Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest

Emelie Folkesson*

Abstract

This article uses a generally accepted conceptualisation of sustainable development that can be operationalized in a judicial context. It focuses on the individual and collective dimensions of the environmental, economic and social pillars, as well as the consideration of inter-generational and intra-generational equity. Case law from the European, African and American systems is analysed to reveal if the elements of sustainable development have been incorporated in their jurisprudence. The analysis reveals that the human rights bodies have used different interpretative methods, some more progressive than others, in order to incorporate the elements of sustainable development in the scope of their mandate, even if they do not mention the concept as such. The overall conclusion is that sustainable development has been operationalized through human rights courts to a certain extent. Sometimes, however, a purely individualised approach to human rights creates a hurdle to further advance sustainable development. The conclusion creates the impression that sustainable development is not just a concept on paper, but that it in fact can be operationalized, also in other courts and quasi-courts. Moreover, it shows that the institutional structure of human rights courts has been used in other areas than pure human rights protection, which means that other areas of law might make use of it to fill the gap of a non-existing court structure.

Keywords: Operationalizing sustainable development, human rights, individual rights/interests, collective rights/interests, human rights courts

1 Introduction

[T]he rigid maintenance of [the individual] approach [to human rights] contributes to the 'stagnation' of international law, and more particularly to the confinement of the idea of 'human rights' within an individualistic horizon, which remains blind to the intrinsic linkage between the individual and the collective interests of society.[1]

Human rights have traditionally emphasised the protection of individual rights against state action. Environmental protection and the process of development, on the other hand, reflect rights and/or interests of the collective, which may or may not correspond with individual human rights. For a couple of decades, the line between individual and collective interests has been blurred and human rights courts have increasingly been faced with both individual and collective dimensions of certain human rights in the context of environmental protection and development. The primary question for this article is how these courts are dealing with the potentially incompatible collective and individual approaches to human rights – both of which are relevant to the pursuit of sustainable development.

This article will shortly present a somewhat generally accepted conceptualisation of sustainable development, which entails the balancing of the environmental, economic and social 'pillars', as well as consideration of inter-generational and intra-generational equity.[2] The emphasis, however, will be on how human rights courts have reasoned around these five elements and the individual and collective dimensions thereof. The analysis includes cases from the European Court of Human Rights (hereinafter 'the European Court' or 'the Court'), the African Commission on Human and Peoples' Rights (hereinafter 'the African Commission' or 'the Commission'), and the Inter-American Court of Human Rights (hereinafter 'the Inter-American Court' or 'the Court'). Even though cases from the different systems cannot be compared in terms of substance, due to, *inter alia*, the difference in applicable law, the judicial reasoning and the interpretative methods of the different dispute-settlement bodies will be compared.

* PhD Candidate in public international law, Erasmus University Rotterdam. The author would like to thank Prof. Ellen Hey, Prof. Klaus Heine and two anonymous reviewers for their valuable insights and constructive comments on the drafts of this article. The usual disclaimer applies.

1. F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *The European Journal of International Law* 1 at 44 (2010).
2. D. MCGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception', 45 *Sustainable Development and Human Rights* at 797-801 (1996). E. Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', 8 *American University Journal of International Law and Policy* at 26 (1992).

2 Individual and Collective Dimensions of Sustainable Development

The concept of sustainable development was coined and defined by the Brundtland Commission in 1987 as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.[3] This definition is nowadays generally accepted and the idea of bridging environmental protection and development has been emphasised repeatedly at international conferences,[4] as well as in international and regional legal instruments and court jurisprudence.[5] The history, the aim, and the legal status of sustainable development have been discussed in numerous writings and will therefore be kept to a minimum in this article.[6]

The 1992 Rio Declaration on Environment and Development defined sustainable development as follows.

> Principle 3:
> The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.
> Principle 4:
> In order to achieve sustainable development, environmental protection shall constitute an integral part

3. G.H. Brundtland (World Commission on Environment and Development), *Our Common Future* (1987), at 43.
4. In Rio de Janeiro in 1992, Johannesburg in 2002 and in Rio de Janeiro again in 2012 (the 'Rio+20' Conference). *See, e.g.,* Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I) (1992). *See also* P.H. Sand, 'UNCED and the Development of International Environmental Law', 8 *National Resources & Environmental Law* (1992-1993), P. Birnie and A. Boyle, *International Law and the Environment* (2002), at 82-82; and M. Sanwal, 'Trends in Global Environmental Governance: The Emergence of a Mutual Supportiveness Approach to Achieve Sustainable Development', 4 *Global Environmental Politics* at 17 (2004).
5. P. Birnie and A. Boyle, *International Law and the Environment* (2002), at 84; M-C. Cordonier Segger, 'The Role of International Forums in the Advancement of Sustainable Development', 10 *Sustainable Development Law & Policy* at 14-17 (2009), N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (2008), at 24, 100, D. Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals', in R. Picolotti and J.D. Taillant (eds.), *Linking Human Rights and the Environment 1* (2003), at 41; and P. Sands, *Principles of International Environmental Law: Volume I, Frameworks, Standards, Implementation* (1995), at 170. International/regional legal instruments: Agreement Establishing the World Trade Organisation, signed in Marrakech on 15 April 1994, 1867 UNTS 154, 33 ILM 1144, Preamble, Consolidated Version of the Treaty on European Union, O.J. 2010 C 83/16, Preamble, North American Free Trade Agreement, 32 ILM 289, 605 (1993), Preamble, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, UN Doc. FCCC/CP/L.7/Add.1, 37 ILM 22 (1998), Security Council resolution on the reconstruction of Iraq, 22 May 2003, UN Doc. S/RES/1483 (2003), § 8(e). Court cases, *e.g.,* ICJ: *Gačíkovo-Nagymaros Project (Hungary* v. *Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, at 7. For comments, *see* Birnie and Boyle (2002), above n. 5, at 96 and P. Sands, *Principles of International Environmental Law* (2003), at 254-255, 263, A.E. Boyle, 'New Law in Old Bottles', in J. Brunnée and E. Hey (eds.), *Yearbook of International Environmental Law* (1998), at 18; P. Sands (1995), above n. 5, at 205; B.E. Hill, S. Wolfson and N. Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions', 16 *The Georgetown International Environmental Law Review*, at 359 (2003-2004) and R. Kemp and S. Parto, 'Governance for Sustainable Development: Moving from Theory to Practice', 18 *International Journal of Sustainable Development* 1/2, at 12 (2005). Many scholars have elaborated on the contested legal status of sustainable development, J.S. Dryzek, 'Paradigms and Discourses', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), at 56. Amongst others, G. Handl, 'Sustainable Development: General Rules versus Specific Obligations', in W. Lang (ed.), *Sustainable Development and International Law* (1995); P. Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (1999), D.B. Magraw and L.D. Hawke, 'Sustainable Development', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007); and N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (2008).
6. *See inter alia* A. Kiss, 'Sustainable Development and Human Rights', in A.A.C. Trindade (ed.), *Human Rights, Sustainable Development and Environment* (1995), at 36; Sands (2003), above n. 5, at 296 and D. Shelton, 'General Developments', in G. Handl (ed.), *Yearbook of International Environmental Law* (1996), at 177; U. Möller, 'Sustainability: Expectations and Reality', in K. Feiler (ed.), *Sustainability Creates New Prosperity: Basis for a New World Order, New Economics and Environmental Protection* (2004), at 19-20; and C. Mitcham, 'The Concept of Sustainable Development: Its Origins and Ambivalence', 17 *Technology in Society* 3, at 311 (1995), at 314-315; N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (2008); P. Sands (1995), above n. 5.

