATIONAL LAW & THE ENVIRONMENT 130 (OUP, 3<sup>rd</sup> ed. 2009).

<sup>24</sup> INT'L LAW COMM'N, REP. ON THE WORK OF ITS SIXTY-SEVENTH SESSION, U.N. DOC. A/70/10, at 27 (2015).

<sup>25</sup> INT'L LAW COMM'N, SECOND REPORT ON THE PROTECTION OF THE ATMOSPHERE BY SHINYA MURASE, SPECIAL RAPPOREUR, U.N.Doc. A/CN.4/68, at 20, ¶30 (2015).

<sup>26</sup> *Id.* at 23, ¶ 35.

CCH envisages that the human race is the primary stakeholder.<sup>27</sup> Therefore, it can be suggested that CCH implies a global responsibility to act, general interest to cooperate at the international level and, ultimately, the basis for the international community to join efforts in protecting the environment.<sup>28</sup> It is also argued that CCH would involve little impact in practice unless it is accompanied by an institutional mechanism and a set of rules or principles to provide the normative framework for the conduct of its members.<sup>29</sup> Like in the cases of UNFCCC and CBD, this is considered 'a functional necessity of multilateral environmental agreements'.<sup>30</sup> It enables long-term interaction among all the regime participants and contributes to forming a community of members committed to addressing common environmental concerns.<sup>31</sup>

From this, at least three implications may be drawn. Firstly, CCH reinforces the idea of the international community, within which there is a minimum of 'subjective cohesion to the social bond between its members' and a common ground of values and procedures aiming at realizing cooperation.<sup>32</sup> Secondly, it provides the basis for the direct and indirect long-term participation of States and non-State actors in addressing environmental concerns, especially when States alone are unwilling or unable to act individually.<sup>33</sup> The importance of including

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<sup>27</sup>ANTÔNIO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 281 (Martinus Nijhoff, 2<sup>nd</sup> ed. 2013).

<sup>28</sup> Int'l Law Comm'n, *supra* note 25, at 23, ¶36.

<sup>29</sup> Michael Bowman, *Environmental Protection and the Concept of Common Concern of Mankind*, in *Research Handbook on International Environmental Law* 493, 503 (Malgosia Fitzmaurice et al. eds., Edward Elgar, 2010).

<sup>30</sup> Duncan French, *Common Concern, Common Heritage and other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?* in *Research Handbook on Biodiversity and Law* 334, 351 (Michael Bowman et al. eds., Edward Elgar, 2016).

<sup>31</sup> Jutta Brunnée, *International Environmental Law and Community Interests*, in *Community Interests Across International Law* 151, 166 (Eyal Benvenisti et al. eds., OUP, 2018).

<sup>32</sup> Andreas Paulus, *International Law and International Community*, in *Handbook of International Law* 44, 45-46 (David Armstrong ed., Routledge, 2009).

<sup>33</sup> *Id.* at 53.

non-State actors in a CCH-based system is twofold: one, they are also affected by global environmental problems and two, at the same time, their actions constitute the primary genesis of those problems.<sup>34</sup> Thirdly, CCH as the normative idea, cannot contribute to the generation of specific substantives obligations for States.<sup>35</sup> Nonetheless, it can serve as a general basis for the development of finer obligations. Hence, it can be an overarching instrument that guides the formalization of the collective actions against environmental challenges. More specifically, it can contribute to the development of measures required to deal with marine plastic pollution at all levels of governance ensuring effective compliance and enforcement.<sup>36</sup>

Thus, CCH is more than just a political tool. It is an instrument of global environmental governance, especially when it comes to preserving the interest of the present and future generations.<sup>37</sup>

#### IV. Principles Concerning CCH

As a burgeoning and amorphous concept, CCH requires the support of complementary principles and rules. The latter is useful for prescribing action to their addressees; while the former, give guidance for future conduct in rule-making processes, interpretation and application.<sup>38</sup>

Principles – namely, international cooperation, solidarity, common but differentiated responsibilities (CBDR), intergenerational equity, precautionary, and sustainable development – can give substantive content to CCH, thus guiding the actions of the international community towards the protection of the environment for the benefit of

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<sup>34</sup> Brunnée, *supra* note 31, at 152-153.

<sup>35</sup> Int'l Law Comm'n, *supra* note 25, at 24, ¶ 37.

<sup>36</sup> Dinah Shelton, *Common Concern of Humanity*, 39 ENVTL. POL'Y & L. 83, 86 (2009).

<sup>37</sup> French, *supra* note 30, at 356-537.

