the SPANISH YEARBOOK of INTERNATIONAL LAW

Back to the Future: the Rio Declaration on Environment and Development and its Principles in their 25th anniversary with a Spanish perspective

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Abstract: The Rio Declaration and its principles had a ground-breaking impact in international law as well as in domestic legal orders. They went beyond their soft-law nature and became a normative horizon that has guided the evolution of international environmental law. Some of the principles then became customary law and others found their way into international agreements. Changes in the global scenario have led to their revision in the form of an affirmation of the principle of sovereignty "taking into account national circumstances" and responding to challenges of implementation and compliance at both international and national levels. Moreover, they empowered non-state actors that became unexpectedly their enforcers. The Rio Principles have the capacity to project themselves into the future, as shown in the case of the proposal of a Global Pact for the Environment that would incorporate most of them in a future treaty. In Spain, the Rio Declaration and its Principles have been referential for the development of environmental law and through the European Union have acquired a stronger normative intensity. However our commitment as a country has depended more on our obligations towards the European Union than on an individual pledge towards the planet.

Keywords: Rio Declaration – Sustainable Development – Principles of International Environmental Law, Soft Law, Environmental Governance

(A) INTRODUCTION

The Rio Declaration on Environment and Development that was adopted at the United Nations Conference of the same name in 1992 in Rio de Janeiro has just celebrated 25 years in June 2017. Examining its influence in this historic period with the benefit of hindsight brings back memories of those years after the end of the Cold War and the fall of the Berlin Wall that were full of great expectations but which have never been met.[1] Back then, the Rio Declaration on Environment and Development and its principles served these expectations establishing a wider normative horizon for States and international organizations that reformulated the principle of state sovereignty as set out in Article 2 of the United Nations Charter, with a functional approach redefining both rights and obligations derived from the territorial power of the State.[2] 25 years later, on 24 June 2017, on the very dates when the Rio Conference on Environment and Development took place, with all the nostalgia but with new political ambitions, a French think tank, le Club de Juristes[3] has presented a proposal to

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1 This study has its origin in the editorial 'Sobre los 25 Años de la Declaración de Río sobre el Medio ambiente y el Desarrollo' in the 8 *Revista Catalana de Derecho Ambiental*, (2017) 1-5.

2 See W. Lang, 'UN-Principles and International Environmental Law', 3 *Max Planck* UNYB (1999), P. H. Sand, 'Global Environmental Change and the Nation State: the Sovereignty Bounded,' in G. Winter (Ed.), *Multilevel Governance of Global Environmental Change* (Cambridge University Press, Cambridge, 2006).

3 This covenant is the draft of a future treaty with a preamble and 26 articles that turn into obligations the Rio principles. See La Commission Environnement du Club de Juristes, 'Vers un Pacte mondial pour l'environnement: Agir pour la planète, agir par le droit', 24 June 2017.

 DOI: 10.17103/sybil.21.6

set a global covenant that will turn most of the principles of this soft law instrument into the rules of an international treaty.[4] President Macron has already endorsed this proposal for a Global Pact for the Environment as one of the goals of French Foreign Policy. If it is adopted, whatever form it takes, soft or hard international law, it will consolidate Rio's most successful principles. Furthermore, it will introduce state-of-the-art principles such as that of non-regression[5] as foreseen in the French and Spanish domestic laws and courts,[6] that will inspire the evolution of international environmental law in an ambitious exercise of progressive development of international law, responding to the need to preserve the status of conservation of the environment against the catastrophic risks of the twenty-first century.

Beyond its legal impact, the Rio Declaration and its principles have an essential influence in environmental politics and the way they have been designed at the national level by state and sub-national authorities. It is this political dimension that has been less addressed by international law academics, but has been embraced by the international relations experts that have seen the Rio Declaration as the final result of a political discourse to convince the non-believers, the reluctant leaders of developed and developing countries to start acting to protect the environment.[7] This political discourse has also informed global governance and has triggered the required changes to empower a more caring and committed international civil society,[8] willing to show the states the path to follow.[9] The Rio Declaration and its principles have also become part of the self-empowerment and diplomacy of sub-state actors and non-state actors[10] as new unacknowledged co-law-makers of the world and executors of their obligations. Thus, in the case of the sub-state entities, as seen recently in the United States of America, after President Trump's desertion of the Paris Agreement on Climate Change, federal states and cities all over the country have decided to go on complying with the

4 Available here.

5 See M. Prieur, 'Non-regression in environmental law', 5.2 *S.A.P.I.E.N.S* (2012).

6 See Conseil Constitutionnel of France, Referral of 21 July 2016, Case 2016-737 DC and the Spanish Constitutional Court 233/2015, of 5 November 2015, BOE Num. 296 11 Nov. 2016.

7 They consider the Rio Declaration as a soft law instrument. As Abbot and Snidal, two referential American authors put it with an interdisciplinary scope transcending divisions between international relations and international law, have argued, 'it initiates a process and a discourse that may involve learning and other changes over time' allowing actors to evaluate their soft law commitments in the perspective of legalization, K. Abbott y D. Snidal, 'Hard and Soft Law in International Governance,' 54 *International Organization* (2000) at 423.

8 Kiss pointed that 'Grâce aux préparatifs de la Conférence de Rio et à son déroulement une «société civile» internationale a pu emerger. (...) Au plan du droit l'aboutissement du processus devrait être la reconnaissance d'une place aux représentants de cette société civile internationale dans les procédures menant à l'élaboration de textes internationaux, mais surtout dans celles qui permettent de contrôler et de mieux assurer la mise en oeuvre effective des règles internationales', A. Kiss, 'Le droit international à Rio de Janeiro et à côté de Rio', 1 *Revue Juridique de l'Environnement* (1993) at 45.

9 As Colás considers, 'international civil society should be associated not only with the agents that operate outside the immediate control of the state, but also with those social forces that have shaped the international society of states', A. Colás, *International Civil Society, Social Movements in World Politics* (Polity Press, Cambridge, 2002) at 170.

10 As in previous works, Cornago explores the political and legal aspects of the diplomacy of sub-state entities, identifying as possible manifestations 'the extension of international agreements through diverse soft-law mechanisms, limited participation in international treaty-making processes (...), intensive participation in multilateral negotiation schemes on a geographical or functional basis'; see N. Cornago Prieto, 'On the Normalization of Sub-State Diplomacy', 5 *The Hague Journal of Diplomacy* (2010) 11-36, at 17.

 DOI: 10.17103/sybil.21.6

acquired commitments becoming the new counterparts on the on-going development of the legal framework to fight against climate change.

As the final statement adopted in the Rio Conference, the Declaration was based on a laboriously achieved consensus assembling the developed and developing countries' views, so often diverging but then reconciling into a common understanding of future challenges and principles to inspire decision-making and action at international and national levels.[11] So it had a complex conceptual structure with a short preamble and 27 principles, some of a political nature and others with different normative intensity. These principles respond to three goals: first to define concepts and links relating development and environment as well as proposing political and environmental rights for the citizen, second, to propose the basic guidelines for public environmental policies, and finally, to consolidate the normative principles of the Stockholm Declaration of 1972, as well as to formulate new ones, meant to be part of both the international legal order and domestic law.

Despite its contested legal nature as a soft law instrument,[12] the great contributions that the Rio Declaration and its principles brought about reside in the functions they have played ever since their adoption. They have informed norm-creation and policy-making at international and domestic levels, as well as norm-implementation, interpretation and adjudication of international law.[13] They are also referential in dispute settlements between States and in conflicts between legal regimes.[14] They have offered guidance and channelled expectations for the future legal development of international agreements, with special relevance in the case of the Conventions also adopted in the Rio Conference, the Convention on Biological Diversity[15] and the Convention on Climate Change that incorporated provisions with the specific principles that should govern their legal development.[16] And as in these

[11] Linking this consensus and the sustainable development principle, Viñuales said 'Born in the 1980s as a conservation concept, 'sustainable development' was brought to light by the report of the Brundtland Commission, 'Our Common Future', in 1987, and crowned at the Earth Summit, in 1992, as the leading concept guiding global efforts to protect the environment. Other concepts had been developed over time, including those of 'eco-development' or 'green economy', but they were unsuccessful in gathering consensus among different stakeholders. 'Sustainable development' proved to be superior in accommodating the developmental concerns expressed by countries such as Algeria, Brazil and India since the late 1960s. Yet, it did not crack the environment–development equation. Rather, it drew a veil over it to enable consensus', J. Viñuales, 'The Rise and Fall of Sustainable Development', 22 *RECIEL*, (2013) at 4.

[12] In this case, the Rio Declaration responds to the definition of soft law adopted by D. Shelton who described it as 'normative provisions contained in non-binding texts', D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford University Press, Oxford, 2000, 2007 reprint). See also, M. Pallemaerts that says, 'It is obvious from their drafting history, form and content, that the Stockholm Declaration, World Chapter for Nature and Rio Declaration each belong to the realm of soft law', M. Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' 1 *RECIEL* (1992), at 254.

[13] States have invoked Rio principles in the context of legal claims against other States adjudicated before international tribunals as it will be analysed below. See T. Fajardo, 'Environmental law principles and General principles of international law', in L. Kramer and E. Orlando (Eds.), *Principles of Environmental Law*, (Elgar Encyclopaedia of Environmental Law, Vol. VIII, 2018), forthcoming.

[14] See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press, Cambridge, 2006).

[15] See Secretariat of the Convention on Biological Diversity, *The Ecosystem Approach*, (CBD Guidelines) Secretariat of the Convention on Biological Diversity 2004).

[16] Art. 3 of the UN Framework Convention on Climate Change sets out a number of international environmental principles applicable to the regime, to be used to guide the implementation of the instrument and assist in meeting the ultimate objectives of this convention. As Maguire examined, the international environmental principles referred to within

 DOI: 10.17103/sybil.21.6

conventions, Rio Principles also inspired all the institutional and normative frameworks that afterwards were adopted and developed in the field of the environment and guided their interpretation.[17]

The Rio Declaration and its principles also served to interpret other international commitments of the fragmented international system, acting as limits for other regimes such as international economic law and investments or humanitarian law, even though, the opposite conclusion was also sustained since this influence could also be interpreted as the acceptance of subordinating environmental protection to all international sectors through its diluting principles.[18] In any case, the Rio Principles have played an important role in the cases of cross-fertilization among different legal regimes, serving to diffuse the conflicts among different rules and making them mutually supportive, at least on paper, so, for instance, trade and the environment have been linked thanks to the Principle of sustainable development.[19]

At the national level, the Rio Declaration and its principles have had a seminal effect in domestic law and policies that led to the adoption of a wide array of measures both related with decision-making and green governance at state, regional and local levels. Its principles related with public participation and empowering non-state actors have deeply influenced the role that NGOs and citizens play in the protection of the environment nowadays. This study will also assess their influence in the Spanish legal order and case law.