of the development process and cannot be considered in isolation from it.[7]

Thus, the aim of sustainable development is to balance environmental, economic and social interests, as well as consider the impact on future generations (inter-generational equity) and on vulnerable groups in the society (intra-generational equity).[8] This gives rise to a number of potential conflicts between various collective and individual interests. The clash between rights and interests is something courts deal with on a daily basis, and judges can therefore give concrete strength to sustainable development by reasoning around its elements and illustrate how the interests can be accounted for, including the ones that are not given priority.[9] As the following chapter of this article will illustrate, the elements of sustainable development have made their way into the reasoning of human rights courts, even where the courts do not have an explicit mandate to 'apply' the concept. Judges can hence operationalise sustainable development even if there is no unanimity among states on the exact meaning or legal status of the concept.[10] The reasoning of the court explains why certain acts are or are not in compliance with the treaty and reveals how the court has balanced the opposing rights and/or interests. An example being that a state limits an individual's right to property through prohibiting extraction of natural resources (the economic pillar) in order to protect the environment (the environmental pillar). Such an act limits the individual right, but might be legitimately justified by its aim and by reimbursing the economic loss through providing the individual with economic compensation.[11] The five elements of sustainable development will now be presented separately, although it should be pointed out that they are closely related in terms of causes and effects.

2.1 The Environmental Pillar

Environmental protection has received a lot of attention since the 1972 UN Conference on the Human Environment in Stockholm. The right to a clean environment can now be found in over a hundred constitutions around the globe, and there are numerous multilateral environmental agreements and expert groups at an international level.[12] Healthy ecosystems and diversity of species not only have intrinsic value in themselves, but are also closely related to human health and well-being. As people form part of ecosystems, their actions directly and indirectly affect the environment and changes in ecosystems consequently change the conditions for human well-being.[13] The right to a clean environment is by nature an interest of the collective, as the environmental health affects people beyond the individual sphere and other borders. This does not preclude an individual dimension of the environmental pillar. Environmental destruction may affect certain individuals in a very severe and concrete manner, while the general public do not suffer, at least not in the present or near future. The environmental pillar in the context of human rights protection has been represented by *e.g.* protection against environmental destruction due to industrial pollution, deforestation, or non-sustainable extraction of resources.[14]

2.2 The Economic Pillar

The economic and social pillars are often combined in the context of sustainable development and then referred to as socioeconomic development.[15] In the framework of this article, however, it is important to point out that there is a significant difference between the economic and social pillars. The economic pillar is connected to economic growth, profit and efficiency.[16] Also the economic pillar has individual and collective dimensions that may or may not strive towards the same goal. The involvement of people and companies in developmental activities tend to be driven by individual economic interests in profit making.[17] Such activities may, however, lead to economic growth, which is of great interest for the collective well-being. In this regard, private companies play a pivotal role and it could be argued that economic growth and development would not occur without them.[18] While profit-driven companies are forced to make decisions based on their individual economic interests, it has become increasingly important for companies to develop and maintain a positive reputation. Therefore, companies tend to include the collective dimension of the economic pillar, as well as envi-

7. UNCED Report (1992), Annex 1.
8. A.E. Boyle and D. Freestone, *International Law and Sustainable Development* (1999), at 16-17.
9. V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (1999), at 36-37.
10. Lowe, above n. 9, at 36-37.
11. *See* Section 3.1.2.
12. Sands (2003), above n. 5, at 296 and Shelton (1996), above n. 6, at 177.
13. Millennium Ecosystem Assessment, 'Ecosystems and Human Well-Being' (2005), available at: <http://www.millenniumassessment.org/documents/document.356.aspx.pdf> (last visited 26 Aug. 2013), at v-vi.
14. *See* Chapter 3.
15. *E.g.*, X. Fuentes 'International Law-Making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment', 2 *International Environmental Agreements: Politics, Law and Economics*, at 109 (2002). The existence of a legally binding right to development is also highly contested, *see, e.g.*, A.A.C. Trindade, 'Environment and Development: Formulation and Implementation of the Right to Development as a Human Right', in A.A.C. Trindade (ed.), *Human Rights, Sustainable Development and Environment* (1995), at 64-65; Boyle and Freestone (1999), above n. 8, at 11-12, Birnie and Boyle (2002), above n. 5, at 87; and C. Tomuschat, *Human Rights: Between Idealism and Realism* (2008), at 55.
16. S. Marks, 'The Human Right to Development: Between Rhetoric and Reality', 17 *Harvard Human Rights Journal* at 138 (2004).
17. Marks (2004), above n. 16, at 146.
18. Marks (2004), above n. 16, at 144, Q.K. Ahmad, 'On Sustainable Development and All That', 3 *Brown Journal of World Affairs* at 206-208 (1996).

ronmental and social considerations in the calculation.[19] The right to property and the general interest in economic growth typically represents the economic pillar in the context of human rights.

2.3 The Social Pillar

An anthropocentric approach to sustainable development can be found in the 1992 Rio Declaration, whose Principle 1 declares that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[20] This, however, does not preclude considerations of the other two pillars, as acknowledgement of the economic and environmental pillars is crucial for the attainment of human well-being. Without a decent environment and economic enhancement, human needs and wants cannot be accommodated.[21] The individual dimension of the social pillar is well protected by human rights documents, and it includes a wide array of rights, including the most basic right to life, as well as religious freedom and the right to private and family life. The social pillar is represented not only by civil and political rights, but also by matters related to human dignity and basic human needs in the context of work, education and improved health. These human rights are traditionally thought of as individual rights, but the collective dimension of them should be pointed out. The right to religion, for instance, includes a freedom to worship in community with others, and improved education and health facilities promote the interests of the collective. There are, moreover, human rights that are collective by nature, namely, the rights and freedoms of social and cultural minorities.[22] The more collective dimensions of the social pillar are closely related to the principles of inter-generational and intra-generational equity.[23]

After presenting the collective and individual dimensions of the three pillars of sustainable development, the following scheme can serve as further exemplifying those dimensions.

2.4 Inter-Generational Equity

The principle of equity between current and future generations is an essential part of sustainable development and it crosscuts the three pillars.[24] Inter-generational equity is frequently connected to the environmental pillar, since it is often used to support the preservation of the environment for future generations. However, the social dimension must not be forgotten; the Brundtland Report refers to 'the ability of future generations to meet *their own* needs' (emphasis added).[25] It is consequently up to the future generations to determine what their needs might be and the duty of present generations is to make sure that the environment is left in the best possible condition to make sure that future generations can fulfil that choice. Hence, the principle also refers to, *e.g.*, sustainable extraction of resources, which protects the economic interests of future generations.[26] That the principle promotes collective reasoning is clear; individual rights and interests of current generations must be considered in the light of the needs and wants of future generations as a collective. Hence, recognition of inter-generational equity is also recognition of a collective dimension of the three pillars.