<sup>38</sup> ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 37 (Hart Publishing, 2011).



humankind.<sup>39</sup> Taken together along with CCH, these principles have the potential to support the general legal basis for the international community to act.<sup>40</sup>

For the sake of better understanding the researcher has divided them into two groups, based on their level of proximity to CCH.

### A. International Cooperation

CCH is based upon the premise that a collective approach provides benefits common to all States.<sup>41</sup> Hence, the principle of international cooperation has been inextricably linked to it since its formal emergence in the 1990s. Principle 7 of the Rio Declaration brooked that 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem', This crystallized further in both- UNFCCC and CBD.<sup>42</sup>

The principle represents a well-established general duty in international law, reflected in several multilateral treaties,<sup>43</sup> other legal instruments

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<sup>39</sup> Pierre-Marie Dupuy, *Formation of Customary International Law and General Principles*, in *The Oxford Handbook of International Environmental Law* 450, 462 (Daniel Bodansky et al. eds., OUP, 2008).

<sup>40</sup> ALEXANDRE KISS & DINAH SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW* 14 (Martinus-Nijhoff, 2007).

<sup>41</sup> Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, in *The Oxford Handbook of International Environmental Law* 551, 553 (Daniel Bodansky et al. eds., OUP, 2008).

<sup>42</sup> Dupuy & Viñuales, *supra* note 8, at 74.

<sup>43</sup> In the context of the law of the sea, UNCLOS contains several provisions on the duty to cooperate. For instance, its article 197 specifies- 'States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features'. Similar examples can be found in CBD (art.5) and UNFCCC (arts.3.5, 4 and 6.b).

and jurisprudence.<sup>44</sup> For instance, the International Court of Justice (ICJ) in the *Pulp Mills* case noted:

it is by cooperating that the States concerned can jointly manage the risks of damage to the environment... so as to prevent the damage in question<sup>45</sup> and that 'these obligations [the procedural obligations of informing, notifying and negotiating] are all the more vital when a shared resource is at issue, which can only be protected through close and continuous co-operation between the riparian States.'<sup>46</sup>

Similarly, in *Southern Bluefin Tuna* cases, the International Tribunal for the Law of the Sea (ITLOS) recalled the obligation to cooperate in the conservation and management of the living resources of the high seas as provided in UNCLOS,<sup>47</sup> and considered that the States parties to the Convention for the Conservation of Southern Bluefin Tuna (1993) should 'intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna' in order to promote the objective of optimum utilization of species.<sup>48</sup>

## B. Solidarity

The need for environmental protection on a community scale illustrates a paradigm shift in the field of international environmental law in which the growing legal importance of collective concerns is increasingly

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<sup>44</sup> Principle 24 of the 1972 Stockholm Declaration on the Human Environment stated: 'International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States'.

<sup>45</sup> *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgement, 2010 I.C.J. Rep.14, 49, ¶ 77 (April 20).

<sup>46</sup> *Id.* at 51, ¶ 81.

<sup>47</sup> ITLOS referred to art. 64 along with arts. 116-119 of UNCLOS. *Southern Bluefin Tuna* (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3&4, Provisional Measures, Order of Aug. 27, 1999, ITLOS Rep. 280, ¶ 48.

<sup>48</sup> *Id.* ¶ 78.

taken into consideration. This was adequately put up by Judge Weeramantry in the following words:

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...rights and obligations...within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.<sup>49</sup>

In this light, solidarity is understood as “an intensified form of interstate co-operation that reaches beyond ‘normal’ partnership”.<sup>50</sup> This is well reflected in the post-1970 State practice and other sources of international law.<sup>51</sup> Although it is a moral or ethical responsibility to supply deference to the interests of others within the international community along with providing them with assistance, wherever possible,<sup>52</sup> it can be paired with legally binding obligations as well, thus making the space for strengthening existing cooperation based mechanisms. Indeed, ‘if not found in international customary law, a duty of solidarity can be negotiated between States through a treaty or even decided upon by an international organization’.<sup>53</sup>

For the reasons mentioned above, the principle of solidarity is critical to the holistic understanding of CCH. Certainly, if States are aware of the need to take action vis-à-vis global challenges, and have a common

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<sup>49</sup> Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgement, 1997 I.C.J. Rep. 7, 118 (September 25) (separate opinion by Judge Weeramantry).

<sup>50</sup> Beyerlin & Marauhn, *supra* note 38, at 35.

<sup>51</sup> Ronald MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 PACE INT'L L.REV. 259, 259-260 (1996).

<sup>52</sup> Laurence Boisson de Chazournes, *Responsibility to Protect: Reflecting Solidarity?*, in *Solidarity: A Structural Principle of International Law*, 93,95 (Rüdiger Wolfrum & Chie Kojima eds., Springer, 2010).