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the UNFCCC are sourced from earlier international instruments, binding acts of international institutions and customary international law and may have not reached the status of customary international law. See R. Maguire, 'Foundations of International Climate Law: Objectives, Principles and Methods', in E. Hollo, K. Kulovesi and M. Mehling (Eds.), *Climate Change and The Law*, Ius Gentium: Comparative Perspectives on Law and Justice, (Springer, 2013), 83-110.

[17] See G. Loibl, 'Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – The Role of 'International Institutions'', 5 *Non-State Actors and International Law*, (2005), 1-20.

[18] Thus, Pallemaerts was very critical about the relationship between environment and trade pointing out, 'Another provision of the Rio Declaration implicitly subordinating international environmental law to international economic law can be found in Principle 12, which addresses the issue of 'trade policy measures for environmental purposes'. Paraphrasing Article XX of GATT, it emphasises that such measures: 'should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. In an apparent attempt to generalise the holding of the GATT panel in the recent dispute between the US and Mexico on tuna import restrictions, it recommends that 'unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided', M. Pallemaerts, *supra* n. 12, at 263.

[19] For instance, the Title IX on Trade and Environment of the Trade Agreement between the European Union and its Member States and Colombia and Peru. Its Article 267.1 on Context and Objectives says: 1. Recalling the Rio Declaration on Environment and Development and the Agenda 21 adopted by the United Nations Conference on Environment and Development on 14 June 1992 (...), the Parties reaffirm their commitment to sustainable development, for the welfare of present and future generations. In this regard, the Parties agree to promote international trade in such a way as to contribute to the objective of sustainable development and to work to integrate and reflect this objective in their trade relationship. In particular, the Parties underline the benefit of considering trade-related labour and environmental issues as part of a global approach to trade and sustainable development'. See the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJ L 276*, 21.12.2012, at 79.

 DOI: 10.17103/sybil.21.6

(B) THE RIO DECLARATION IN ITS TIME: BACK TO THE FUTURE

The Rio Declaration was seen in its time as a half empty glass[20] because it failed to address all the problems or to formulate all the principles of international environmental law,[21] as previously the Stockholm Declaration on Human Environment of 1972 also failed to address then. It was also seen as a half empty glass due to the fact that it subordinated environmental protection to economic development in some of its principles[22] (Principles 2, 3, 4, 5, 8). This subordination had been a requirement of the developing countries, which had led to adulteration of the formulation of the original version of the Stockholm Declaration Principles, and in particular its Principle 21,[23] to which Principle 2 had added the concept of development[24]:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies*, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[25]

This approach diverged from the Stockholm Declaration that was considered more balanced on this issue,[26] even though, developing countries saw it as a positive adjustment to the environmental focus of Stockholm.

The origin of this vision that linked the environment to development is to be found in the Brundtland Report, "Our Common Future", that was drafted by the World Commission on Environment and Development at the request of the General Assembly of the United Nations, on

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[20] See A. Kiss, 'The Rio Declaration on Environment and Development', in L. Campiglio et al. (Eds.), *The Environment after Rio: International Law and Economics*, (Graham & Trotman / M. Nijhoff, 1994) at 63; David H. Getchest, 'Foreword: The Challenge of Rio', 4 *Colorado Journal of International Environmental Law and Policy*, (1993) 1-19, at 14, Peter H. Sand, 'International Environmental Law' 4 *EJIL* (1993) 377-389.

[21] See J. Viñuales, 'The Rio Declaration: A Preliminary Study', in J. Viñuales, (Ed.), *The Rio Declaration on Environment and Development. A Commentary*, (Oxford University Press, 2015), at 2.

[22] See M. Pallemaerts, *supra* n. 12, at 256.

[23] The Principle 21 of the Stockholm Declaration on the Human Environment says 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' The Stockholm Declaration was adopted in 1972 in the first United Nations conference addressing the protection of the environment, however its title shows the lack of consensus to name the environment. Text available here.

[24] A. Kiss and D. Shelton, *Guide to International Environmental Law*, (Martinus Nijhoff Publishers, Boston and Leiden, 2007) at 12.

[25] The text of the Rio Declaration is available here.

[26] Pallemaerts was very critical on this point, arguing, 'The fact that a clause virtually identical to Stockholm Principle 21 can be found in Principle 2 of the Rio Declaration, appearing at the beginning of the Declaration and not in the 21st place, gives cause for optimism, but a closer reading of Principle 2 reveals a skilfully masked step backwards. The Rio text is not identical to the one adopted in Stockholm: the Rio version of the principle of responsibility stipulates (...) an addition of two words, which is anything but innocent. The stronger emphasis on development in this new version upsets the delicate balance struck in Stockholm between the sovereign use of natural resources and the duty of care for the environment. In the Stockholm Declaration, the sovereign right of states to exploit their natural resources was affirmed in the context of their national environmental policies, giving 'a more ecological colour' to the principle of sovereignty over natural resources (...)', see M. Pallemaerts, *supra* n. 12, at 256.

 DOI: 10.17103/sybil.21.6

which the Rio Declaration is based.[27] This report undertook a diagnosis of the evils of the planet from two main causes: poverty and the model of production and consumption of the developed countries (Principles 3, 5, 6, 8). Far from being disconnected, these causes fed a vicious circle in which poor countries overexploited their resources with a narrow profit margin to meet the demands of developed countries that wanted to consume everything, all the time and at low prices. I consider this diagnosis fully valid today, and moreover the situation has worsened. At the Rio Conference in 1992, in order to solve the well-known problems arising from the excesses of the consumption and production model, science and new technologies were expected to bring about energy efficiency as a remedy for overexploitation and its devastating effects: more goods could be produced with fewer resources and at a lower energy cost. This hope, however, was betrayed by the unrelenting demand for more products and services. The poverty to be eradicated (Principle 5[28]) was mostly due to a colonial past and a global market governed by a law of perpetual dependence of developing countries' production on developed countries' demand. A few decades later, this paradigm has been altered by new and unforeseen circumstances: the scarcity of resources –real or just the idea of future scarcity- has turned developing countries into emerging powers of a new world order. In it, States are now classified according not just to their economic or military power but also according to their bio-capacity and their contribution to global pollution and climate change.[29] The consolidation of this new world system and the late economic crisis has led States, however, to re-examine the meaning and role to be played by some of the pillars of the Rio Declaration, those of the Principles of Sustainable Development (Principles 1, 4, 5, 12, 20 and 27) and the Common but Differentiated Responsibilities (Principle 7[30]) both closely related to Equity[31] (Principle 3[32]). The Principle of Common but Differentiated Responsibilities redefines obligations and reciprocity in international law, altering the obligational structure of most environmental agreements making the asymmetric distribution[33] of

[27] The Brundtland Report took its better known name from Gro Harlem Brundtland who presided over the World Commission. The real title of this report was *Our Common Future*. Its Annex 1 is a Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law. See its text here.

[28] Principle 5 says 'All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world'.

[29] See T. Fajardo, 'Los bienes públicos del medio ambiente: el reto de la gestión sostenible de los recursos naturales en la Unión Europea', 16 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, (2012), at 219-246.

[30] Principle 7 says 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. 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'.

[31] See D. French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities', 49 *International and Comparative Law Quarterly* (2000), at 35.

[32] Principle 3 says 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

[33] Juste Ruiz describes 'conventional asymmetry' as a 'technique consisting of the diversification of the obligations and rights of the parties, which must respond to their different responsibilities according to the respective degree of economic and scientific development. Incentives for certain States, particular derogations, differentiated obligations, grace periods, regionalization, etc., has also had its preferred application in the protection of the atmospheric environment.' See J. Juste

rights and duties a characteristic of these legal regimes, "in view of the different contributions to global environmental degradation". However, the affirmation and later questioning of this principle is clearly reflected in the Framework Convention on Climate Change and its normative development through the Kyoto Protocol and the Paris Agreement which still states in its Article 2.2 that "*This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*".[34] However, during the Paris Agreement negotiations, any claim for compensation for historical responsibility[35] for the effects of development, was finally rejected. The proposal of a Global Pact for the Environment incorporates the Principle of Common but Differentiated Responsibilities in its preamble and in its Article 20 that is called *Diversity of national situations* previous to Article 21 on *Monitoring of the implementation of the Pact*, showing with this position on the pact that there has been a change of course towards the idea of capacity to comply, eluding the responsibility for repairing environmental damage and abandoning the asymmetrical approach that attributed to developed countries the duty to fund cooperation to protect the environment.[36] Now, states are expected to comply with their duties depending on their national capabilities, which is a requirement derived from the fact that their obligations demand domestic legal and policy measures.

In 1987, the Brundtland Report identified many of the risks derived from our modern system of production[37] and foretold catastrophic consequences that now we have to face:

Ruiz, *Derecho Internacional del Medio ambiente*, (Madrid, McGraw Hill, 1998).

[34] See the Paris Agreement on Climate Change.

[35] On the concept of historical responsibility see J. Jaria Manzano, 'El Derecho, el Antropoceno y la Justicia', 7 *RCDA* (2016), 1-13. He says 'debe hacerse frente a la responsabilidad histórica—que se hace visible en expresiones como 'deuda ecológica' o 'deuda climática'—, la inequidad presente—que se materializad en el intercambio ecológicamente desigual en el contexto de la diferenciación centro-periferia en la economía-mundo capitalista—, y la sostenibilidad futura en relación con la transformación antrópica del Sistema Tierra', at 12.

[36] The second paragraph of this Article 21 says 'This mechanism consists of a Committee of independent experts and focuses on facilitation. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall pay particular attention to the respective national circumstances and capabilities of the Parties', see *supra* n. 4.

[37] See the Brundlant Report, *supra* n. 28, at 35.