2.5 Intra-Generational Equity

The principle of equity between current populations was also emphasised by the Brundtland Commission, which recognised the 'essential needs of the poor, to which overriding priority should be given'.[27] The overall aim of the principle is to promote justice between today's generations and not only between people in dif-

19. On the importance of Corporate Social Responsibility principles, *see*, for instance, <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/> (last visited 26 Aug. 2013). On credit risk management for determining, assessing and managing environmental and social risk in project finance, *see also* <http://www.equator-principles.com/> (last visited 26 Aug. 2012).
20. *See also* Sands (2003), above n. 5, at 293.
21. D. Tladi, *Towards a Nuanced Conceptualization of Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (2007), at 81.
22. D. Sanders, 'Collective Rights', 13 *Hum. Rts. Q.* at 368-370 (1991).
23. Tladi (2007), above n. 21, at 81. *See also* Birnie and Boyle (2002), above n. 5, at 86-87 and Fuentes (2002), above n. 15.
24. E. Brown Weiss, 'Intergenerational Equity and Rights of Future Generations' in A.A.C. Trindade (ed.), *Human Rights, Sustainable Development and Environment* (1995:1); and U. Beyerlin, 'Different Types of Norms in International Environmental Law: Policis, Principles and Rules', in D. Bodansky, J. Brunnée, and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), at 446; Brown Weiss (1992), above n. 2, at 26. *See also* Brundtland (1987), above n. 3, at 43; and Rio Declaration (1992), Principle 3.
25. Brundtland (1987), above n. 3, at 43, R.J. Araujo, S.J., 'Rio+10 and the World Summit on Sustainable Development: Why Human Beings are at the Center of Concerns', 2 *Georgetown Journal of Law & Public Policy* at 203-204 (2004) and Tladi (2007), above n. 21, at 46.
26. Tladi (2007), above n. 21, at 41; *see also* E. Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity', 11 *Ecology Law Quarterly* 4, at 495 (1984).
27. Brundtland (1987), above n. 3, at 43. *See also* D. Shelton, 'Equity' in D. Bodansky, J. Brunnée, and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007); and E. Brown Weiss, 'Environmental Equity: The Imperative for the Twenty-First Century', in W. Lang (ed.), *Sustainable Development and International Law* (1995:2), at 22.

	Environmental interest	Economic interest	Social interest
Individual dimension	Protection against severe environmental destruction that affects the health of an individual.	Economic interests of a company in extraction of resources.	An individual interest in the enjoyment of the private sphere.
Collective dimension	Protection against diffuse environmental degradation that does not directly affect individuals for the time being, but that affect *e.g.* fish stocks and, in the long term, also human beings.	Economic interests of society in having a certain industry in the neighbourhood, *e.g.* for increased work opportunities.	Cultural interests of indigenous peoples,[1] improved education and accessibility to health facilities.

[1] A.A. Du Plessis and C. Rautenbach, 'Legal Perspectives on the Role of Culture in Sustainable Development', 13 *Potchefstroom Electronic Law Journal*, at 27 (2010).

ferent states[28] but also between different communities within states.[29] The intra-generational principle focuses on ensuring the needs of the poor, and it highlights the importance of measures promoting distributional justice in today's society.[30] This is not limited to enhancing the economic situation of poor and vulnerable people, even if economic development of a country is necessary to meet the needs of the poor. Social and cultural values are, however, equally important as economic benefits, which makes the principle of intra-generational equity closely related to both the economic and the social pillars.[31] The principle's relation to the environmental pillar is that inequities between people are a cause of environmental degradation, as poverty deprives people of environmentally sustainable choices.[32] Also this principle clearly promotes the collective dimension of the pillars.

3 Case Law Analysis

The case law analysis will highlight examples of how sustainable development can be operationalised through human rights courts. Deeper empirical evidence is not yet available, but the following cases show a development towards an implementation of the elements of sustainable development in certain situations. In the context of human rights courts, it is important to point out that the courts do not mention the concept of sustainable development as such, that would be too politically sensitive since the respective conventions do not entail a right to sustainable development. The courts can, however, help us to deepen our understanding of sustainable development by recognising and reasoning around the individual and collective dimensions of the concept's elements described above.

3.1 The European Court of Human Rights

The European Court is not explicitly mandated to protect the environmental pillar of sustainable development, while the economic and social pillars are embedded in various provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms[33] (hereinafter the 'ECHR'). The right to a clean environment has nonetheless started to crystallise in two ways.[34] Firstly, a certain level of environmental quality is required for the effective enjoyment of certain rights. Secondly, limitations of certain rights are permitted due to the general interest in a democratic society to protect the environment.[35] The provisions of the ECHR are drafted in an individualistic language, intended to protect the individual against state action. As mentioned above, however, some rights do have collective dimensions and so has the general interest, which can serve as a legitimate justification to limit certain individual rights.

3.1.1 Protection against Environmental Destruction

Turning back to 1994 and the *López Ostra* case,[36] where the European Court made clear that environmental obligations under the ECHR do not only cover state activities, but also cover activities carried out by private parties, in this case a waste treatment plant. The Court held

28. J. Danaher, 'Protecting the Future or Compromising the Present?: Sustainable Development and the Law', 14 *Irish Student Law Review* at 127-128 (2006). On the North-South discussion, *see* R.E. Jackson, 'Thoughts on Sustainable Development: A Perspective from the Third World', 3 *Brown Journal of World Affairs* 2, at 215 (1996) and A.D. Tarlock, 'Ideas Without Institutions: The Paradox of Sustainable Development', 9 *Indiana Journal of Global Legal Studies*, at 35 (2001).
29. Brundtland (1987), above n. 3, at 43.
30. *Id*.
31. E. Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment', 84 *The American Journal of International Law* 1, at 201 (1990).
32. Brown Weiss (1990), above n. 31, at 201, S. Beder, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics', 4 *New Zeeland Journal of Environmental Law* at 229 (2000).
33. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* on 3 September 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998, *respectively*.
34. I have deliberately excluded cases concerning noise pollution, due to their lack of long-term dimension. Extensively on environmental cases and the European Court, *see* D. Garcia San José, *Environmental Protection and the European Convention on Human Rights* (2005).
35. D. García San José, 'Environmental Protection and the European Convention on Human Rights', published by the Council of Europe, available at <http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-21(2005).pdf> (last visited 26 Aug. 2013), at 8-9.
36. European Court of Human Rights: *López Ostra* v. *Spain*, Application No. 16798/90, Judgment of 9 December 1994.

that the environmental degradation in this case directly obstructed the applicant's right to private and family life, Article 8 of the ECHR.[37] The European Court stated that even if there were no grave health risks, severe environmental pollution could nonetheless affect the well-being of individuals and their right to effectively enjoy their homes.[38] Although recognising that states do have a certain margin of appreciation to protect the economic interest of the town in having a waste treatment plant nearby, the Court nonetheless held that such interests could not outweigh the right to private life, referring to its 'practical and effective' doctrine. This doctrine emphasises that rights are to be interpreted and applied in a way that makes them practical and effective, not theoretical and illusory 'rights on paper'.[39] In this case, the right to private and family life had been rendered practically ineffective, due to fume emissions, noise and strong smells from the plant, according to the Court.[40] It therefore came to the conclusion that the right to private and family life was violated, as Spain had not struck a fair balance between the general interest in having the waste treatment plant nearby and the individual right.[41] Four years later, the European Court came to a similar conclusion in the *Guerra and Others* case.[42] Moreover, the Court held that environmental responsibilities under Article 8 include an obligation of State authorities to provide affected people with information about the environmental situation that might interfere with their private and family life. Thereby, the European Court also recognised a procedural dimension of the environmental pillar.[43]

