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Our Planet

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on climate and justice.

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UNEP

From the desk of

KLAUS TOEPFER

**United Nations
Under-Secretary-General
and Executive Director,
UNEP**

This issue of *Our Planet* is dedicated to the Millennium Development Goals and the rule of law.

While much can be achieved by voluntary action, from tackling extreme poverty to delivering safe and sufficient drinking water, the achievements will be even greater if underpinned by a sound legal structure and a vibrant judiciary. Nowhere is this more important than for the environment which, with economic and social development, forms part of the virtuous trio of pillars on which sustainable development depends.

Natural capital

Some may still view the environment as a luxury: they see a river or a forest as only worth conserving for its beauty when all other development-related issues have been resolved. But this natural capital is, along with the financial and human variety, the very foundation of health and wealth because of the 'ecosystem services' it provides. Some experts have calculated that these nature-based services – from the atmosphere and ozone layer to the globe's wetlands and

grassland – are worth \$33 trillion a year, nearly twice the 'world' GNP of human-made goods and services of around \$18 trillion.

Paper tigers

Until recently, the laws designed to protect this natural wealth – and its vital role in fighting poverty – have either been inadequate or patchily implemented. There are, of course, more than 500 international and regional agreements, treaties and arrangements covering everything from the protection of the ozone layer to the conservation of the oceans and seas. Almost all countries have national environmental laws. But unless these are enforced and complied with then they are little more than symbols, tokens or paper tigers.

Part of the problem has been that legal experts' awareness of environmental law – particularly, but not exclusively, in developing countries and the nations of the former Soviet Union – has not kept pace with the growth in agreements and with the recognition of the crucial importance of balancing environmental, developmental and social considerations in judicial decision making. Sometimes it is also due to a lack of resources, sometimes to downright apathy; but, whatever the cause, many environment-related cases fail to reach or succeed in court.

Increasing awareness

This goes to the heart of the Millennium Development Goals, as it affects billions of people. We are increasingly aware that what happens in one part of the world can affect other areas – be it toxic pollutants from Asia, Europe and North America contaminating the Arctic, or the greenhouse gases of the industrialized regions triggering droughts or the melting of glaciers in developing ones.

In 2002 UNEP convened a symposium of more than 100 senior judges from around the world to boost the training, knowledge and awareness of the world's judiciary. They adopted the Johannesburg Principles on the Role of Law and Sustainable Development, which were presented

to that year's World Summit on Sustainable Development (WSSD). The judges have since formed a Global Judicial Alliance with UNEP, giving greater attention to their role in advancing the Millennium Development Goals through the rule of law.

We have all been striving to realize the Johannesburg principles, and I am happy to report key successes. Only a few weeks ago, chief justices and legal experts from the Arab world met in Cairo and adopted the statute of the Arab Judges Union for the protection of the environment. A similar meeting involving the francophone countries will take place in Paris in February 2005, chaired by Guy Canivet, the chief justice of France. A European Union Judges Forum on the environment has been established, and comparable ones set up in Latin America, Asia, southern Africa and the Pacific. And the Government of Egypt is taking steps to establish a judicial training centre in Cairo.

Crucial development

At WSSD, Arthur Chaskalson, Chief Justice of South Africa, who co-hosted the symposium, said: 'Our declaration and proposed programme of work are, I believe, a crucial development in the quest to deliver development that respects people and that respects the planet for current and future generations and for all living things. The rule of law is the basis for a stable country and ultimately stable world.'

I believe that, as a result of this two-year effort, the environment pillar of sustainable development is a little stronger and better able to carry forward the Millennium Development Goals ■

YOUR VIEWS

*We would really like to receive your feedback on the issues raised in this edition of **Our Planet**. Please either e-mail feedback@ourplanet.com or write to:*

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STRENGTHENING THE RULE OF LAW

KOFI ANNAN,
UNITED NATIONS
SECRETARY-GENERAL



UN Photo by Mark Garten

NO ONE IS ABOVE THE LAW, and no one should be denied its protection....

The rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, while the powerful manipulate laws to retain power and accumulate wealth....

At the international level, all states – strong and weak, big and small – need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From trade to terrorism, from the law of the sea to weapons of mass destruction, States have created an impressive body of norms and laws. This is one of the United Nations proudest achievements.

And yet this framework is riddled with gaps and weaknesses. Too often it is applied selectively, and enforced arbitrarily. It lacks the teeth that turn a body of laws into an effective legal system....

Just as, within a country, respect for the law depends on the sense that all have a say in making and implementing it, so it is in our global

community. No nation must feel excluded. All must feel that international law belongs to them, and protects their legitimate interests.

Rule of law as a mere concept is not enough. Laws must be put into practice, and permeate the fabric of our lives....

Throughout the world, the victims of violence and injustice are waiting: waiting for us to keep our word. They notice when we use words to mask inaction. They notice when laws that should protect them are not applied.