<sup>53</sup> *Id.*

interest in forming ‘a solidarity-driven community for the purpose of self-preservation’ and environment protection.<sup>54</sup>

It seems solidarity as a matter of creed is inherent to CCH in the sense that States’ obligations towards a common concern also extend to other members of the international community, especially those who need assistance to implement policies for the protection of CCH.<sup>55</sup> The next two principles cater to this idea in greater detail.

### C. Common but Differentiated Responsibilities

The principle of common but differentiated responsibilities (CBDR) is at times perceived as the other side of CCH.<sup>56</sup> It is aimed at distributing the effort required to manage global environmental problems among States, according to their past and present responsibilities and respective capabilities.<sup>57</sup> In this respect, again, Principle 7 of the Rio Declaration states:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Similarly, references to CBDR can be found in UNFCCC that obligates the parties to protect the climate system ‘in accordance with their common but differentiated responsibilities and respective capabilities’.<sup>58</sup> Further, the Kyoto Protocol (1997) set stricter emission-

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<sup>54</sup> Beyerlin & Marauhn, *supra* note 38, at 35-36; KI-GAB PARK, LAW ON NATURAL DISASTERS: FROM COOPERATION TO SOLIDARITY?, IN COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 136, 146 (Eyal Benvenisti et al. eds., OUP, 2018).

<sup>55</sup> Frank Biermann, ‘Common Concern of Humankind’: *The Emergence of a New Concept of International Environmental Law*, 34 ADV 426, 461-462 (1996).

<sup>56</sup> Brunnée, *supra* note 41, at 566.

<sup>57</sup> Dupuy & Viñuales, *supra* note 8, at 83.

<sup>58</sup> UNFCCC, *supra* note 18, art. 3.1.

related obligations on developed countries,<sup>59</sup> while no new obligations were imposed on developing countries.<sup>60</sup> The Paris Agreement also declares that it 'will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.<sup>61</sup> Thus, CBDR is included in environmental treaties in six different ways—mitigation, adaptation, finance, technology, capacity-building and transparency.<sup>62</sup>

CBDR might have a bearing on CCH in two definite ways. One, like CCH, it requires all States to participate in international actions to address global environmental challenges; and two, it acknowledges that differentiated environmental standards manifested mainly in the aforesaid areas need to be accepted as a matter of principle.<sup>63</sup> Due to its quest to achieve substantive equity CBDR can also be seen as a 'reflection of solidarity' in international environmental relations.<sup>64</sup> It can be said that States are increasingly paying attention to considerations of equity in rule-making processes, thus recognizing that any approach to these community challenges 'must reflect both the States' contributions to a given problem and their abilities to address it'.<sup>65</sup>

#### **D. Intergenerational Equity**

The principle of intergenerational equity requires each generation to use the natural resources of the planet in such a manner that it can be passed on to future generations in no worse conditions than it was received. In

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<sup>59</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, art.3.1, Dec.11, 1997, 2303 U.N.T.S. 148.

<sup>60</sup> *Id.* art. 10.

<sup>61</sup> Paris Agreement, *supra* note 21, art. 2.2.

<sup>62</sup> DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 222-226 (OUP, 2017).

<sup>63</sup> PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 246 (CUP, 4<sup>th</sup> ed. 2018).

<sup>64</sup> Beyerlin & Marauhn, *supra* note 38, at 63.

<sup>65</sup> Brunnée, *supra* note 41, at 567.

this respect, three additional considerations are to be taken into account: conserving the natural resources so that future generations can use them to satisfy their own needs (comparable options); ensuring that the quality of the environment is comparable between generations (comparable quality); and equitable access to the use and benefits of the natural resources (comparable access).<sup>66</sup>

Although this intergenerational perspective can be traced in early environmental instruments, the modern guidelines of intergenerational equity can be found in the Stockholm Declaration (1972), which recognized that humans bear ‘a solemn responsibility to protect and improve the environment for present and future generations’ (Principle 1). It also asserts the need to safeguard the natural resources of the earth ‘for the benefit of present and future generations’ (Principle 2). But there is little reference to equity in the text of the treaty. Rio Declaration is more vocal on this when it states that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’ (Principle 3).

Thereafter, a reference to the principle can be found in other major treaties as well. According to UNFCCC: ‘the Parties should protect the climate system for the benefit of present and future generations of humankind’<sup>67</sup>, while the Paris Agreement acknowledges intergenerational equity as one of the several aspects to be considered while responding to climate change.<sup>68</sup> Likewise, CBD expresses its determination to ‘conserve and sustainably use biological diversity for the benefit of present and future generations’.<sup>69</sup>

The principle was also recognized in the ICJ’s *Gabčíkovo-Nagymaros* case, wherein it was noted:

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<sup>66</sup> Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615, 616 (2008).