Also in the *Giacomelli* case,[44] the European Court found a violation of Article 8, due to environmental destruction. In its assessment, the Court evaluated whether the authorities had complied with the national environmental requirements. Since the domestic procedures on suspension for facilities that did not fulfil the environmental requirements were not followed, the Court held that it indicated that the state had failed to fulfil its obligations under Article 8.[45] The European Court has hence set national environmental standards as a measurement of compliance with the obligations under the ECHR. Thus, the Court is hesitant to set its own standards for the environmental pillar and recognise that environmental protection in general is important for human well-being. It rather relies on the Contracting Parties' existing national standards, thereby giving them a certain margin of appreciation as to the threshold for environmental destruction to trigger protection under the ECHR.

These cases illustrate that the European Court implicitly recognises the three pillars of sustainable development. The parameter used to include the environmental pillar in the domain of the Court, however, is whether or not the environmental destruction *directly and severely* interferes with the right to private and family life. Such interferences, however, do not need to be physical breaches of peoples' homes; less concrete and physical interferences such as fume emissions, noise and strong smells that make the families living conditions unbearable also fall within this scope.[46] The Court is hence focused on the individual dimension of the social pillar (direct interference with the right to private and family life), but it also recognised the individual environmental dimension thereof (given there is a direct link to an individual right). The collective aspect of environmental protection was left out of the reasoning, as well as the intrinsic value of the environment in itself. The clash between the individual, and potentially collective, economic interests in the industries and economic growth on the one hand and individual social and environmental interests on the other hand was recognised by the European Court. The measure used to determine a fair balance was whether or not the individual right could be effectively enjoyed given the environmental situation created by economic activities. In the above cases, the fume and noise emissions from the plants were so severe that the applicants' living conditions became unbearable and their right under Article 8 became practically ineffective.

The European Court has also constructed a link between severe environmental destruction and the right to life, Article 2 of the ECHR. The Court found Turkey to be in breach of its due diligence obligations in the case of *Öneryldiz*,[47] since the state authorities were responsible for the uncoordinated management of a

37. European Court: *López Ostra,* § 49.
38. European Court: *López Ostra,* § 51. *See also* Popovic (1995-1996), at 518-519.
39. The original case where the 'practical and effective' doctrine was developed was *Marckx* v. *Belgium,* Application No. 6833/74, Judgment of 13 June 1979*, see* § 31. Other cases are *Airey* v. *Ireland*, Application No. 6289/73, Judgment of 9 October 1979, § 24 and *X and Y* v. *Netherlands*, Application No. 8978/80, Judgment of 26 March 1985, § 23. Generally on this doctrine, *see, e.g.,* G. Cohen-Jonathan, 'Respect for Private and Family Life', in R.S. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for Protection of Human Rights* (1993), at 409; and A. Mowbray, 'European Convention on Human Rights: The Issuing of Practice Directions and Recent Cases', 4 *Human Rights Law Review* at 78 (2005). On the 'margin of appreciation' doctrine, *see, e.g.,* R.S.J. Macdonald, 'The Margin of Appreciation', in R.S. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for Protection of Human Rights* (1993), at 103; and Y. Arai, 'The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights', 16 *Netherlands Quarterly of Human Rights* 1, at 41 (1998).
40. European Court: *López Ostra,* § 47.
41. European Court: *López Ostra,* § 58.
42. European Court: *Guerra and Others* v. *Italy,* Application No. 14967/89, Judgment of 19 February 1998.
43. European Court: *Guerra and Others,* §§ 57-60. On proceduralisation of rights, *see, e.g.,* D.M. Beatty, *The Ultimate Rule of Law* (2004), at 15-25, A. Antonelli and A Biondi, 'Implementing the Aarhus Convention: Some Lessons from the Italian Experience', 5 *Environmental Law Review* (2003), at 170-171 and M. Gavouneli, 'Access to Environmental Information: Delimitation of a Right', 13 *Tulane Environmental Law Journal*, at 304-306 (2000).
44. European Court: *Giacomelli* v. *Italy,* Application No. 59909/00, Judgment of 2 November 2006.
45. European Court: *Giacomelli,* §§ 87-93.
46. European Court: *López Ostra,* § 47 and *Giacomelli,* § 76.
47. European Court: *Öneryldiz* v. *Turkey*, Application No. 48939/99, Judgment of 30 November 2004.

municipal garbage tip that eventually exploded and killed a number of people living in a slum adjacent to the dump.[48] Regarding Article 2, the Court highlighted the positive obligations to ensure the right to life:

> [The positive obligation] entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life … This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.[49]

The Court focused on the individual dimension of the social pillar (the right to life), and in that context it concluded that states have far-reaching positive environmental obligations to ensure that the right to life is protected. Even though the Court is focusing on the individual right, the reasoning implies that as a collective, citizens of the Contracting Parties have a right to an environment that does not put their lives at risk.

This case further showed that the European Court implicitly recognises the principle of intra-generational equity. The Court held that the seemingly voluntary settlement next to the garbage tip in fact was not that voluntary. The economic situation of the slum dwellers, in conjunction with encouragement from the state through town planning, had forced them to live in dangerous areas, where the environmental situation was eventually costing them their lives. The Court rejected the state's argument that the slum dwellers were responsible for situating themselves at risk and inferred that states have a far-reaching responsibility to ensure that vulnerable people are to be protected against environmental destruction. The European Court thereby recognised the collective dimension of the social pillar by highlighting the plight of the slum dwellers following the rational of the principle of intra-generational equity.

Around the year 2000, the European Court received a number of complaints from Russian citizens regarding the environmental situation in Cherepovets. In its first judgement, *Fadeyeva*,[50] the European Court expressly set out the general principles regarding environmental destruction in the context of Article 8, namely,

> [I]n order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an *actual interference* with the applicant's private sphere, and, secondly, that a level of *severity* was attained (emphasis added).[51]

The Court then pointed out that environmental concerns were growing and that European States had adopted various measures to reduce emissions and pollution from industries, hence referring to its 'living instrument' doctrine. This doctrine draws on the idea that the interpretation of the ECHR provisions evolves over time to accommodate changes in society that were not anticipated when the Convention was drafted, such as the increasing concerns about the environment.[52] It thereby opened up for more progressive interpretation in the environmental field, but continued instead by stating that states do have a wide margin of appreciation in this field and that the Court's role in environmental protection is merely subsidiary. The European Court held that it would focus its analysis on the procedural aspects of Article 8 and only in exceptional cases considers the substantive part of the decisions taken by national authorities in environmental cases.[53] Thus, the Court made clear that it did not recognise the collective dimension of the environmental pillar that promotes healthy ecosystems in general, something highly relevant in the pursuit of sustainable development.