 DOI: 10.17103/sybil.21.6

> "31. Many of the risks stemming from our productive activity and the technologies we use cross-national boundaries; many are global. Though the activities that give rise to these dangers tend to be concentrated in a few countries, the risks are shared by all, rich and poor, those who benefit from them and those who do not. Most who share in the risks have little influence on the decision processes that regulate these activities.
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> "32. Little time is available for corrective action. In some cases we may already be close to transgressing critical thresholds. While scientists continue to research and debate causes and effects, in many cases we already know enough to warrant action. This is true locally and regionally in the cases of such threats as desertification, deforestation, toxic wastes, and acidification; it is true globally for such threats as climate change, ozone depletion, and species loss. The risks increase faster than do our abilities to manage them.
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> "33. Perhaps the greatest threat to the Earth's environment, to sustainable human progress, and indeed to survival is the possibility of nuclear war, increased daily by the continuing arms race and its spread to outer space. The search for a more viable future can only be meaningful in the context of a more vigorous effort to renounce and eliminate the development of means of annihilation."

As expressed in this last paragraph, the Brundtland Report was most concerned at the possibility of a nuclear war, a risk that seemed to be in the past after the end of the Cold war and that now has been unexpectedly brought back by the recent threats of North Korea, which is using nuclear weapons once again to redefine power relations in the global society.[38]

(C) ON THE LEGAL NATURE OF THE RIO DECLARATION AND PRINCIPLES

Discussing the legal nature of the Rio Declaration and its principles requires approaching them, first, as a soft law instrument with a set of legal principles[39] that was adopted as the "one 'product' of the United Nations Conference on Environment and Development designed precisely to embody rules and principles of a general and universal nature to govern the future conduct and cooperation of States (...)".[40] In contrast to this general Declaration, two framework Conventions on Climate Change and Biodiversity were adopted as well as another soft law instrument that was expressly called "Non-legally binding authoritative statement of principles for a global consensus on the management,

[38] See the UN Security Resolution 2371(2017) on North Korea establishing sanctions under Chapter VII of the Charter and its Article 41 after 'Expressing its gravest concern that the DPRK's ongoing nuclear- and ballistic missile-related activities have further generated increased tension in the region and beyond, and determining that there continues to exist a clear threat to international peace and security', *S/RES/2371 (2017)*, 5 August 2017, at 2.

[39] I consider that "as far as universal international law is concerned, a principle of law is only general when it can be found expressed in all the main legal systems of the world. When a judge has found that a given principle is recognized by the civilized nations, he must still ascertain whether it is transposable to the international sphere. There are nonetheless general principles taken from national law that are short-lived. Once recognized by a judgment they tend to crystallize into or become customary international law or be endorsed by treaty law. This does not exclude, however, that 'general principles' may also be used at merely a regional level as shown by the case of the European Union"; see T. Fajardo, 'Environmental law principles...', supra n.13. Also see G. Winter, 'The legal nature of environmental principles in international, EU, and exemplary national law' in G. Winter (Ed.), *Multilevel Governance of Global Environmental Change. Perspectives from Science, Sociology and the Law*, (Cambridge University Press, 2010).

[40] Shelton points out 'in the environmental field, statements of principles coming from global conferences have stimulated the conclusion of both legally binding and non-binding instruments, with peaks of regulation following the Stockholm and the Rio Conferences...', D. Shelton, *supra* n.12, at 555.

 DOI: 10.17103/sybil.21.6

conservation and sustainable development of all types of forests".[41]

As such, both a soft law instrument and a set of principles share some common features: they "may lack the supposedly harder edge of a 'rule' or an 'obligation' but they are certainly not legally irrelevant."[42] In both cases, as an instrument of soft law and as principles, they defy the consensual basis of international law because they have not been agreed in treaty-making processes and have not received endorsement by national assemblies. They have been inferred from domestic law and international agreements and customary law and had been proclaimed in a world conference final statement.[43] Moreover, some of them, as in the case of the precautionary principle (Principle 15[44]), were and still are frequently objected to by States such as in the case of the United States of America that prefer to consider them just as approaches and criteria fulfilling political functions rather than normative ones.[45] Moreover, there are principles that are not universally accepted but have an existence at regional and domestic levels. Others can have a double nature: as a political or non-binding nature for some states and at the same time as binding rules that have become part of the legal systems of others or have been incorporated in international treaties. Thus, the precautionary principle is part of the principles of the environmental policy of the European Union and its Member States[46] and informs both their internal and external policies. So in some of the international agreements celebrated by them, the contracting parties have reserved the potential effects of the precautionary principle when negotiating international obligations with the EU and its Member States that accept it as binding.[47]

For all of it, the Rio Declaration as soft law plays an important role as a "trendsetter for the expanding content of international law"[48] and is in the inception of hard law, despite the difficulties

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41 See Annex III of the Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. III), 14 August 1992.

42 See A.E. Boyle 'Some Reflections on the Relationship of Treaties and Soft Law', *48 International and Comparative Law Quarterly* (1999) 901-913, at 907.

43 See A. Kiss and D. Shelton, supra n. 24.

44 Principle 15 says '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.'

45 See G. Lynham 'The *Sic Utere* Principle as Customary International Law: A Case of Wishful Thinking?', 2 *James Cook U. L. Rev.* (1995), at 172.

46 It is among the EU environmental principles formulated in Article 191.2 of the Treaty on the funcioning of the EU that says: 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'

47 So, for example, Peru made a declaration affirming that it will interpret the Trade Agreement with the EU and its Member States against the background of Principle 15 of the Rio Declaration on Environment and Development on the precautionary principle. See the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJ L 276*, 21.12.2012, at 79.

48 Drumbl characterizes soft law as 'trendsetter for the expanding content of international law' (p.3) even though it defines it as a 'law-like behavior that falls outside the principal sources of law identified in Article 38(1)'. It highlights the role of United Nations as a locus of soft law-making activity (p. 19); M. A. Drumbl, 'Actors and Law-Making in International Environmental Law.' in Malgosia Fitzmaurice, David M. Ong, Panos Mercuris (Eds.) *Research Handbook of International Environmental Law*, (Edward Elgar Publishing, 2010) at 14.

arising when moving from soft law to the binding principles of international law via customary international law or via treaty making processes.[49] Thus the Rio Declaration, as Professors Boyle and Freestone said, "overtly intended to initiate new law for the international community of States and for this reason many of its provisions are formulated in normative and obligatory terms, although the declaration is formally non-binding. It marks the emergence of developing countries as a real and substantial influence on the making of international environmental law...".[50]

On the other hand, confronting the Rio Principles as international principles, with the theory of sources of law leads to opposing solutions. Thus, according to those that consider that Article 38 1(c) of the International Court of Justice Statute lists the general principles as another source of international law, many Rio Principles would be among the sources of international environmental law.[51] However there is no unanimity about this characterization of the principles or even on the theory of sources. As a result, many academic authors in legal traditions such as those of Spain, Latin America or China[52] prefer to refer to forms of creation of international law and discard the principles because they merely reflect treaties and customs rationale.[53] When not considered as a source of law, principles are characterized as non-binding by-products from these forms of creation and manifestation of international law. However, many Rio Principles as examined in the following sections show attributes of hard legalization: obligation, precision and adjudication. In this regard, the wording of the Rio Declaration and principles differs from that of the Stockholm Declaration, as shown by the prevailing use of the word *shall*. The drafting of the Rio obligations had a clear intention to go further; however on too many occasions the lack of precision is the bargaining chip of consensus. Regarding adjudication, the case law of international and domestic tribunals shows a growing list of judgments in which judges have explicitly referred to the Rio Principles while in other cases they have not done so but they have applied them.[54]

Whether or not considered as sources of international law, the Rio Principles are the proof that principles are not redundant since they play different functions from those ascribed to custom or international agreements from which they stem. However, their most relevant function has been to guide interpretation and implementation of international and domestic environmental laws. They inspire policy making and fill gaps in court decision-making avoiding *non liquet*. They helped to

[49] As studied by P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, (New York: Oxford University Press, 3rd Edition, 2009), and P.-M. Dupuy, 'Soft Law and the International Law of the Environment' 12 *Michigan Journal of International Law* (1991) 420-435, at 435.

[50] A.E. Boyle and D. Freestone (Eds), *International Law and Sustainable Development. Past Achievements and Future Challenges*, (New York: Oxford University Press, 1999) at 69.

[51] See T. Fajardo, 'Environmental law principles ...', *supra* n. 13.

[52] See Chiu Hungdah, 'Chinese View on the Sources of International Law' 28 *Harvard International Law Journal* (1987) at 289.

[53] See Drnas de Clément, Z., 'Fuentes del Derecho Internacional del Medio Ambiente', in F. Sindico, R. Fernández Egea & S. Borrás Pentinat (Eds.), *Derecho Internacional del Medio Ambiente. Una Visión desde Iberoamérica*, (Cameron May, London, 2011), Julio A. Barberis, 'Los Principios Generales de Derecho como Fuente del Derecho Internacional,' 14 *Revista del Instituto Interamericano de Derechos Humanos* (1991), at 11.

[54] For instance, this is the case of the Southern Bluefin Tuna Cases, New Zeland, Australia v. Japan (1999), International Tribunal for the Law of the Sea, *38 ILM* (1999), at 1624-1656. See S. Marr, *The Precautionary Principle in the Law of the Sea. Modern Decision Making in International Law* (Martinus Nijhoff Publishers, 2003), at. 1.

 DOI: 10.17103/sybil.21.6

crystallize or to trigger the customary process such as in the case of the principle of the Environmental Impact Assessment (Principle 17[55]) that is now accepted worldwide as a customary norm establishing a tool that States must use at both national and international level. In the Pulp Mills Case,[56] the ICJ referred to transboundary environmental impact assessment as part of customary international law. So, in suitable conditions, use of a general principle has been considered a justifiable act of judicial legislation. What is conspicuously absent are general principles on the law of reparation.[57]

The International Court of Justice has used soft law instruments[58] and principles of environmental law without attributing a legal nature —either customary law or treaty law— but uses it for the interpretation and adaptation, even for the progressive development of international law. Thus, in the *Case Concerning the Gabčikovo-Nagymaros Dam*, regarding the sustainable development principle, the ICJ considered that "new norms and standards have been developed, set forth in a great number of instruments ...[and] have to be taken into consideration, ..., not only when States contemplate new activities but also when continuing with activities begun in the past".[59]

(D) THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT AND THE OTHER RIO PRINCIPLES INSPIRING ENVIRONMENTAL POLICIES AND GOVERNANCE

The influence of the principles and political guidelines of the Rio Declaration that have inspired international environmental law and green governance and the making of public policies over the last 25 years is undeniable. However, it has suffered erosion due to its incessant invocation, in particular, of the principle of sustainable development. Thus, Professor Rodrigo affirms in his work "The Challenge of Sustainable Development", that the abuse of this principle has put it on the verge of irrelevance.[60] Moreover, in recent years, the Rio principles have been relegated to the margins of the political agenda because of the economic crisis.

