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A review of States practice of sustainable forests management with regard to some international conventions

Introduction

In international law, jurisprudence and most legal theories admit that the implementation of existing conventional rules can lead to new customary rules through consistent States practice.² This view which affirms the existence of dialectical links between conventional rules and existing and/or emerging customary norms,³ promotes the search for and inquiry about relationships that could exist today between the concept of sustainable forest management and some international instruments that seek to protect the global ecosystem, through the review of States practice. To begin with, it is necessary to indicate that conventional instruments themselves are, for the time being, considered as the primary source of obligations towards global environmental protection. However, the recurrence of commitments made by States and international organizations in international treaties can, in certain circumstances, produce customary rules, through the practice of States and intergovernmental organizations.⁴ Dupuy considers that although international conventions are binding on State parties, they make up a huge portion of what is regarded as ‘State practice’, which contributes to the steady crystallization of conventional norms in the corpus of customary international law and “as a consequence of this duality, two lines of argument confront each other”.⁵ This last view constitutes the basis of this analysis.

By way of reminder, Schuck *et al.* define sustainable forest management as:⁶ “... the prerequisite for the sustainable use of forests. Sustainable management means the stewardship and use of forests and forest lands in such a way and at such a rate that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future,

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² See ‘Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary Law’, International Law Association (2003).

³ See Oscar Schachter, ‘Entangled Treaty and Custom’, in *International Law at a Time of Perplexity*, (ed) Y. Dinstein (1989).

⁴ See De Sadeleer, N & Born, C.H, *Droit international et communautaire de la biodiversité* (2004) at 41- 45.

⁵ See Dupuy, P.M, ‘Formation of customary International Law and General Principles’, in *International Environmental Law: The Oxford Handbook*, (eds.) Daniel Bodansky, Jutta Brunnée & Ellen Hey (2007).

⁶ See Schuck, A., Päivinen, R., Hytönen, T & Pajari, B, *Compilation of Forestry Terms and Definitions* (2002) at 27.

relevant ecological, economic and social functions at local, national, and global levels and that does not cause damage to other ecosystems”.

However, as FAO notes,⁷ the notion of forest sustainability does not yet mean the same thing to everybody. There are some conceptual divergences and approaches to forest sustainability. However, the clarification of the concept by ITTO that:⁸ “sustainable forest management is the process of managing forests to achieve one or more clearly specified objectives of management with regard to the production of a continuous flow of desired forest products and services, without undue reduction of its inherent values and future productivity and without undue undesirable effects on the physical and social environment” is shared by several member States in the Northern and Southern hemispheres. It is also worthy to note that the Non-legally Binding Authoritative Statement of Principles for a global consensus on the Management, Conservation and Sustainable Development of all types of Forests adopted during the Rio Summit in 1992 associates the concept of sustainable forest management with related terms such as forest conservation; ecologically viable exploitation of forests. Likewise, FAO compares the concept of forest sustainability with the related concepts of the conservation, rational and sustainable use of this type of natural resources.⁹

Customary international law and international organizations, above all else, constitute the choice field of the concept of States practice. In fact, according to the Statute of the International Court of Justice:¹⁰ “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. International custom, as evidence a general practice accepted as law”.

According to Bravo,¹¹ the general practice specified in the provisions of the Statute of ICJ is that which produces customary rules likely to bind the whole international community or at least a majority of States. It is worth emphasizing that the term ‘practice’ refers first and foremost to facts or actions and describes the manner of implementing principles and rules of science/technology, as opposed to their theoretical statements. In international law, however, States practice first of all refers to the practical application of the rules of international law.¹² It also enables the interpretation of the rules of the ‘law of nations. Lastly, State practice, such as it manifests itself through different forms of international activities, can contribute to the emergence of customary norms of international law,¹³ provided that the said practice is “representative” and that “particularly interested States” participate in it.¹⁴ However, it is not easy to understand and recognize State practice because this requires reliance on State

⁷ See ‘State of the World’s Forest: Summary Report’, FAO (2005).

⁸ See ‘Criteria and Indicators of Sustainable Management of Natural Tropical Forests’, ITTO (1998).

⁹ See *supra* n. 6.

¹⁰ See Article 38 (1) of the Statute of the International Court of Justice.

¹¹ See Bravo, L.F, ‘Méthodes de Recherche de la Coutume Internationale’, in *Recueil des Cours Académie de Droit International* (1986).

¹² See Cassese, A, *International Law* (2005) at 18- 19.