Eventually, the European Court found Russia to be in violation of Article 8, as the air pollution levels exceeded the national environmental standards and the justifications put forward by the state did not strike a fair balance between the individual right and the community interest.[54] In its assessment, the Court found that the air pollution without doubt adversely affected the applicant's quality of life.[55] Direct interferences with individual rights must be 'in accordance with the law', but as the plant was privately owned, the state did not directly interfere with the applicant's right. The state nonetheless has positive obligations and 'domestic legality should be approached not as a separate and conclusive test, but rather as one of many aspects which should be taken into account in assessing whether the State has struck a "fair balance" in accordance with Article 8 § 2.'[56] The European Court found the contribution of the steel plant to the economic system of the region constituted a legitimate aim in the meaning of Article 8 § 2,

48. European Court: *Öneryldiz,* §§ 98-110.
49. European Court: *Öneryldiz,* §§ 89-90.
50. European Court: *Fadeyeva* v. *Russia,* Application No. 55723/00, Judgment of 9 June 2005. *See alsoLedyayeva, Dobrokhotova, Zolotareva and Romashina* v. *Russia*, Application Nos. 53157/99, 53247/99, 53695/00 and 56850/00, Judgment of 26 October 2006 and *Dubetska and Others* v. *Ukraine,* Application No. 30499/03, Judgment of 10 February 2011, §§ 6, 10-11 and 73.
51. European Court: *Fadeyeva,* § 70.
52. The original case for this interpretation method was *Tyrer* v. *United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, § 31 and repeated in, *e.g., Soering* v. *United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, § 102, *Loizidou* v. *Turkey*, Application No. 15318/89, Judgment of 23 March 1995, § 71 and *Matthews* v. *United Kingdom*, Application No. 24833/94, Judgment of 18 February 1999, § 39. *See also* Mowbray (2005), above n. 59, at 60-61, F. Matscher, 'Methods of Interpretation of the Convention', in R.S. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for Protection of Human Rights* (1993), at 68; and G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', (2012), available at <http:// papers .ssrn .com/ sol3/ papers .cfm ?abstract_ id= 2021836> (last visited 27 Aug. 2013).
53. European Court: *Fadeyeva,* §§ 103-105.
54. European Court: *Fadeyeva,* § 134.
55. European Court: *Fadeyeva,* § 88.
56. European Court: *Fadeyeva,* § 101.

but the recourse sought by the applicant in national courts was ineffective and the state did not provide her with any alternative solution to enable her to move away from the dangerous area.[57] Her individual right to private and family life was hence rendered ineffective and the individual and collective economic interest of having the steel plant in the region could not justify that.[58]

Moreover, the Court recognised the intra-generational equity dimension in the *Fadeyeva* case. It observed that the applicant probably did not have the possibility to move from the hazardous area, as she had very limited financial resources. Therefore, the states were expected to take further measures to ensure that the applicant's right to private and family life was ensured, in line with the 'practical and effective' doctrine.[59] This can be compared to the *Guerra and Others* case, where the Court held that distribution of environmental information sufficed to fulfil the due diligence obligations under Article 8.[60] Even though the European Court is hesitant to give the environmental pillar explicit support, its focus on the 'practical and effective' side of the social pillar does translate into a certain degree of environmental protection. However, it is clear that the issue for the Court is not the environmental destruction as such; the power plant may continue to contaminate as long as people are not negatively affected by it.

In the *Kyrtatos* case,[61] the European Court reiterated its findings in *López Ostra* and stated that severe environmental degradation can affect individuals' private sphere even if it does not endanger their health, as long as such degradation can be directly linked to an individual's home. The Court found no such link in the present case, although it recognised that the surroundings might have been severely damaged by the illegal draining of a wetland adjacent to the applicants' home, including damage to birds and protected species.[62] With regard to this case, Francioni argues,

> The paradoxical result of this decision is that the preservation of the environment from the attack caused by illegal activities depends on the interference that such illegal activities produce in the private life of individuals. A different approach would have been preferable. The Court could have given more weight to the illegal character of the environmental destruction and interpreted Article 8 more liberally so as to consider the applicants legitimate stakeholders in the management of natural resources which were not only part of their *extended* [emphasis added] home and private life but, more importantly, constituted a public environmental good affecting the collective life of the people living in and around the area.[63]

Translated into the conceptualisation of sustainable development presented above, the *Kyrtatos* case illustrates that the European Court did not consider the collective aspects of the social pillar and thereby the environmental pillar was overlooked. By narrowly focusing on the individual social aspects, the Court instead promoted the economic pillar, *i.e.* the interest of private companies to exploit the wetland for economic gain.[64] The problem from a sustainable development point of view is not that the economic pillar was promoted, but rather that the environmental pillar was not partaking in the balancing, as the environmental destruction did not interfere directly and severely with an individual right. The necessity and proportionality test (hence the balancing part) of the court's assessment requires an interference with a right. If there has been no interference, as the Court concluded in the *Kyrtatos* case, the test if the state has struck a fair balance between the individual right and the collective interest will not be applied. One of the keys to operationalising sustainable development hence seems to be recognition of the collective dimension of individual rights, as it will facilitate the inclusion of all pillars in the balancing between the conflicting interests.

3.1.2 Interferences with Human Rights to Protect the Environment

In the *Fredin* case,[65] the European Court found no violation of the applicant's right to property, Article 1 of Protocol No. 1. The Court held that Sweden had struck a fair balance between the individual right (to extract gravel from a property) and the general interest in environmental protection.[66] Again, the Court stated that protection of the environment was an increasingly pertinent topic in today's society.[67] This was further illustrated in the *Posti and Rahko* case,[68] where the interference with two fishermen's right to possession under Article 1 of Protocol No. 1 was justified, since it fulfilled the legitimate aim of preserving fish stocks. Moreover, the measures were proportionate, as the applicants' right to fish was restricted, not completely banned and they received compensation for the losses suffered.[69] These cases illustrate the clash between the individual economic interests of the applicants vs. the collective interest in preserving the environment for future generations (inter-generational, social aspects). Moreover, they show that the European Court is not hesitant to give the Contracting Parties a rather wide margin of appreciation

57. European Court: *Fadeyeva,* §§ 123, 132-133.
58. European Court: *Fadeyeva,* § 117.
59. European Court: *Fadeyeva,* §§ 120-132.
60. European Court: *Guerra and Others,* § 60.
61. European Court: *Kyrtatos* v. *Greece,* Application No. 41666/98, Judgment of 22 May 2003.
62. European Court: *Kyrtatos*, §§ 52-54.
63. Francioni (2010), above n. 1, at 51.
64. Francioni (2010), above n. 1, at 51; and Tladi (2007), above n. 21, at 87-90.
65. European Court: *Fredin* v. *Sweden (No. 1),* Application No. 12033/86, Judgment of 18 February 1991. The second *Fredin* case concerned the right to fair and public hearing as provided by Art. 6(1) of the ECHR, *Fredin* v. *Sweden (No. 2),* Application No. 18928/91, Judgment of 23 February 1994.
66. European Court: *Fredin,* §§ 51-56.
67. European Court: *Fredin,* § 48.
68. European Court: *Posti and Rahko* v. *Finland,* Application No. 27824/95, Judgment of 24 September 2002.
69. European Court: *Posti and Rahko,* §§ 76-78. The ECtHR held that the right to fish in State-owned waters constituted a 'possession' and hence fell in the scope of Art. 1 Protocol No. 1, § 76.