<sup>67</sup> UNFCCC, *supra* note 18, art. 3.1.

<sup>68</sup> Paris Agreement, *supra* note 21, pmbl. ¶ 11.

<sup>69</sup> CBD, *supra* note 13, pmbl. ¶ 23.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and a growing awareness regarding the risk of the pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed...<sup>70</sup>

### E. Precautionary Principle

The precautionary principle is seen as a strategy to take anticipatory measures in order to avoid uncertain future risks concerning the environment.<sup>71</sup> The formal definition in Principle 15 of the Rio Declaration<sup>72</sup> is considered to have attracted the widest support by States.<sup>73</sup> Using similar terminology, UNFCCC directs that:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.<sup>74</sup>

Likewise, CBD mentions in its preamble:

where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.<sup>75</sup>

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<sup>70</sup> Gabčíkovo-Nagymaros, 1997 I.C.J., 77, ¶ 140.

<sup>71</sup> Jonathan B. Wiener, *Precaution*, in *The Oxford Handbook of International Environmental Law* 598, 598-599 (Daniel Bodansky et al. eds., OUP, 2008).

<sup>72</sup> 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' Principle 15, UNCED, Rio Declaration on Environment and Development, June 13, 1992, U.N.Doc. A/CONF.151/26. Rev.1.

<sup>73</sup> Sands et al., *supra* note 63, at 230.

<sup>74</sup> UNFCCC, *supra* note 18, art. 3.3.

<sup>75</sup> CBD, *supra* note 13, pmb. The Cartagena Protocol on Biosafety to CBD refers to Principle 15 of the Rio Declaration while addressing the import of living modified

There is an interesting international jurisprudence available in this area as well. In the *Pulp Mills* case, for instance, the ICJ observed that ‘while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute [of the River Uruguay], it does not follow that it operates as a reversal of the burden of proof’.<sup>76</sup> Although the Court did not anoint precautionary principle as the international customary law, at the very least its assertion suggested that the principle has certain decisive effects in international law.<sup>77</sup> In 2011, in its *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, the Seabed Disputes Chamber of ITLOS touched upon two critical aspects. Firstly, the Chamber noted that disregarding ‘plausible indications of potential risk...would amount to a failure to comply with the precautionary approach’<sup>78</sup> and secondly, it observed Principle 15 of the Rio Declaration ‘has initiated a trend towards making this approach part of customary international law’.<sup>79</sup>

With reference to CCH, it can be asserted that the precautionary principle entails the commitment of States ‘to act carefully and with foresight when taking decisions that concern activities that may have an adverse impact on the environment’,<sup>80</sup> including, at a later stage, regulation of activities potentially harmful to the environment, even if there is no conclusive evidence of the harm they may cause.<sup>81</sup> It consists of a strong future-oriented perspective that promotes the idea of intergenerational solidarity, based on the premise that ‘policy-makers at all levels should feel compelled to administer and conserve

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organisms. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, arts. 1, 10.6 and 11.8, Jan. 29, 2000, 39 I.L.M. 1027.

<sup>76</sup> *Pulp Mills*, *supra* note 45, at 71, ¶ 164.

<sup>77</sup> Sands et al., *supra* note 63, at 236.

<sup>78</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, Feb. 1, 2011, ITLOS Reports 2011, 10, 46, ¶ 131.

<sup>79</sup> *Id.* at 47, ¶ 135; Sands et al., *supra* note 63, at 239.

<sup>80</sup> Sands et al., *supra* note 63, at 234.

<sup>81</sup> *Id.*



the earth's ecosystem as an indispensable basis for the wellbeing of humankind, both now and in the future'.<sup>82</sup>

## F. Sustainable Development

In its report 'Our Common Future' of 1987, the World Commission on Environment and Development (known as the 'Brundtland Commission') defined the term 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>83</sup> The term began to gain traction post-UNCED in 1992. Since then, it has influenced a broad number of multilateral legal instruments with some authors asserting that we are witnessing 'a transition from international environmental law and international economic law to an international law of sustainable development'.<sup>84</sup>

The key features of sustainable development are placed in Principle 3 of the Rio Declaration, which highlights its interrelation with the principle of intergenerational equity. Per Principle 4: 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. The 2002 Johannesburg Declaration on Sustainable Development further declared that 'economic development, social development and environmental protection' constitute the 'interdependent and mutually reinforcing pillars of sustainable development'.<sup>85</sup>

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<sup>82</sup> Beyerlin & Marauhn, *supra* note 38, at 52.