I believe we can restore and extend the rule of law throughout the world. But ultimately, that will depend on the hold that the law has on our consciences. The organization was founded in the ashes of a war that brought untold sorrow to mankind. Today we must look again into our collective conscience and ask ourselves whether we are doing enough.

Each generation has its part to play in the age-long struggle to strengthen the rule of law for all – which alone can guarantee freedom for all. Let our generation not be found wanting.

Taken from the Address to the General Assembly, New York, 21 September 2004.

The boundaries of environmental law are expanding rapidly. The Millennium Declaration pledged to spare no effort to free all humanity from the threat of living on a planet irredeemably spoiled by human activities and whose resources would no longer be sufficient for its needs. It builds on the first principle of the Stockholm Declaration which, more than 30 years ago, recognized our fundamental right to adequate conditions of life and an environment of a quality that permits dignity and well-being. We also owe corresponding obligations to ourselves and to future generations to protect and improve the environment.

There are fundamental issues that we need to address: the tension between development and protection of the environment, particularly acute in the poorer developing countries, but present throughout the world; the tension between short-term needs and long-term concerns; the tension between developing frameworks of laws designed to protect the environment and implementing them; and the issue of globalization and the presence throughout the world of multinational corporations, which are often the source of development, but are also a source of environmental damage.

Securing respect

It may seem strange that judges, who have at times been considered somewhat aloof, should concern themselves about these matters. But they do. More than 100 senior judges from around the world, including 32 chief justices, held a conference in Johannesburg at the time of the 2002 World Summit on Sustainable Development and acknowledged the existence of these rights and obligations. They also acknowledged the important role that civil society has in securing respect for these rights and compliance with these obligations.

Rights are not self-executed. We have learned from bitter experience that unless they are vigorously and assertively enforced, they may have no substance. Civil society has a crucial role in promoting

The more vibrant civil society, the greater the likelihood is that rights and freedoms will be respected

Partners in law

ARTHUR CHASKALSON describes how the judiciary is increasingly working with civil society and the international community to secure and enforce environmental rights and freedoms

respect for and asserting fundamental rights and freedoms. As a South African, I have lived in a society in which there was no respect for rights, freedoms and human dignity. I know from my own experience the absolutely crucial role that civil society played in the struggle for them in my country and how much we owe it for the rights and freedoms that we have now in our country today and the extraordinary Constitution in which they are entrenched.

Right to the environment

One of the rights and freedoms entrenched in our Constitution is the right to the environment. It says that everyone has the right to an environment which is not harmful to healthy well-being, and to have it protected for the benefit of present and future generations through reasonable legislation and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

It is one of a series of socio-economic rights in our constitution, which also include the right to access to health care,

the right to access to housing, the right to access to education and children's rights. All these rights are 'justice seeable' and our courts are being called upon on occasion to enforce them. In doing so, they have occasionally told the Government that it is not complying with its obligations under the Constitution.

Central cases

The really central cases are almost always brought to court by organs of civil society. They have the expertise, the knowledge and the commitment to assemble facts in a coherent way and to identify the crucial issues – and to present a case which brings to the fore these rights and the suffering of the people being denied them, and explains the reasons why the court should intervene. Great suffering can occur if those cases are not brought before the court – or worse are brought, but not properly, so that important evidence is left out and important arguments not raised, causing the case to fail through lack of preparation.

Civil society is therefore the engine for asserting these rights and freedoms, but the judiciary also has an important role to play in upholding them. In this sense, the ▶

Henry M. Nyaga/UNEP/Topham





James Hong Yi Wai/UNEP/Topham

judiciary and organs of civil society are partners in securing compliance with the law. Those who suffer the most when rights are not protected, and freedoms are not upheld, are the poor. It is the poor, too, who are likely to suffer the most as a result of environmental degradation. But it is not only the poor and marginalized sections of the community who look to civil society to protect their rights and interests: all sections of society do so. It is the responsibility of governments and civil society to see these rights are not abused or ignored. The more vibrant civil society, the greater the likelihood is that rights and freedoms will be respected.

At the judges' symposium in Johannesburg, we recognized that the boundaries of environmental law are expanding rapidly, and that there is an urgent need for a concerted and sustained programme of work focused on education, training and disseminating information in this field. We recognized the importance of public participation in environmental

We must learn to act as equal members of a community with concern for the welfare of all

decision making; the need for access to justice for the settlement of environmental disputes and for the defence and enforcement of environmental rights; and the necessity for public access to relevant information. We acknowledged the important contribution of the whole of society and the need to strengthen the capacity of organizations and initiatives that seek to enable the public to focus attention – on a well-informed basis – on environmental protection and sustainable development issues.