when it comes to restricting economic rights to promote the collective dimension of the environmental pillar, as long as such measures are legitimate and proportionate.
In the *Housing Association of War Disabled and Others*,[70] the European Court found that the withdrawal of building permits constituted control of property in the meaning of Article 1(2) of Protocol No. 1 and it was thereby an interference with the right to property. However, the Court noted,

> [I]n an area as complex and difficult as that of spatial development, the Contracting States should enjoy a wide margin of appreciation in order to implement their town- and country-planning policy … Nevertheless, the Court cannot fail to exercise its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right of property.[71]

The European Court then stated that the state's aim of forest protection was legitimate, but that the measures taken were disproportionate. Since the authorities had withdrawn building permits from people who had bought the land for the sole purpose of building homes, and they were moreover not offered compensation or new land, the Court concluded that there had been a breach of Article 1 of Protocol No. 1.[72] In terms of sustainable development, this case differs from the other two where the right to property was restricted in the name of the collective environmental pillar, since there is a clear social pillar component (building homes). In the previous cases, it was the individual economic interests of the applicants that were restricted (extraction of gravel, fishing), which moreover were duly compensated.
Also in *Hamer*,[73] the European Court found an interference with the applicant's right to property. It was reiterated that the environment is not a value specifically protected by the ECHR, although the Court made a reference to the 'living instrument' doctrine:

> The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.[74]

This was ground-breaking in the sense that the European Court for the first time explicitly referred to the environment as having a value in itself and that economic interests and even a fundamental right, the right to property, should not be given priority over environmental interests.[75] The Court found the demolition of the applicant's summerhouse to be a proportionate measure, even though it was built almost thirty years ago. Due to the fact that the only way to achieve the aim of a forested area without buildings was to restore the property and demolish the house, the Court found that the state had struck a fair balance between the environmental interest and the individual right.[76] This shows that the European Court is not always disregarding the collective approach. The context, however, should not be forgotten. To restrict individual rights to promote the environmental interest as a justification put forward by the state is far less politically sensitive than attributing the right to a clean environment to individual rights contained in the ECHR. Nevertheless, the European Court recognised the intrinsic value of the environment and it is clear from *Hamer* that the individual social and economic interests of the applicant were duly restricted in the interest of preserving the environment for future generations through recognising the collective aspect of the environmental and social pillars.

3.2 The African Commission on Human and Peoples Rights

The African Charter on Human and Peoples' Rights[77] (hereinafter 'the ACHPR') does, contrary to the other two regional documents, contain an explicit right to a clean environment, as well as a right to development.[78] It does not, however, entail a provision on *sustainable* development. As its European and Inter-American counterparts, the African Commission does therefore not refer to the concept of sustainable development as such, even though it is more explicit in its elaborations of the elements presented above. Two cases are relevant in illustrating the African Commission's contribution to operationalising sustainable development, namely, the case of *Ogoniland*[79] and the *Endorois* case.[80]

70. European Court: *Housing Association of War Disabled and Victims of War of Attica and Others* v. *Greece*, Application No. 35859/02, Judgment of 13 July 2006.
71. European Court: Housing Association of War Disabled and Others, § 37.
72. European Court: Housing Association of War Disabled and Others, §§ 39-41.
73. European Court: *Hamer* v. *Belgium,* Application No. 21861/03, Judgment of 27 November 2007.
74. European Court: *Hamer*, § 79.
75. Factsheet: Environmental-related cases in the case law of the European Court of Human Rights, available at: <http://www.echr.coe.int/NR/rdonlyres/0C818E19-C40B-412E-9856-44126D49BDE6/0/FICHES_Environnement_EN.pdf> (last visited 28 Sep. 2012), at 6.
76. European Court: *Hamer*, §§ 86-89.
77. African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* on 21 October 1986.
78. Artis. 22 and 25 ACHPR.
79. African Commission on Human and Peoples' Rights: *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria* (*'Oginiland'*), African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).
80. African Commission: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)* v. *Kenya*, African Commission on Human and Peoples' Rights, Comm. No. 276/03 (2009).

The question for the African Commission in the case of *Ogoniland* was about balancing different individual and collective rights and interests. An oil consortium had exploited oil in the Ogoniland area, resulting in severe environmental destruction, such as soil, water and air contamination. Moreover, the protesting Ogoni people were met with immense violence, including attacks, burning and destruction of villages and execution of leaders by national security forces.[81] The African Commission pointed out that states have the right to exploit oil and other natural resources in order to be able to ensure the economic and social rights enshrined in the ACHPR. However, the environmental and social interests of the Ogoni people was not sufficiently addressed by the government, which moreover actively engaged in violating the rights of Ogonis by attacking them and destroying their villages.[82] The measures taken by the Nigerian authorities to ensure the economic interest were hence not proportionate to the environmental and social costs paid by the Ogoni people. In its analysis, the Commission highlighted the importance of integrating the different pillars:

> These rights [to health and a clean environment] recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.'[83]

The African Commission stepped away from the purely individualistic language that its European counterpart is using, recognising the collective dimension and the right of the community as a whole to have the right to an environment that is not unsustainably overexploited by resource-extracting corporations.[84]

In the *Endorois* case, the complainants alleged violations of a number of provisions due to the displacement of the Endorois indigenous community through the creation and re-gazetting of a game reserve.[85] The group claimed that their centuries-old traditional way of living was intrinsically linked to the area around Lake Bogoria and that the compensation they had been promised for the relocation had not been implemented.[86] The state contested the status of the Endorois community as indigenous and thereby their claim to collective rights. The African Commission disagreed and highlighted the sacred relationship the group had with the land, as well as self-identification as an indigenous group.[87] Moreover, the Commission 'draw inspiration' from the progressive interpretation of the Inter-American Court in the field of community rights (see below) and held that even if indigenous groups have been affected by modern society in their way of life, they may still fulfil the criteria of 'distinctiveness' that entitles them to collective rights.[88]

By relying on case law from the Inter-American, the European Court, and other international human rights bodies, the Commission found that the indigenous lands of the Endorois had been severely and disproportionally encroached upon, in violation of Article 14 (the right to property).[89] Even though the respondent state argued that the Endorois people still had access to the land for the purpose of obtaining food and engaging in certain economic activities such as beekeeping and livestock grazing, the African Commission held that such privileges and restricted access 'falls below internationally recognised norms. The respondent state must grant title to their territory in order to guarantee its permanent use and enjoyment.'[90] The state also raised wildlife management and conservation as a justification to limit the rights of the complainants.[91] The African Commission rejected that argument and held that 'the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems' and 'continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law.'[92]

The Commission exemplified application of the principle of intra-generational equity by rejecting the respondent state's argument that special treatment of indigenous groups could be perceived as discriminatory.