<sup>83</sup> WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (OUP, 1987).

<sup>84</sup> ALAN BOYLE & DAVID FREESTONE, INTRODUCTION TO INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT - PAST ACHIEVEMENTS AND FUTURE CHALLENGES 1, 3 (Alan Boyle & David Freestone eds., OUP, 1999).

<sup>85</sup> WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, JOHANNESBURG, 26 AUGUST-4 SEPTEMBER 2002, ¶ 5, U.N. Doc. A/CONF.199/20, at 1 (Aug. 26 – Sep. 4, 2002).

The principle of sustainable development has also been included in the multilateral treaties related in one way or another to CCH. UNFCCC specifies that ‘the Parties have a right to, and should, promote sustainable development’,<sup>86</sup> the Kyoto Protocol refers to the promotion of sustainable development as an objective of combating climate change,<sup>87</sup> and the Paris Agreement emphasizes upon ‘the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty’<sup>88</sup>. In CBD, the sustainable use of the components of biodiversity and the conservation of biodiversity itself are two of the main objectives of the convention.<sup>89</sup>

The vision of sustainable development as a principle that informs other norms was in a way recognized by the ICJ in the *Gabčíkovo-Nagymaros* case. After referring to ‘new norms and standards’ that have been developed to deal with the relationship between economic activities and environmental protection, the ICJ observed that the ‘need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development’.<sup>90</sup> Further details on sustainable development were provided in the Separate Opinion of Judge Weeramantry in the same case. For him, sustainable development was ‘more than a mere concept, but as a principle with normative value’.<sup>91</sup> He further explained:

The principle of sustainable development is...a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community. The concept has a significant role to play in the resolution of environmentally related disputes...It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both

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<sup>86</sup> UNFCCC, *supra* note 18, art.3.4.

<sup>87</sup> Kyoto Protocol, *supra* note 59, art.2.1.

<sup>88</sup> Paris Agreement, *supra* note 21, pmbl. ¶8.

<sup>89</sup> CBD, *supra* note 13, art.1.

<sup>90</sup> *Gabčíkovo-Nagymaros*, *supra* note 70.

<sup>91</sup> *Id.* at 88.

development and environmental protection, and that neither of these rights can be neglected.<sup>92</sup>

It is the integrative character of the principle (i.e. functioning as the bridge between other approaches), which allows for the reconciliation of the conflicting interests, thus offering guidance in the application of rules and 'inevitably [influencing] the further development of law'.<sup>93</sup> In the words of the International Law Association the integrationist approach 'is the primary means by which courts and tribunals provide an overarching conceptual framework for sustainable development'.<sup>94</sup> Seen this way, the said principle could thus become a powerful tool in the context of dispute settlements and infusion of a universal consciousness against specific forms of environmental harms, including marine plastic pollution and others.

## V. Conclusion

CCH embraces the interest of the international community in protecting the global environment and humanity from harm caused by anthropogenic activities. It must be conceded, however, that CCH *per se* is not enough to give significant guidance for the conduct of States. Due to its generality or abstraction, it requires succor from more specific norms to support its practical application. Those norms, according to their degree of particularity, are principles and rules. The

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<sup>92</sup> *Id.* at 95.

<sup>93</sup> Lowe, Vaughan; *Sustainable Development and Unsustainable Arguments*, in *International Law and Sustainable Development - Past Achievements and Future Challenges* 19, 34 (Alan Boyle & David Freestone eds., OUP, 1999); French, *supra* note 30, at 65; NICOLAS DE SADELEER, *ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES* 307 (OUP, 2002); CHRISTINA VOIGT, *SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW* 162 (Martinus Nijhoff, 2009).

<sup>94</sup> 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development in *Int'l Law Association, Rep. of the Seventy-Fifth Conference* 866, 866 (Int'l Law Association, 2002).

former can supply content to CCH, thus guiding the actions of the States towards the protection of the environment for the benefit of all.

CCH has proven to be suitable in dealing with global environmental issues such as climate change and its adverse effects on the conservation of biodiversity. In the particular case of the regulation of marine plastic pollution, the characteristics associated with CCH are directly relevant because it is a global and long-term environmental challenge, affecting both present and future generations, that requires the cooperation of the international community in order to, ultimately, achieve the protection of the environment from marine plastic pollution.

The application of CCH as a framework for a prospective international legally binding instrument on marine plastic pollution might be useful to approach a global problem which, like other major environmental issues, transcends the boundaries of a single State and requires a culture of collective action.

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