Capacity building is important. The judges are committed to undertaking programmes to enhance their knowledge and skills in environmental law. They recognize that there is a need for civil society to do the same, and fully support initiatives to bring this about. A second meeting of senior judges, in Nairobi in January 2003 – called to give substance to the discussions in Johannesburg, and to plan for implementing some of the decisions taken there – also recognized the important role of civil society. It called on UNEP to develop and implement programmes of capacity building, not only for judges but for other legal stakeholders such as prosecutors, enforcement officers, lawyers, public-

interest litigation groups and others engaged in developing, implementing and enforcing environmental law in the context of sustainable development. The judges expressed their full support in cooperating with UNEP in developing and implementing such programmes – particularly in developing countries and countries in transition. They undertook themselves to contribute towards capacity building within the judiciary, and formed a committee of ten senior judges from all regions of the world to advise UNEP on developing and implementing the capacity building programme.

Being human and fallible, we all tend to think about ourselves more than others; about the present time, rather than the future. We must learn to act as equal members of a community with concern not just for our own welfare but for the welfare of all, for the welfare of our children and their children, and their children's children. If we aspire to sustainable development and a healthy environment, that is the commitment we must make ■

The Honourable Justice Arthur Chaskalson is Chief Justice of the Republic of South Africa.

JUSTICE can be shortsighted

CHRISTOPHER WEERAMANTRY outlines shortcomings in modern legal systems in the light of sustainable development and calls on judges to bring longer perspectives to the bench

Sustainable development is one of the most vibrant topics in both domestic and international law. Judges, as custodians of the law, have a major obligation to contribute perspectives that might otherwise pass unnoticed.

The gap between the world's rich and poor – which modern technology should enable us to narrow – unfortunately keeps widening. Development is the bridge by which we can cross it. Unfortunately, we tend to build this bridge with material stolen from future generations. Similarly, development is taking place all over the world without regard to environmental considerations. This hurts two groups in particular – the unborn and the poor. Neither has the ability to assert its rights. Neither is sufficiently vocal. The judiciary must hold the balance between powerful interests on the one hand and the voiceless on the other. This imposes an enormous role of trusteeship upon the judiciary, which has a delicate act to perform in balancing the rights and needs of those who are now alive with those of future generations.

African traditional wisdom teaches us that the human community is threefold: those who went before, those who are alive here and now, and those who are yet to come. No human problem can be completely considered without reference to all those three. Yet we tend to look at environmental matters with blinkers on. We do not look at the traditions that have come down to us from the past. We do not look at those who are going to be deprived in the future. We just concentrate on the present. Modern law is shortsighted. Who is better placed to supply the necessary correctives than the judiciary?

Developing concepts

There are many different principles within the principle of sustainable development. These include intergenerational rights, the trusteeship principle, the principle of collective duties, the emphasis on duties rather than rights, the precautionary principle, the concept of the interrelationship of rights and obligations, rights and duties *erga omnes* (ie towards the whole of the human community) and so on. All of those are concepts which judges are able to develop. The judiciary is at the centre of the development of the concept of sustainable development.

Humanity has lived with its environment for thousands of years. Out of that cohabitation, principles have evolved and become ingrained in the traditions of many cultures and civilizations. The law that judges administer must be a multicultural assemblage of the wisdom of the world. If we look at the wisdom of China, Japan, Europe itself before



Erna Lammers/UNEP/Topham



the Industrial Revolution, the Islamic civilizations, India, Sri Lanka, Africa and its outstanding examples of environmental conservation, Australia, the Native Americans and so forth, we will learn respect for the one common environment which we all inhabit. Modern law tends to lose sight of such ancient wisdom and the judiciary has a sterling role to play in bringing it into modern judicial discourse.

Sri Lanka was converted to Buddhism through the mission of the Emperor Asoka's son 23 centuries ago. He came to Sri Lanka as a monk and accosted the king when he was on a hunting expedition. 'What is this you are doing?' he asked. 'You are hunting these poor animals and behaving as if you are the owner of this land. You are not the owner of this land. You are only the trustee, bear that in mind. And you hold it in trust for all living creatures who are entitled to use it.' This is the first principle of modern environmental law. The trusteeship principle is as old as humanity, as old as human beings living together on the planet in a common environment.

We must devise similar concepts, and the procedures to deal with them, because we are interested not just in the development but also in the enforcement of environmental law. One concept is *continuous mandamus*, the question of standing. How can generations yet unborn appear before a

a means of keeping the peace but also a means of active cooperation for the benefit of the community.

There is also excessive emphasis, particularly under the influence of 19th century positivism, on the letter of the law. Yet all our great traditions say the letter of the law is not as important as the principles that lie behind it. Many tend to regard contractual rights as ones with which other people – the court, the state and so on – cannot interfere because they spring from a private arrangement between two parties. Yet this arrangement can concern the whole community. If somebody sells or leases his land to somebody else, that person cannot use it like an article of movable property to do with it what he will. Certain obligations towards the community follow from the ownership of land.

There is a concentration on the present generation rather than on all those yet to come. We also think of ourselves, human beings, as the only entities that have rights on this planet. And although the law tends to know no cultural bounds, we do not yet think of ourselves as multicultural. All this has led to much shortsightedness and many environmental problems.

Active cooperation

The law of the future must be a law of active cooperation.

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