> The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance.[93]

The African Commission thereby recognised the importance of positive actions to address the situation of vulnerable people in society, in line with the principle of intra-generational equity. This collective approach to the social and economic interests of the Endorois community is crucial in the pursuit of sustainable develop-

81. African Commission: *Ogoniland*, §§ 1-7.
82. African Commission: *Ogoniland*, §§ 53-54.
83. African Commission: *Ogoniland*, § 51.
84. Francioni (2010), above n. 1, at 51-52.
85. African Commission: *Endorois*, §§ 1, 3, 6.
86. African Commission: *Endorois*, §§ 10-12.
87. African Commission: *Endorois*, §§ 155, 157.
88. African Commission: *Endorois*, §§ 158-162.
89. African Commission: *Endorois*, §§ 237-238. The Commission also found the state to be in violation of Arts. 8 (right to religious freedom), 17 (right to culture), 21 (right to freely dispose wealth and natural resources) and 22 (right to development).
90. African Commission: *Endorois*, §§ 181, 186, 206.
91. African Commission: *Endorois*, § 178.
92. African Commission: *Endorois*, § 235.
93. African Commission: *Endorois*, § 196.

ment and in stark contrast to the individual reasoning of its European counterpart.

3.3 The Inter-American Court of Human Rights

The Inter-American Court has mostly dealt with cases concerning sustainable development in the context of indigenous peoples.[94] As mentioned above, the American Convention on Human Rights[95] (hereinafter the 'ACHR') does not contain an explicit right to a clean environment, but the Inter-American Court has nonetheless incorporated environmental rights in the scope of its mandate through progressive treaty interpretation even though the Court does not explicitly mention the concept of sustainable development. Moreover, the collective reasoning applied by the African Commission can be traced also in the case law of the Inter-American Court, which is remarkable since it does not explicitly contain communitarian rights, as its African counterpart does.

The first case concerning the right to ancestral lands was filed on behalf of the Mayagna (Sumo) Awas Tingni Community against Nicaragua.[96] The Inter-American Court held that the logging concessions awarded to private companies in the communal lands of indigenous peoples constituted a breach of the right to property, Article 21 of the ACHR. Even though Article 21 does not contain an explicit right to communal lands, the Court concluded that indigenous groups have the right to community entitlement and thereby the right to hunt, fish, gather food and live by their cultural beliefs, without having their land exploited by environmentally and culturally destructive activities, such as commercial logging.[97]

The Inter-American Court based its decision on the preparatory works, which revealed that the phrasing 'enjoyment of private property' was changed to 'enjoyment of his property' and thereby taking away the individualistic phrasing of the provision. Moreover, the Court stressed that the ACHR is a 'living instrument'[98] that must be interpreted in the light of present-day conditions and that Article 29(b) of the ACHR prohibited a restrictive interpretation of the rights guaranteed by the Convention.[99] The Inter-American Court clearly recognised all three pillars, since it added the environmental pillar to its analysis through progressive treaty interpretation. In terms of balancing, the Court focused on the collective aspects of the social and environmental pillar, which in this case outweighed the individual economic interests of the logging companies, as their loss could more easily be compensated for in monetary terms.

The Inter-American Court elaborated further on the interpretation methods of Article 21 in the *Yakye Axa Indigenous Community* case.[100] With a reference to the 1969 Vienna Convention on the Law of Treaties,[101] the Court stated that not only should the provisions directly related to the ACHR be considered, but also instruments that are related to the human rights system as such. In the present case for instance, the International Labour Organisation (hereinafter 'ILO') Convention No. 169[102] was deemed appropriate to consider in the context of communal property rights. The Inter-American Court specifically referred to Article 13 of the ILO Convention, which provides that special attention shall be given to the cultural and spiritual values of the indigenous groups and their relationship to the territories on which they live, especially the collective aspects of such values. In the light of this, the Inter-American Court declared that Article 21 must be interpreted as requiring states to safeguard the traditional lands and the natural resources therein *and* to make sure that this right is effectively realised, something that Paraguay failed to do in this case.[103] The Inter-American Court further stated that the right to communal property of ancestral lands includes preservation of cultural values, as well as the transmission of such values to future generations, *i.e.* referring to the principle of inter-generational equity, without further legal justification why this principle should be incorporated in this context.[104]

The clash between current property owners and indigenous peoples became apparent in the *Sawhoyamaxa Indigenous Community* case,[105] and once again the Inter-American Court recognised the collective dimension of Article 21. It stated that current possession of land was not a requirement, if, as in the present case, the indigenous group unwillingly had had to leave its territory, which subsequently was transferred to third parties. The right to restitution of such land, according to the Court, does not cease only because the indigenous group is no longer fishing, hunting or gathering if they are hindered to do so for reasons beyond their control. The Court held that as long as the relationship between the traditional lands and the spiritual and material identity of the indigenous group exists, the right to restitution should be enforceable.[106] The Inter-American Court hence recognised the collective social values of the

94. T. Buergenthal and D. Shelton, 'Contentious Cases before the Court', in *Protecting Human Rights in the Americas: Cases and Materials* (1995).
95. American Convention on Human Rights, adopted on 22 November 1969, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).
96. Inter-American Court of Human Rights: *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of 31 August, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001).
97. Inter-American Court: Mayagna (Sumo) Awas Tingni Community, §§ 145-155.
98. Referring to its European counterpart, *see Mayagna (Sumo) Awas Tingni Community,* § 145. *See also* Inter-American Court: *Yakye Axa Indigenous Community*, § 125.
99. Inter-American Court: *Mayagna (Sumo) Awas Tingni Community*, §§ 145-148.
100. Inter-American Court: *Yakye Axa Indigenous Community* v. *Paraguay*, Judgment of 17 June 2005, Inter-Am. Ct. H.R. (Ser. C) No. 125 (2005).
101. Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 1969, at 679.
102. Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, *entered into force* on 5 September 1991.
103. Inter-American Court: *Yakye Axa Indigenous Community*, §§ 136-140, 152-156.
104. Inter-American Court: *Yakye Axa Indigenous Community*, § 124.
105. Inter-American Court: *Sawhoyamaxa Indigenous Community of the Enxet People* v. *Paraguay*, Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003).
106. Inter-American Court: *Sawhoyamaxa Indigenous Community of the Enxet People*, §§ 125-134.

indigenous groups, which are more difficult to compensate than third-party economic claims. By doing so, it opened up for integration of the three pillars through promoting the collective dimension of the social and environmental pillars, while leaving it open for the economic interests of third parties to be satisfied through economic reimbursement.

Moreover, since the Sawhoyamaxa group did not have access to its lands, the situation had become very serious, with a number of deaths and numerous people getting ill from living next to a national road. The Inter-American Court stated that vulnerable people should be given high priority when it comes to the implementation of Article 4(1) of the IACHR, the right to a life in dignity. The Court found that Paraguay violated this provision, since it failed to take positive actions to protect the Sawhoyamaxa community members.[107] This is an example of how the principle of intra-generational equity has been applied in practice. The Inter-American Court recognised the vulnerable situation of the indigenous group and how measures to protect such groups must be effectively implemented.

In the *Saramaka People* case,[108] the Inter-American Court established that not only indigenous peoples, but also tribal communities can have profound relationships with their ancestral lands, even if they settled there as late as the 17th and 18th centuries. Thereby, they also have the right to communal property in accordance with Article 21.[109] The Inter-American Court referred to a number of international conventions[110] and reiterated that State Parties to the IACHR have due diligence obligations to ensure that indigenous *and* tribal peoples' rights are effectively protected so that their social, economic and cultural survival is guaranteed and preserved in order to be able to transmit their distinct traditions to future generations.[111] The Inter-American Court concluded that the mining and logging concessions awarded by Suriname violated the right to natural resources on communal land.