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[55] Principle 13 says 'Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'.

[56] See A. Cançado Trindade, Separate Opinion, Pulp Mills Case. *ICJ Reports* (2010) 135–215.

[57] See T. Fajardo, 'Environmental law principles ...', *supra* n. 13.

[58] So I considered that 'In the case law of the International Court of Justice, an evolution can be observed from an absolute disregard for the new notions of soft law in the form of United Nations resolutions and declarations, to a certain sensitivity to those soft law instruments that cannot be denied legal effect, as stated by Judge Hersch Lauterpacht in his separate opinion appended to the Court's 1955 Advisory Opinion on South-West Africa: 'It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly ... addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other. (p. 118).', See T. Fajardo, 'Soft Law', *Oxford Bibliographies*, (Oxford University Press, 2014) at 41.

[59] *Case Concerning the Gabčikovo-Nagymaros Dam, ICJ Reports, 1997*, para. 140.

[60] See A.J. Rodrigo, *El Desafío del Desarrollo Sostenible. Los principios de Derecho internacional relativos al desarrollo sostenible*, (Centro de Estudios Internacionales, Marcial Pons, Madrid, 2015).

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(1) The Principle of Sustainable Development

The Brundtland Report defined the Principle of Sustainable Development as:

> "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."[61]

The Rio Declaration recast it in its Principles 1, 4, 5, 12, 20 and 27, by adding different aspects, some of them controversial and open to diverging interpretations. Thus, sustainable development was tainted with an anthropocentric approach because Principle 1 said that "Human beings are at the centre of concerns for sustainable development'" and was subjected and subordinated to economic development because Principle 4 determined that "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". Principle 5 charged it with expectations of justice and redistribution and Principle 12 as analysed below made it not a compass of environmental cooperation but just a moderate factor of correction of the ravaging modes of economic cooperation.

This way, the Rio Declaration established the poly-faceted formula for the Principle of Sustainable Development that would later be the object of multiple adaptations due to its fragmentation in three dimensions: the environmental, the economic and the social, as well as its implementation by an infinite variety of political entities embracing it: non-state actors and the whole range of subnational entities, from federal states to local entities. The concept of sustainable development also encompasses the concepts of sustainable use, intergenerational equity, intra-generational equity and integration.

Despite all this, the Rio Declaration and the Principle of sustainable development have been invoked— not for their nature or normative intensity but for the halo of legitimacy that they confer on any normative or executive act that refer to them in their preambles and provisions.[62] So preambles of all types of legal and executive instruments adopted by international and domestic institutions at all levels of responsibility have invoked the Rio Declaration, the Principle of sustainable development[63] or its Agenda 21 to convince the parties of international conferences and the members of the parliaments and assemblies that they were the necessary and the right measures to adopt to protect the environment –or to pretend they were doing so. However, beyond the good intentions and

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[61] See the Brundlant Report supra n. 28 at 41.

[62] Mercado says that the principle evokes a new imagery of justice: 'el desarrollo sostenible evoca un nuevo imaginario de la justicia que sustituiría al imaginario de la justicia subyacente al hoy tambaleante contrato o compromiso que sostenía al Estado social. Un nuevo imaginario apto para declinar la justicia en todos los niveles espaciales (locales, estatales, regionales y globales) y temporales (intra e intergeneracional) que la globalización exigiría, superando la visión sincrónica y confinada territorialmente en el Estado de los anteriores imaginarios de la justicia. Además, evoca un imaginario desde el que es posible plantear soluciones tanto a la incesante polarización social y a la brecha en términos de desarrollo entre ricos y pobres, entre el Norte y el Sur, como para servir como principio normativo desde el que afrontar los desafíos de la crisis ecológica', P. Pacheco Mercado, 'Desarrollo sostenible y gobernanza: retóricas del derecho global y de la justicia ambiental', E. Pérez Alonso et al. (Ed.), *Derecho, Globalización, Riesgo y Medio ambiente*, (Tirant Lo Blanch, Valencia, 2012) at 95.

[63] After the Johannesburg Conference on Sustainable Development in 2002, it also serves to underpin social and economic policies.

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the political messages, this principle and the Rio Declaration itself have been undermined by poor implementation. The vagueness of their wording that was the price to be paid for achieving consensus led to a lack of compliance to their commitments that was not sanctioned either by political or legal responsibilities. This is why Professor Viñuales talks about fall and rise of sustainable development and "the need to use another 'weapon' to spearhead efforts to meet the challenge of implementation".[64] However, the green economy goal that was adopted in the Rio+20 Conference of 2012 was meant to be the substitute for the Principle of Sustainable Development but has so far failed. It was one of the main hopes at this revival of Rio Conference, but never reached the level of popularity and acceptance as the Principle of Sustainable Development.

Full implementation of the Rio Declaration and its principles would have required greater institutionalization of the sub-system of international environmental law. However, States continue to refuse to create an international environmental organization. The case of the United Nations Environment Program, the UNEP, is still far from meeting the challenges of the planet, because despite its up-grading in the 2012 Rio Conference, the potential of its wide mandate was never exploited; on the contrary, its inadequate funding was intended to impede its ability to promote environmental protection through political and legal approches. The United Nations Environment Assembly, the UNEA that was created at this conference as a necessary universal forum and test for future progress, is still waiting for adequate back up and resources to allow greater ambition in its resolutions.[65]

(2) The Rio Principles and Guidelines on Political and Environmental Rights

As the Global Pact for the Environment does now, the Rio Declaration made of non-state actors a weapon charged with hope for the protection of the environment. The hopeful and ambitious approach of the Rio Declaration made possible an upgrading of the role of the concerned members of the global civil society. Thus, the principles of the Rio Declaration that promoted the opening of decision-making processes to non-state actors[66] (Principle 10[67]) acquired a crucial value and made empowering citizens and NGOs, women,[68] young people,[69] indigenous peoples and other local

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64 See J. Viñuales, 'The Rise and Fall...', *supra* n.11, at 3.

65 There has been a negative dependency on the institutions of sustainable development despite the efforts to describe them as mutually supportive or complementary. Due to this, it has been more an alibi not to go further65 than the real reasons behind the lack of commitment of States with the idea of a new international organisation capable of growing competences on promotion and control if not sanction.

66 See J. Ebbesson, 'Principle 10: public participation', in Jorge E. Viñuales (Ed.), *The Rio Declaration on Environment and Development. A Commentary*, (Oxford University Press, 2014).

67 Principle 10 says 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

68 Principle 20 says 'Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development'.

69 Principle 21 says 'The creativity, ideals and courage of the youth of the world should be mobilized to forge a global

communities[70] possible.[71]

The challenge of implementation of the Rio Declaration was endorsed not by States but by non-state actors: local entities that first became familiar with their political and legal duties regarding the environment thanks to Agenda 21 and NGOs and citizens that have turned adjudication into the most effective tool to influence the decision-making processes and legislation.[72]

Without the Rio Principles, we cannot understand the latest developments in environmental justice,[73] which demand greater protection of the environment *per se* by public authorities as well as protection of future generations from disasters to which climate change can condemn the planet. It is now in Article 11 of the proposal of the Global Pact for the Environment on Access to environmental justice that says

> "Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact."

This proposal also has a constitutional vocation since it incorporates environmental and political rights for every person as in Article 1 on the Right to an ecologically sound environment that says "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment" and Article 10 on Public Participation: "Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment".

Non-state actors now seek to transcend the figure of the nation-state when their national borders

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partnership in order to achieve sustainable development and ensure a better future for all. The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.'

[70] Principle 22 says 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

[71] The Preamble of the Voluntary Agreement between the EU and Liberia says: 'Having regard to the importance of Principles set out in the 1992 Rio Declaration in the context of securing sustainable forest management and, in particular, of Principle 10 concerning the importance of public awareness and participation in environmental issues and of Principle 22 concerning the vital role of indigenous people and other local communities in environmental management and development.' See Voluntary Partnership Agreement between the European Union and the Republic of Liberia on forest law enforcement, governance and trade in timber products to the European Union, *OJ L 191*, 19.07.2012, at 3.

[72] See D. Estrin, 'Limiting Dangerous Climate Change. The Critical Role of Citizen Suits and Domestic Courts - Despite the Paris Agreement', 101*CIGI Papers*, (2016), at 13; Randall S., Abate, 'Public nuisance suits for the Climate Justice Movement: The right thing and the right time', 85 *Washington Law Review*, (2010), at 197, L. Bergkamp, 'A Dutch Court's 'Revolutionary' Climate Policy Judgment: The Perversion of Judicial Power, the State's Duties of Care, and Science», 12 *Journal of Environmental & Planning Law*, (2015) 239-261 and L. Bergkamp & J.C. Hanekamp, 'Climate Change Litigation Against States: The Perils of Court-Made Climate Policies', 24 *European Energy and Environmental Law Review* (2015), 102-114.

[73] See S. Borrás Pentinat, 'Movimientos para la justicia climática global: replanteando el escenario internacional del cambio climático', 33 *Relaciones Internacionales*, (2016) Grupo de Estudios de Relaciones Internacionales (GERI) – UAM, 97-119.