> [T]he right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.[112]

Again, this quote illustrates the collective language that the Inter-American Court uses in the context of indigenous peoples. In this case, the economic interest of the tribal community of small-scale logging and trade as part of their economic organisation, clashed with the economic interest of the State and logging companies to engage in large-scale logging. The Court therefore looked at environmental impact reports of the respective logging activities, which revealed that the large-scale logging had devastating effects on the environment, leaving large areas ruined for animals and farming, while the small-scale logging by the tribe did not have such negative effects.[113] Moreover, large-scale logging could potentially endanger the tribe's traditional way of life, contrary to Article 21 and the right to possess resources that are necessary for the cultural, social and economic survival of the tribe.[114] This case is a good example of how the different dimensions of the three pillars are recognised and balanced to reach the most sustainable outcome.

Also the Inter-American Commission on Human Rights has followed the footsteps of the Inter-American Court regarding progressive treaty interpretation when environmental destruction is threatening the rights of indigenous peoples. In the *Yanomami Indians* case,[115] the Commission held that Brazil violated the right to life and physical integrity when constructing a highway through ancestral lands of indigenous peoples. Similarly, the Inter-American Commission concluded that the life support on which the indigenous community relied upon was endangered because of the logging concessions awarded by the Belize authorities in the *Maya Indigenous Community of Toledo* case. The Commission found a violation of the claimants right to communal property, even though it pointed out the importance of economic development.[116]

These cases regarding communal property rights show that the San José Court is not hesitant to engage in progressive treaty interpretation of the ACHR, by referring to preparatory works, case law of other human rights bodies, international human rights law in general and other documents that relate to the subject matter. The language used by the Inter-American Court furthermore shows that it is more concerned about the collective aspects of the rights than its European counterpart. Moreover, the Inter-American Court has showed that the principles of intra-generational and inter-generational equity can be operationalised in the context of human rights. In terms of the three pillars, the cases illustrate that the Inter-American Court has used the principles of inter-generational and intra-generational

107. Inter-American Court: *Sawhoyamaxa Indigenous Community of the Enxet People*, §§ 162-163, 178.
108. Inter-American Court: *Saramaka People* v. *Suriname,* Judgment of 28 November 2007, Inter-Am. Ct. H.R. (Ser. C) No. 172 (2007).
109. Inter-American Court: *Saramaka People,* §§ 85-86, 132-133. *See also* Inter-American Court: *Moiwana Community* v. *Suriname,* Judgment of 15 June 2005, Inter-Am. Ct. H.R., (Ser. C) No. 124 (2005), on the rights of tribal communities.
110. Including common Art. 1 of the ICCPR and the ICESCR.
111. Inter-American Court: *Saramaka People,* § 95.
112. Inter-American Court: *Saramaka People,* § 122.
113. Inter-American Court: *Saramaka People,* §§ 150-151.
114. Inter-American Court: *Saramaka People,* §§ 130-135.
115. Inter-American Commission on Human Rights: *Yanomami Indians*; The Human Rights Situation of the Indigenous People in the Americas, Inter-Am. OEA/Ser.L/V/II.108, Doc. 62 (2000).
116. Inter-American Commission on Human Rights: *Maya indigenous community of the Toledo District* v. *Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004). Referencing the above mentioned *Ogoniland* case from the African Commission, *see* § 149.

equity when balancing the three pillars. The Court recognised the collective dimension of the pillars and that such interests are more difficult to compensate than individual economic interests and that they therefore should be given priority.

4 Concluding Remarks

This article uses a generally accepted conceptualisation of sustainable development that can be, and has been, operationalised through judicial reasoning. The conceptualisation focuses on the potentially incompatible individual and collective dimensions of the environmental, economic and social pillars, and the principles of inter-generational and intra-generational equity. Case law from the three regional human rights bodies (the European, the African and the Inter-American) is analysed in order to reveal how they have wrestled the individual and collective dimensions of the elements of sustainable development and what legal arguments they used in order to do so. The human rights bodies do not explicitly refer to sustainable development, but they have all incorporated the elements thereof to a certain extent. The fact that human rights courts deal with the environmental pillar, even those that are not explicitly mandated to do so, shows that human rights courts have created an institutional framework that is dealing not only with human rights, but also with environmental concerns to a certain extent. This means that other areas of law that do not yet have such institutional structure might use, or have used, this well-established framework to deal with claims.

The European Court acknowledged that environmental concerns are increasingly important in today's society (referring to its 'living instrument' doctrine) and effectively connected certain environmental destruction to the right to life, and the right to private and family life. In terms of balancing the three pillars, the European jurisprudence shows that the economic pillar cannot outweigh the individual dimension of the social and environmental pillars, *i.e.* economic interests cannot be used as a justification if a person can show environmental destruction that directly and severely infringes a right and thereby prohibits an individual from effectively enjoying his or her right. However, the analysis also showed that the European Court has been hesitant in recognising the collective dimension of the social and environmental pillars in cases regarding an infringement of a right due to environmental destruction. By failing to recognise the importance of the collective dimension, the balancing of the three pillars became askew, since the environmental dimension of the collective social right was excluded from the balancing test. This might be a sign of the political context in which the European Court works. With an enormous backlog of cases, it might be hesitant to step too far outside its mandate and attract even more claims.[117] Moreover, collective rights, or recognition of collective rights, are outside the legal cultural and constitutional heritage in Europe and the context of human rights.[118] The European Court might therefore not be the ideal institution for operationalising sustainable development. However, given the situation with few ideally suited courts or quasi-courts dealing with sustainable development claims from individuals, this analysis at least shows that sustainable development has been operationalised to a certain extent by the European Court.

The other two regional institutions illustrate how the collective dimensions of the three pillars can be incorporated in a human rights context. Thereby, the pillars were all considered in the balancing process and the court or quasi-court was in a better position to make an objective evaluation of which pillar(s) were reasonable to put at fore and how the other(s) could be accounted for. By doing so, the African Commission and the Inter-American Court effectively operationalised sustainable development through judicial reasoning and illustrated a way of fulfilling the aim of balancing the sometimes-contradictory aims of the three pillars. The fact that human rights courts have operationalised the concept of sustainable development to a certain extent creates the impression that other courts or quasi-courts, such as the World Bank Inspection Panel, the Aarhus Compliance Committee, or even the World Trade Organisation Dispute Settlement Body, could do the same.

117. On backlog of cases, *see* M. O'Boyle, 'On Reforming the Operation of the European Court of Human Rights', European Human Rights Law Review 1, at 1 (2008), R. Wolfrum and U. Deutsch, *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (2009), A. Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges', 57 *Nomiko Vima* (Greek Law Journal) (2009).

118. F. Wieacker, 'Foundations of European Legal Culture', 38 *American Journal of Comparative Law* (1990), at 20-23 and G. Bierbrauer, 'Toward and Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans', 28 *Law and Society Review* at 251-252 (1994). On collective rights and interests generally, *see, e.g.,* D.G. Newman, 'Collective Interests and Collective Rights', 49 *The American Journal of Jurisprudence*, at 127 (2004) and D. Sanders, 'Collective Rights', 13 *Human Rights Quarterly* at 377 (1991).