 DOI: 10.17103/sybil.21.6

become a barricade to avoid confronting global problems, as is now the case in the USA. This is why States and cities such as California or Washington and NGOs and US companies have initiated a process of negotiation with the Secretary-General of the United Nations to formalize their commitment to the Paris Agreement, regardless of the decision to abandon it taken by President Trump.[74] A Coalition of states, cities and NGOs led by Michael Bloomberg will catalyze the efforts of the American paradiplomacy[75] that has committed itself to fulfill the objectives of the Paris Agreement as reported to the Secretary-General of the United Nations. This Coalition has also assumed the task of submitting the report of compliance with the contribution determined at the national level, if the Department of State fails to do so. The NGO Bloomberg Philanthropies will also compensate the cuts to the financing of the institutional framework to combat climate change and will pay for the 25% quota that the United States should pay to maintain the Secretariat of the UNFCCC, 15 million dollars.[76] The UN Secretary-General also named the Governor of California as special adviser for states and regions to the upcoming U.N. talks in Bonn.[77]

However, both in the Rio Declaration and in the Global Pact for the Environment, there was no reference that could indict past or future behaviour of multinational companies or just question their capacity to interfere in international decision-making processes or to undermine state sovereign right to exploit natural resources.

(3) The Effect of the Rio Principles on International Cooperation

The principle of cooperation conceived as an expression of good neighbourliness is defined in Principle 27 of the Rio Declaration as requiring that "[s]tates and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principle embodied in this Declaration and in the further development of international law in the field of sustainable development". This general principle of cooperation has evolved to include more procedural guarantees such as information sharing and participation in decision-making processes.

Afterwards, these principles have had an important impact in international cooperation instruments in which they appeared in preambles and provisions expressing a common understanding of the idea of sustainable development and legitimating political and economic cooperation.[78] These principles have clearly inspired the European Union action as a global actor[79] in its relationships with

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[74] See President Trump's Statement on the Paris Climate Change Agreement of 1 June 2017.

[75] See N. Cornago Prieto, 'Paradiplomacy-Protodiplomacy', in Martel (Ed), *The Blackwell-Wiley Encyclopedia of Diplomacy*, (Blackwell-Wiley, London, 2017).

[76] Mike Bloomberg has been named by the UN Secretary-General Special Envoy for Cities and Climate Change; see V. Volcoci, 'Bloomberg delivers U.S. pledge to continue Paris climate goals to U.N.', Reuters, 5 June 2017, and Bloomberg Foundation, 'Mike Bloomberg doubles down to ensure America will fulfill the Paris Agreement'.

[77] D. Kahn, 'Jerry Brown is in Russia to talk about the climate', *E&E News*, September 7, 2017.

[78] See for instance, the preamble of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part that says 'Mindful of the importance that both Parties attach to the proper implementation of the principle of sustainable development, as agreed and set out in Agenda 21 of the 1992 Rio Declaration on Environment and Development', *OJ L 276*, 28.10.2000, p. 45–80.

[79] For instance, the ACP-EU Official Joint Parliamentary Assembly adopted a Resolution in its 24th Session, in

its neighbours as well as the blocks of its counterparts such as the ACP countries[80] or Central America. For example, the agreement of the European Union with Central America refers to the Rio Declaration and its principles with different purposes, thus its Article 20.1 on the environment, says:

> "The Parties shall promote a dialogue in the areas of environment and sustainable development by exchanging information and encouraging initiatives on local and global environmental issues, recognising the principle of shared but differentiated responsibilities, as set forth in the 1992 Rio Declaration on Environment and Development." [81]

Of crucial importance are also those Rio principles that target peace [82] and security as complementary goals to environmental protection.[83] In recent years, rule-makers have also had to fight the worst impacts of war and conflict on the environment. Thus, Principles 24[84] and 25[85] continue to await more vigorous action as the International Law Commission finalizes its Draft Articles on Environmental Protection in Relation to the armed conflict.[86] Moreover, Principle 23 which states

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Brussels, in March 1997, *OJ C* 308, 9/10/1997.

[80] See Article 50 on Cooperation on Environment saying: "1. The Parties agree to cooperate in order to protect and improve the quality of the environment at local, regional and global levels with a view to achieving sustainable development, as set forth in the 1992 Rio Declaration on Environment and Development. 2. Taking into account the principle of common but differentiated responsibilities, the priorities and national development strategies, the Parties shall pay due attention to the relationship between poverty and the environment and the impact of economic activity on the environment including the potential impact of this Agreement. 3. Cooperation shall in particular address: (a) the protection and sustainable management of natural resources and ecosystems, including forests and fisheries; (b) the fight against pollution of fresh and marine waters, air and soil, including through the sound management of waste, sewage waters, chemicals and other dangerous substances and materials; (c) global issues such as climate change, depletion of the ozone layer, desertification, deforestation, conservation of biodiversity and biosafety; (d) in this context, cooperation shall seek to facilitate joint initiatives in the area of climate change mitigation and adaptation to its adverse effects, including the strengthening of carbon market mechanisms. 4. Cooperation may involve measures such as: (a) promoting policy dialogue and exchange of best environmental practices, experiences, and capacity building, including institutional strengthening; (b) transfer and use of sustainable technology and know-how, including creation of incentives and mechanisms for innovation and environmental protection; (c) integrating environmental considerations into other policy areas, including land-use management; (d) promoting sustainable production and consumption patterns, including through the sustainable use of ecosystems, services and goods; (e) promoting environmental awareness and education as well as enhanced participation by civil society, in particular local communities, in environmental protection and sustainable development efforts; (f) encouraging and promoting regional cooperation in the field of environmental protection; (g) assisting in the implementation and enforcement of those multilateral environmental agreements that the Parties are part of; (h) strengthening environmental management, as well as monitoring and control systems."

[81] Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, *OJ L 346*, 12 December 2012.

[82] A. Kiss, 'International humanitarian law and the environment', 31 *Environmental Policy and Law*, (2001) at 223; B.K. Schafer, 'The Relationship Between the International Laws of Armed Conflict and Environmental Protection. The Need to Revaluate what Types of Conduct are Permissible During Hostilities', 19 *California Western International Law Journal*, (1989), at 287.

[83] R. A. Malviya, 'Laws of armed conflict and environmental protection: an analysis of their inter-relationship', *ISIL Year Book of International Humanitarian and Refugee Law*, Vol. 1, 2001.

[84] Principle 24 says 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary'.

[85] Principle 25 says 'Peace, development and environmental protection are interdependent and indivisible'.

[86] The International Law Commission's Draft Articles on the protection of the environment during armed conflicts analyses the applicability of relevant rules and principles of international environmental law in this context, to reiterate that "the law of armed conflict is *lex specialis*, but at the same time this area of international law continuously develops and this

"the environment and natural resources of peoples subjected to oppression, domination and occupation must be protected" faces a reality such as that of Western Sahara or Palestine in which occupants who should be the "trustees" of their natural heritage, exploit mining, agricultural, fishery and water resources for their domestic benefit against international humanitarian law that prohibits it.[87]

The general formulation of these principles has made it possible to open a path for research that have considered natural resources as a curse for developing countries and have assessed the stressed that was anticipated by the Brundlant Report that said:

> "1. Among the dangers facing the environment, the possibility of nuclear war, or military conflict of a lesser scale involving weapons of mass destruction, is undoubtedly the gravest. Certain aspects of the issues of peace and security bear directly upon the concept of sustainable development. Indeed, they are central to it.
> 2. Environmental stress is both a cause and an effect of political tension and military conflict. Nations have often fought to assert or resist control over raw materials, energy supplies, land, river basins, sea passages, and other key environmental resources. Such conflicts are likely to increase as these resources become scarcer and competition for them increases."[88]

(E) THE RIO PRINCIPLES AS THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The Rio Principles are part and parcel of international environmental law and function as its own set of principles. Some serve as systemic principles and others as material principles and procedural guarantees that have been adapted on a sector-by-sector basis, and so have found their way into international agreements, domestic legal systems and, of course, more soft law instruments, such as those adopted in the following United Nations Conferences that tried to continue Rio's mission but could not maintain the momentum or renew the commitment up to its initial ambitions.[89]

As systemic principles, the Rio principles characterize international environmental law as a sub-system of international law. Among them the principle of no harm (Principles 2 and 13) and the principle of common but differentiated responsibilities (Principle 7[90]) are its most characteristic features.

The obligation reflected in Principle 21 of the Stockholm Declaration and later incorporated in

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development is informed by the development of other areas of international law", International Law Commission, Sixty-eighth session, Geneva, 2 May-10 June and 4 July-12 August 2016, Protection of the environment in relation to armed conflict, A/CN.4/L.870/Rev.1 and A/CN.4/685 .

[87] On 4 August 2017, the International Law Commission appointed a new Special Rapporteur, Marja Lehto, to finish the draft principles and to further address areas such as protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors, and overall application of the draft principles to armed conflicts of a non- international character. See the Report of the International Law Commission in its sixty-ninth session, Chapter 10 on Protection of the environment in relation to armed conflicts, A/72/10 .

[88] Our Common Future Report, *supra* n. 27, at 239.

[89] See M. Fiztmaurice, S. Maljean-Dubois, Stefania Negri (Eds.), *Environmental Protection and Sustainable Development from Rio to Rio+20*, (Queen Mary Studies in International Law, London, 2014); Gabriela A. Oanta, 'Protection and Preservation of the Marine Environment as a Goal for Achieving Sustainable Development on the Rio+20 Agenda', *16 International Community Law Review*, (2014) 14–35.

[90] As presented in the above sections.

Principle 2 of the Rio Declaration, is a Rosetta stone of the international environmental law and exposes its frailties since this principle of no harm or prevention is the most challenging in terms of implementation and compliance.[91] Namely it says that states have the responsibility not to cause transboundary environmental damage with the activities that take place under their jurisdiction or their control. The International Court of Justice recognized it in its advisory opinions where it said that "[t]he 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." [92]

Principle 13 adds the internal dimension of responsibility turning it into a liability principle that States should adopt in their national legal systems. Conceiving responsibility with such a wide spectrum was consensual and unreservedly accepted but due to the countless violations it has experienced, compliance never seems to be borne in mind by states.[93] States are guided by the non-written principle that whoever the victim may be today can become an offender tomorrow, leading States not to react in the case of transboundary accidents as they did in the cases of Chernobyl or Sandoz accidents.[94]

Furthermore, the way this principle of no harm has been incorporated into treaties is far from satisfactory. Thus, as Professor Lynham criticised shortly after the Rio Conference, "there is such inconsistency in the nature and extent of the obligations imposed on States' parties by the numerous treaties prohibiting transboundary harm, that there is no clear indication that States recognise this prohibition as obligatory. Several treaties which contain the *sic utere tuo ut alienum non laedas* obligation are mandatory in this prohibition against causing transboundary harm. But there are many more treaties that are merely recommendatory in nature, and their prohibitions against causing transboundary harm impose no legal obligations. [...] They are hortatory or 'soft law' in character, and for this reason, do not evince any *opinio juris* on the part of the States who are signatories to them. If a treaty does not command, but merely recommends that a State act in a particular manner, then any failure by a State to act in the way prescribed will be of little consequence". [95]

Therefore, the draft Global Pact for the Environment shows the state of the art global consensus on this vital issue in its Article 7 on Environmental Damage, which does not say who should confront the task of repairing, and proclaims that "The necessary measures shall be taken to ensure an adequate remediation of environmental damages" but, at least, it recognises the procedural guarantee:

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[91] Okowa work identifies a number of difficulties associated with implementing the principle of responsibility including: issues of retroactivity, apportioning responsibility among states; apportioning responsibility for future damage; and managing the scientific uncertainty associated with such claims. Ph. Okowa, 'Responsibility for Environmental Damage', in M. Fitzmaurice, D. Ong and P. Merkouris (Eds.), *Research Handbook on International Environmental Law*, (Edward Elgar Publishers, London, 2010)

[92] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 241–42, para. 29; also see *Case Concerning the Gabçikovo Nagymaros Project (Hung. v. Slovakia)*, 1997 ICJ 7, para. 53.

[93] And then, as Durkheim says the violation of the norm proves its validity.

[94] See J. Juste Ruiz and T. Scovazzi (Coords.), *La práctica internacional en materia de responsabilidad por accidentes industriales catastróficos*, (Tirant Lo Blanch, Valencia, 2005).

[95] See Lynham, G. 'The *Sic Utere* Principle as Customary International Law: A Case of Wishful Thinking? (1995) 2 *James Cook U. L. Rev.* 172-189, at 181.

> "Parties shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Parties shall promptly cooperate to help concerned States."

As one of the most recent referential agreements, the Paris Agreement on Climate Change offered a poor alternative introducing a loss and damage mechanism to redress harm arising from climate change. Such a mechanism does not impose responsibility on a particular state; it just avoids disputes by remedying the harm suffered as a result of climate change.[96]

(F) THE RIO PRINCIPLES AS PRINCIPLES OF DOMESTIC ENVIRONMENTAL LAW

The Rio Principles have an important influence in domestic law, due to the special nature of International Environmental Law, meant to be transposed and enforced at domestic level and to inform internal legal systems and institutions. This vocation was acknowledged and enhanced by Principle 11, which explicitly formulates an obligation: "States shall enact effective environmental legislation"[97]. The Rio Principles were meant to be incorporated by States into their domestic legal systems by adopting effective environmental laws "without forgetting the cost that this might entail for developing countries" (Principle 11). Thus principles such as precaution (Principle 15) or internalisation of environmental costs (Principle 16) or environmental impact assessment (Principle 17) are formally recognized in almost all countries, although their effectiveness and degree of compliance depends on the strength of their institutions and the way in which they guarantee the rule of law in environmental terms. This is why the practice of States shows the inconsistency between their adherence to the principles and their inadequate application both internationally and internally, and thus their poor commitment to the last principle, the 27th which stated that "States and Persons shall cooperate in good faith and in a spirit of solidarity in the application of the principles enshrined in this Declaration and in the further development of international law in the field of sustainable development."

Thus, the Rio Principles became the most basic tools to inspire and promote the adoption of environmental legislation in those countries in which it was not part of their legal systems before the Rio Conference. Ever since then, and with the help of the United Nations Environment Programme (UNEP), the Rio Principles have been incorporated in most legal systems as the guiding principles of their environmental chapters. This is despite the fact that in many countries environmental legislation has only a symbolic or formal presence in their national legal systems because of the lack of human and financial resources to implement them efficiently as a new branch of law that was perceived at first as a novelty or as an imposition in order to get international support and funds.

Some of these principles stem from the most developed national legal systems and have acquired a

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[96] See M. Campins i Eritja, 'De Kioto a París: ¿Evolución o Involución de las Negociaciones Internacionales sobre el Cambio Climático?', 61 *Instituto Español de Estudios Estratégicos*, (15 June 2015).

[97] Principle 11 goes on saying "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

special status as generally recognized environmental law and policy principles. They have been introduced in constitutions, administrative and civil codes and have inspired the adoption of policies on sustainable development as in the case of the European Union and its Member States, including Spain. Among them, the principle of integration soon acquired a relevant place. The case of the European Union is particularly relevant since it incorporated the principle in the forefront of its political action guidelines, through a formulation that while experiencing some changes have stayed true to the principle in Article 11 of the Treaty on the Functioning of the European Union that says:[98]

> "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

The principle of integration can also be found in the executive orders of the Obama era. Thus, he adopted Guidelines to integrate climate change concerns in all US policies to facilitate the transition to an economy not dependant on coal and fossil fuels. One of the first things, that President Trump did was to annul them and to erase them from the websites of the EPA. These guidelines were a valuable expression of Principle 4 of the Rio Declaration.

Special mention must be made of the European Union and its Member States' legal systems as receptors and promoters of the Rio Principles where some of them have become general principles of European environmental law. The Rio principles have had an enormous success in the European Union legislation were they have acquired the hard nature of law and a constitutional value after being incorporated in its constitutional treaties. First, the principles of the Stockholm Declaration of 1972 inspired the first environmental actions of the then European Economic Community and were later introduced into the treaties when for the first time the Single Act incorporated an environmental chapter. Later, the principles of sustainable development and precaution were incorporated under the influence of the Brundlant Report and the Rio Declaration in the EU Law. They are also recognized in the Charter of Fundamental Rights of the EU attached to the Treaties that has a full and legally binding value.[99]

(G) THE RIO DECLARATION AND ITS PRINCIPLES IN SPAIN

The Rio Declaration and its principles as previously those of the Stockholm Declaration have had a seminal effect in the Spanish legislation and environmental governance, taking their roots in the national level but also growing robustly through the Autonomous Communities and Local Authorities' legal regimes that form the complex and rich federal structure of Spain. Their political and legal importance can be found at different levels: permeating Spanish administrative law and institutions by them-self or through European Law, and what I consider the most relevant aspect for this study: their role as interpretative tools and 'source of inspiration' of the Spanish legal system. At first, they filled the gap of a non-existing background on protecting the environment *per se* and, then,

[98] The Treaty of Amsterdam made of the principle of integrating environmental requirements into the rest of Community policies a principle informing from the front Articles of the Treaty.

[99] See M. Lee, 'The Environmental Implications of the Lisbon Treaty', 10 *Environmental Law Review*, (2008) 131-138.

they served as a legal compass for the legislator, the judges, the Administration –national, regional and local- and finally they empowered the citizens to participate in the processes concerning them. Thus, the Constitutional Court and the Supreme Court have used the principles of the Stockholm and the Rio Declarations as interpretative tools[100] of the right to the environment as foreseen in the Spanish Constitution that the former clearly inspired.[101]For instance, the Supreme Court used the Stockholm Declaration on the Human Environment as a reference and an interpretative tool[102] of the Spanish Constitution as well as the international agreements ratified by Spain, in one of its judgments affirming:

> "An interpretation to apply the Washington Convention and the Community law which are part of the Spanish legal system and which develops Article 45 of the Spanish Constitution in respect of the protection of protected species must be carried out in an extensive sense, in accordance with the fundamental principles of environmental protection set out in the Declaration of the United Nations Conference on the Human Environment in Stockholm of 16 June 1972, which is the source of inspiration."[103]

The Constitutional Court has also examined the value of Stockholm and Rio principles that have been invoked by citizens and NGOs as part of their constitutional rights as well as limits to the State's powers. It has considered that some of them are not yet part of the international law or of the European Union system as in the case of the principle of non regression, but it has acknowledged its

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[100] An analogy can be established with Article 10.2 of the Spanish Constitution that says 'Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain'. This Article turns a non-binding instrument such as the Universal Declaration of Human Rights into an interpretative reference of the Spanish Constitution in the context of the political transition where it was most needed.

[101] Article 45 of the Spanish Constitution says "1. Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. 2. The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity. 3. For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused."

In its Judgement 102/1995 of 26 June, the Constitutional Court said: 'The environment, as it has been described, is a concept born to return to the unit the various components of a reality in danger. If this had not been presented, its appearance would be unimaginable for mere theoretical, scientific or philosophical reasons, and therefore not legal. The triggering factors have been soil erosion, deforestation and desertification; the pollution of marine, river and uplift waters as and the atmosphere by pernicious effect of smoke, fumes, effluents and waste, the whole species extinction or the degeneration other and degradation of agricultural wealth, forestry, livestock or fisheries, noise pollution and many other manifestations ranging from simply incidental to lethal, with a negative impact on the health of population in an essential unit of individuals. In other words, but with a substantially identical content, these dysfunctions are those included in the catalogue included in Work document num. 4 that on August 25, 1970, the Secretariat of the E.C.E. presented to the Meeting of Government Advisers on the environment of the Economic Commission for Europe. Diagnosed as serious, in addition, the threat that supposes such attacks constitute a challenge that has caused an immediate symmetrical response, in defence that at all legal dimensions constitutional, European and universal is identified with the word "protection", substratum of a function whose primary purpose is to be the "conservation" of the existing one, with a dynamic aspect tending to the "improvement", both contemplated in the constitutional text (Art. 45.2 Spanish Constitution), as well as in the Single Act (art 130 R) and in the Declarations of Stockholm and Rio, BOE No. 181, 31 July 1995, fj.7, p. 26

[102] See T. Fajardo, 'Principios del Derecho Comunitario y Aplicación Judicial en España en los años 2003 y 2004', 26 *Revista de Derecho Comunitario Europeo*, (2006) 135-179, at 160.

[103] See STS 13 December 2004, RAJ, RJ 2004\8178, at 5.

 DOI: 10.17103/sybil.21.6

legal value as a constitutional canon of interpretation. In its judgment 233/2015[104], it denied that the non-regression principle might be accepted as limiting the powers of the legislator, even though it recognized it as interpretative criterion because:

> "The exegesis of the constitutional obligation to defend and restore the environment or, in other words, the task of ensuring the fulfillment of obligations arising from this constitutional precept is always complex when, as in this case, process, regression or involution of the environmental protection standards previously established in the sphere of ordinary legislation is alleged [...]
>
> "In this context, the principle of non-regression of environmental law (also known as the stand-still clause) is linked to the original foundation of this sector of the legal system, and enunciates a strategy that is undoubtedly plausible in terms of the conservation and rational use of natural resources, which with different techniques and denominations have already been received in some sectoral regulations of international, European or national law (STC 45/2015, of 5 March, FJ 4) or in international jurisprudence or of the neighboring countries, whose detail is not relevant because it is sectoral references that do not specifically affect the maritime-terrestrial public domain. In the vocation of universal application with which this principle is stated, it is today at most a lex non scripta in international environmental law and, undoubtedly, constitutes an advanced doctrinal formulation that has already enlightened a political aspiration of which, to cite a significant document, echoed the Resolution of the European Parliament of 29 September 2011 on the elaboration of a common position of the EU before the United Nations Conference on Sustainable Development, «Rio + 20 »(Section 97).
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> "Thus, the question that we must clarify is whether it is possible to directly extract such a principle from the postulates collected in Article 45 of the Spanish Constitution. Certainly, as already noted in the aforementioned SSTC 149/1991 and 102/1995, the notions of conservation, defense and restoration of the environment, explicit in sections 1 and 2 of this constitutional precept, involve both the preservation of the existing and a dynamic aspect tending to its improvement that, in what pertains particularly to the protection of the maritime-terrestrial demand, oblige the legislator to ensure the maintenance of its physical and legal integrity, its public use and its landscape values. In particular, the conservation duty of the public powers has a dimension, that of not promoting the destruction or degradation of the environment, which would not consent to the adoption of measures, lacking objective justification, of such caliber that they would be a patent step back in the degree of protection that has been achieved after decades of tuition. This dimension inevitably evokes the idea of "no regression", although the concepts that we are here contrasting do not admit a mechanical identification, since it is also noteworthy that the constitutional duty is projected onto the physical environment, while the principle of non-regression is predicated of the legal system. In constitutional terms, this significant difference means that the standard is not intangible, and therefore the appreciation of the potential negative impact of its modification on the conservation of the environment requires careful consideration, in which, as one among other factors, the pre-existing regulation will have to be taken into consideration."[105]

Certainly petrifying the legislative power is not the core meaning of the principle of non-regression

[104] Sentence 233/2015, of November 5, 2015. Appeal for unconstitutionality 5012-2013. Interposed by more than fifty deputies of the Socialist Parliamentary Group of the Congress in relation to diverse precepts of the Law 2/2013, of May 29, of protection and sustainable use of the littoral and of modification of the Law 22/1988, of July 28, of coasts. Principles of non-retroactivity, legal security, interdiction of arbitrariness and environmental protection; regime of public goods: nullity of the legal precepts that exclude from the maritime-terrestrial public domain artificially and controlledly flooded lands, establish a specific demarcation regime for the island of Formentera and introduce a guarantee of the functioning of certain purification facilities; interpretation in accordance with the Constitution of the provision that excludes certain population centers of the maritime-terrestrial public domain (STC 149/1991), *BOE* No. 296, 11 December 2015.

[105] Sentence 233/2015, at FJ 2, p. 117174.

but the obligation of protecting the environment.[106] Nonetheless, the non-regression principle when applied to the status of conservation of the environment implies a development of the principle of sustainable development as shown by López Ramón who argues that "The principle of non-environmental regression is an adaptation to the contemporary circumstances of the idea of human progress that is behind the revolutionary declaration. It is a derivation of the principle of sustainable development, which imposes solidarity progress with future generations, solidarity that implies never retreat in the measures of environmental protection."[107]

In a different perspective, the principle of sustainable development has emerged in disputes between the central government and the Autonomous Communities regarding the competent authority to exercise the power of decision. In most cases, the Constitutional Court has decided in favour of the central government. However as analysed below, the debate is still on-going as part of the political exercise of competences on times of economic crisis when the central government but also the Autonomous Communities are inclined to adopt regressive measures.[108]

However, the legal influence of the Rio Declaration was mainly channelled through the European legislation, and through it, it found its ways into state, regional and even local legislative and administrative acts that incorporated references in their preambles and provisions, referring both to the European legislation as well as to the Rio Declaration.[109] Of particular relevance on disseminating the knowledge of the Rio Conference are the local plans implementing Agenda 21 that gave great visibility to the Rio Declaration and raised awareness of its principles among the decentralized entities of the state and, particularly, to the local powers.

Via European legislation, comprised of both hard and soft law instruments, the Rio Principles acquired a stronger normative intensity in the Spanish legal system. In the same way, the Principle on Sustainable Development became referential for the Spanish Environmental Policy as a national adaptation of the European strategies. Thus, the Spanish Sustainable Development Strategy adopted in 2007 was "framed under the EU Sustainable Development Strategy (SDS)"[110] and thus:

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[106] On this judgment, see L. J. Parejo Alfonso, "La sentencia del Tribunal Constitucional 233/2015, de 5 de noviembre, y el demanio marítimo-terrestre. La debilitación de la eficacia protectora del orden constitucional y, por tanto, de la adecuada ordenación del espacio marítimo", and all the other articles on the monographic volume of 140 *Práctica urbanística: Revista mensual de urbanismo,* (2016), B. Lozano Cutanda 'Derecho Ambiental. Algunas reflexiones desde el Derecho Administrativo', 200 *Revista de Administración Pública* (2016) 409-438, at 17.

[107] See F. López Ramón, 'Introducción general: regresiones del derecho ambiental', *Observatorio de políticas abientales*, 2011, 19-24, at 21. From the same author also see 'El principio de no regresión en la desclasificación de los espacios naturales protegidos en derecho español', 20 *Revista Aranzadi de Derecho Ambiental* (2011) 13-27 and 'La aceptación legislativa del principio de no regresión ambiental en Francia', 201 *Revista de administración pública* (2016), 269-277.

[108] See F. López Ramón, supra note 107, and in the case of Galicia: A. Nogueira López, "Galicia: recuperación del primer nivel organizativo sin una apuesta ambiental relevante" and in the case of Cataluña, M.T. Vadrí Fortuny, "Cataluña: presencia marginal del medio ambiente en una coyuntura política todavía inestable" at *Observatorio de políticas ambientales,* 2016.

[109] The accession of Spain to the European Community in 1986 triggered the adoption of environmental law, and in particular of administrative law as part of the process of transposition into the Spanish legal system of the *acquis communautaire* and its implementation.

[110] The EU Sustainable Development Strategy was reviewed in several occasions to 'sharpen its objectives and to set new milestones', its text is here. See the European Commission Communication from the Commission to the Council and the European Parliament - Draft Declaration on Guiding Principles for Sustainable Development, *COM/2005/0218 final*, 25

> "In line with the European Sustainable Development Strategy, the governing principles of the SSDS include the promotion and protection of the fundamental rights and intra and inter-generational solidarity, as well as precautionary principles and to make the polluter pay for any action affecting public health and the environment. In addition, the participation of citizens, companies and social interlocutors will be promoted in the processes of decision making, for which some of the action lines proposed are: to increase the education and public awareness in matters of sustainable development, to improve the social dialogue, to increase the social responsibility of companies and to foster associations between the public and the private sector to obtain a more sustainable consumption and production".[111]

The adoption by the United Nations Assembly of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals also had an echo in the European Union and in Spain's strategies.[112] However, now the prophecy about the Sustainable Development principle being superseded by its economic dimension has been fulfilled. The Act on Sustainable Economy adopted in 2011[113] clearly says that its measures:

> "All of them are intended to serve new growth, balanced, sustainable growth. Sustainable in three senses: economically, that is, increasingly solid, based on the improvement of competitiveness, innovation and training; environmentally, to make the rational management of natural resources an essential opportunity to promote new activities and new jobs; and socially sustainable, as promoter and guarantor of equal opportunities and social cohesion".

However, this Act has been brought before the Constitutional Court by the Autonomous Communities that considered that their competences were invaded by the national legislator. To this effect, the Constitutional Court has ofter indicated that the national government is the competent authority to exercise these powers as part of the general scheme of the distribution of powers in relation to the environment, stating that in this matter the State is assigned "the basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protection standards"(Article 149.1.23 Spanish Constitution).[114] The breach of the principles of collaboration and federal loyalty justify that Autonomous Communities often challenge national regulation, since that does not attribute to the State a plus in the regulation. However, the Autonomous Communities have also tried to have their own interpretation of principles, as in the case of sustainable development in its different dimensions. Friction over this iussue have led them to go against the Act on Sustainable Economy, in the case of fulfilling the meaning of grean economy.

April 2005.

[111] See Spanish Sustainable Development Strategy, 1-134, at 8. It also covers the three dimensions of the Principle of Sustainable Development when it says 'This strategy is framed under the EU Sustainable Development Strategy (SDS), which was renewed in the Council of Brussels of 2006 with the general principle of "determining and elaborating measures that allow the continuous improvement of the quality of life for the present and future generations by means of the creation of sustainable communities having full capacity to efficiently manage and use resources, to take advantage of the potential for ecological and social innovation offered by the economy, and at the same time, ensuring prosperity, environment protection and social cohesion"', at 5.

[112] Angel Rodrigo considers that after the adoption of this Agenda, that sustainable development 'has become one of the three basic purposes of the United Nations, together with the maintenance of international peace and security and the promotion and protection of human rights', *supra* n.60, at 37.

[113] See Act 2/2011 on Sustainable Economy, Ley 2/2011 de Economía Sostenible, 4 March, BOE No. 55, 5 March 2011, 1-176.

[114] See the Judgment 194/2004 of the Constitutional Court of 4 November, BOE No. 290, of 2 December 2004.

This has taken place in the broader scenario of the European debate to fix this goal of promoting new activities, a Green economy at the service of creating new jobs as part of the European Union strategies and Spain will benefit from European funds to achieve it. As put by the European Commission:

> "It aims to ensure that economic growth goes hand-in-hand with sustainable development in Spain, through targeted investments in the areas of green transport, improved water quality, integrated urban development and other measures to support the country's transition to a low-carbon economy."[115]

Regarding environmental governance, Spanish institutions were also influenced by the Rio Declaration's call for greening institutions. The first Ministry of the environment was born in 1996 under the star of Rio and has made a most atypical evolution since its creation.[116] The Ministry first developed itself as a requirement of the implementation and enforcement of the European Union legislation and then it became itself an example of the development of a green governance institution growing at a variable speed and slowing down when the economic crisis imposed its priorities. Thus, in this time of economic crisis, the Spanish Ministry is now contained in a macro structure that ensemble agriculture, fisheries and food competences. Not all the Autonomous Communities have attained the same degree of autonomy or the same extent of competences in the field of the environmental protection and their institutions vary, creating different institutional systems, difficult to map and far from the limits of this study.[117]

Furthermore, the Spanish Ministry of Agriculture, Food and Environment has developed an external dimension that involves the adoption of an external political logic and strategy in accordance with the competences shared and concurrent with the European Union.[118] In the realm of its bilateral relations, Spain has used soft law instruments such as memoranda of understanding[119] and bilateral agreements to acknowledge the importance of the Rio Principles to inspire its environmental cooperation. Thus, the Spanish cooperation agreement with Morocco on environmental protection

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[115] In 2015, the European Commission adopted Spain's largest "Operational Programme" for the 2014-2020 funding period, which will cover the entire Spanish territory, with a total budget of €7.7 billion, of which the EU will contribute €5.5 billion from the European Regional Development Fund. '5.5. Billion for Sustainable Growth in Spain', 23 July 2015,

[116] After the Spanish accession to the EU, the *Dirección general del medio ambiente* was created and received a relevant budget, powers and duties which actually made it independent to follow its objectives. The Ministry of Environment has existed since 1996 even though it has suffered many reforms; the last of them has been its merger in a Ministry of environment, agriculture and food. Nevertheless, when discussing environmental policy and legislation, special mention must be made of the Spanish quasi-federal organization, which has important consequences for this matter. The Spanish Constitution designs a territorial quasi-federal organization. On the one hand there is the central Spanish Parliament and on the other there are 17 Autonomous Communities, which are sub-national entities with their own parliament, government and public administration. Every Autonomous Community has within its own Statute (territorial Constitution), a detailed list of competences in which it has law-making powers, and therefore every *Autonomous Community* has different law-making powers.

[117] This herculean task is for the administrative law academia.

[118] See the International Projection of the Ministry of Agriculture, Food and Environment, 'Proyección Internacional del Ministerio de Agricultura, Alimentación y Medio Ambiente'.

[119] See the Memorandum de Entendimiento del Ministerio de Medio ambiente del Reino de España y el Ministerio de Medio ambiente y Recursos Naturales de El Salvador, 22 June 2006 and the Memorandum de Entendimiento del Ministerio de Agricultura, Alimentación y Medio ambiente del Reino de España y el Ministerio de Medio ambiente y Recursos Naturales de El Salvador sobre iniciativas relativas al Cambio Climático, 21 November 2013.

 DOI: 10.17103/sybil.21.6

says:

> "Respecting and supporting the Rio Declaration and the provisions adopted at the Special Session of the United Nations General Assembly in June 1997 on financial assistance and the transfer of clean technologies,
>
> Have agreed as follows:
>
> Article 1.
>
> The Parties shall develop their bilateral cooperation on the environment on the basis of equity, equality of rights and mutual benefits within the framework of their competences and their respective legislation. Such cooperation, of a scientific, technical and technological nature, shall in particular promote the development of environmentally friendly technological exchanges."[120]

The Spanish Ministry is represented in the United Nations institutions and, of particular importance, in the Programme of the United Nations for the Environment, whose temporary presidency Spain exercised in 2011-2012. Thus, acting on behalf of the European Union, Spain gave its voice to the EU goals during the pre-Conferences that led to Rio +20 Conference arguing:

> "The position of Spain before this summit, in line with the postulates of the European Union, focuses on achieving progress towards a low carbon, resource efficient economy that generates growth, competitiveness and employment for the sake of sustainable development and the eradication of poverty." [121]

During the conference, Spain tried to confront the weak institutionalisation of the environmental global governance and had to accept the inexistence of consensus on green economy.

(F) FINAL REMARKS AND CONCLUSIONS

The Rio Declaration and its principles —as previously the Stockholm Declaration— had a ground-breaking impact in international law as well as in domestic legal systems.[122] They transcended the soft-law nature that had been attributed to them, becoming a normative horizon made of legal expectations, some of which have turned to customary law or found their way into international agreements. Furthermore, they have guided the evolution of international environmental law as well as the institutional systems born out of the international environmental agreements.

The Rio Declaration gave visibility to the environmental problems and a voice to the non-state actors, NGOs, indigenous people and citizens of the world that have assumed important tasks in protecting the environment in a new global scenario in which the planet is threatened by growing risks and problems that have their origin in human activities and our model of development that

[120] See Acuerdo de cooperación entre el Reino de España y el Reino de Marruecos en materia de medio ambiente, 20 Nov. 2000, BOE No. 172, 17 July 2008.

[121] See Press Note of the Ministry of Food, Agriculture and the Environment, (Nota de Prensa del MAGRAMA), 'El Secretario de Estado, Federico Ramos traslada a los agentes económicos y sociales el compromiso de España para que "Rio+20" concluya con avances', 18 June 2012. During this period, former president Rodriguez Zapatero also made a statement on behalf of Spain and the EU on our commitment to fight climate change, 'Our Planet'.

[122] See Lluís Paradell-Trius, 'Principles of International Environmental Law: An Overview' *Review of European Community & International Environmental Law* Vol. 9, 2000, p. 93.

could lead in the terms of Ulrich Beck to a metamorphosis of the world.[123] In this global picture, emerging powers are dismantling economic paradigms that previously condemned them to poverty and dependence on external aid and cooperation, while other developing countries are not. Now as before, most developing countries cannot break the chains of poverty and have to endure environmental problems such as climate change, in the form of floods, drought, desertification or elevation of the sea level that condemn them to migration, war and even physical disappearance under layers of water and oblivion. However, the bio-capacity of emerging powers counted on oil and minerals and other natural resources has led to revise some of the key Rio Principles, in particular, the principle of common but differentiated responsibilities to undermine its rationale of cooperation and support to developing countries. In legal terms, these adjustments of the Rio spirit are shown in the international negotiations and decision-making processes in the form of an affirmation of the principle of sovereignty that even though it is still limited by the function of protecting the environment, this must be done "taking into account national circumstances". This cannot mean a return to the selfishness of the nation state to avoid both liability and responsibility for environmental protection at the cost of the future of the planet.

Thus, the analysis that I have made of the Rio Declaration and its principles could be seen as that of an observer who sees the half empty glass. This is because the challenges of implementation and compliance faced by any rule of international law are especially cruel to the Rio Declaration and its principles,[124]due to the enormous incongruity between the normative expectations and the political action that has been taken by States and international organisations to achieve them.

However, a description of the glass as half full is possible if we consider that the Rio Declaration and its principles made possible a new way of perceiving the world, making visible the major environmental problems and the links between poverty and the environment, modernity and pollution and resource depletion, the industrial revolution model of progress and climate change.[125]

Should we ask ourselves if the Rio Principles have the capacity to project themselves 25 years more into the future, then the answer is clearly yes, because even if the future is uncertain, most normative tools we have now are an important development of the Rio Declaration.[126] Now they are informing the United Nations Sustainable Development Goals adopted in 2015 to inspire its action beyond, until 2030. As Okowa says, "After all, principles of international law are not episodic or transitory; they are in general formulated to apply beyond the specific historical or political context that gave rise

[123] Ulrich Beck, in his last and unfinished book, argued that we are facing a situation of metamorphosis of the world that surpasses the notion of change in society because 'Change brings a characteristic feature of modernity into focus, namely permanent transformation, while basic concepts and the certainties that support them remain constant. Metamorphosis, by contrast, destabilizes these certainties of modern society. It shifts the focus to 'being in the world' and 'seeing the world', to events and processes which are unintended, which generally go unnoticed, which prevail beyond the domains of politics and democracy as side effects of radical technical and economic modernization,' see Ulrich Beck, *The Metamorphosis of the World*, (Polity Press, Cambridge, 2016) at xi.

[124] See N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, (Oxford University Press, 2002).

[125] See A. Pigrau, 'Laudato Si', VI *Revista Catalana de Dret Ambiental*, (2015) 1 – 10.

[126] Foo Kim Boon wrote in 1992 'Fifty years hence, it is likely to be seen as one of the most important documents to have been negotiated and adopted by the states concerned', 'The Rio Declaration and its Influence on International Environmental Law', *Singapore Journal of Legal Studies* (1994) 347-364, at. 364.

to them",[127] the Rio Declaration Principles certainly have a projection into the future. Particularly, now, when France is willing to lead the negotiations for the adoption of a Global Pact for the Environment that would assume the highest of challenges, the one that the Stockholm and the Rio Conferences failed to do and States have always avoided adopting a sector-by-sector approach to the protection of the environment: the adoption of an international treaty that will set out explicitly and unambiguously the limits of the state sovereignty and the obligations for the protection of the environment.

In the case of Spain, our national circumstances in the European Union made us the richest country in terms of nature and thus the biggest redoubt of the shrinking European environment. Spain was committed to the Rio Declaration from the beginning as it was with the Stockholm Declaration so that both had a seminal effect in our legal and institutional system. However our commitment as a country has depended more on our obligations towards the European Union than on an individual pledge towards the planet. Spain could do more.[128] Despite our poor performance in terms of implementation and compliance with the Rio Declaration and Principles, we are accepting that sustainability has evolved to demands of non regression on the protection of nature and that regressive measures have to be submitted to the strongest motivation that allows accountability even in times of economic crisis. Thus, in Spain, the Principle of Sustainable Development is still a vital reference —as well as an alibi— guiding environmental policies and decisions at all levels of responsibility in the federal structure of Spain and Europe.

[127] See Ph. Okowa, 'Responsibility for Environmental Damage', in M. Fitzmaurice, D. Ong and P. Merkouris (Eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishers 2010, supra n. 91.

[128] For example, a OECD report said 'Spain could do more to reduce GHG emissions and improve energy security by reforming energy prices'. See *OECD*, Perspectives: Spain, Policies for a Sustainable Recovery, (OECD Publishing, Paris, 2011) at 18, http://dx.doi.org/10.1787/9789264201736-en