¹³ See Thirlway, H, ‘The Sources of International Law’, in *International Law*, (ed.) Malcom D. Evans (2003); Boisson de Chazournes, L, ‘Qu’est – ce que la pratique en droit international?’, in *La pratique et le droit international* (2004).

¹⁴ *The North Sea Continental Shelf Case*, ICJ Rep.1969.

documents; collections of treaties; diplomatic reports and reports of international organizations; international adjudications likely to reveal the conduct of subjects of international law which are States and multilateral organizations.¹⁵

The appraisal of the practice of sustainable forest management as derived from some international conventions is therefore important. The analysis of the practice of sustainable forest management first began shortly after the observation of quasi-collapse of the cycle of international negotiations to establish a multilateral convention on sustainable forest management within the framework of UNFF.¹⁶ Then, it was carried out after the publication of the Stern and IPCC reports on the thorny issue of climatic change and global warming,¹⁷ which later show, once more, the importance of forest biodiversity for all humanity. Lastly, a detailed review of existing literature shows that several studies had already addressed the broad issue of the international sustainable forest management regime.¹⁸ The substance of these different analyses shows that various international conventions related to sustainable forest management provide a minimum legal framework for the conservation of certain forest species. However, they do not adequately consider the multi-functional nature of the said natural resources. Indeed, these pioneer studies concluded that at conventional level, the international legal norms of forest sustainability are unclear, weak and incomplete.

The aim of this analysis therefore is not to call into question the credible conclusions of the aforementioned studies, but to examine the same issue by laying emphasis on the States practice of forest sustainability as derived from some international conventions. In this respect, the first part of the paper dwells on the concept forest sustainability as it appears in certain international legal instruments. The second part assesses the practice of forest sustainability on the basis of some international instruments with regard to the requisites of jurisprudence. The third part discusses and analyzes the main assessment resulting from the evaluation. The paper ends with a prospective conclusion.

1. Forest Sustainability as derived from related International Conventions

It is not possible to cover all multilateral conventions relating to global environmental protection likely to show the practice of States with regard to the sustainable management of forest resources within the scope of this paper. Actually, our choice was largely influenced by the FAO Report.¹⁹ In effect, the appendix of this document contains a list of certain conventions and

¹⁵ See Condorelli, L, 'La Coutume', in *Droit international: Bilan et perspectives*, (ed.) Mohammed Bedjaoui (1991).

¹⁶ See 'The Non- legally Binding Instrument on All Types of Forests' (2007). Available at: www.un.org/unff.

¹⁷ See Stern, N, 'The economics of climate change. The Stern Review' (2006). Available at: www.hm-treasury.gov.uk/independent_reviews/stern/; 'Climate change 2007: The Physical Sciences Basis. Summary for the Policymakers', IPCC (2007). Available at: www.ipcc.ch.

¹⁸ See Brunnée, J, 'A Conceptual Framework for an International Forest Convention: Customary Law and Emerging Principles', in *Global Forest and International Environmental Law*, (ed.)(1996); Tarasofsky, R.G, 'Assessing the International Forest Regime: Gaps, Overlaps, Uncertainties and Opportunities', in *Assessing the International Forest Regime*, (ed.) Richard G. Tarasofsky (1999); Ruis, B.M.G, 'No forest convention but ten trees treaties', *Unasylva* No 206, Vol.3: 12-17.

¹⁹ See 'State of the World's Forest: Summary Report', FAO (2007).

global agreements relating to biodiversity conservation, management and biological species of forest origin. This list of international conventions includes the International Tropical Timber Agreement. The part that follows below briefly presents the concept of forest sustainability as derived from the corpus of the aforementioned international legal instruments.

To begin with, it is necessary to point out that the analytical approach used within the scope of this paper is the inductive or “*a posteriori* approach”. According to this approach, rules relating to sources of international law, and especially customary norms, must be found in the practice of States, and not in *a priori* reasoning.²⁰ However, the analysis also borrows from forestry and other social sciences to support its line of argument.

1.1. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) that was signed during the Rio Summit covers all species that fall under biodiversity, including those inherent in forest ecosystems. The three goals of this international legal instrument are:

- to promote the conservation of biodiversity;
- the sustainable use of its components;
- the fair and equitable sharing of benefits arising out of the utilization of genetic resource.

This Convention takes into account scientific reality which reveals that forest ecosystems contain 70 percent of plant and animal species existing in the world.²¹ In a general, in Articles 6 and 10 (a), States Parties to the Convention are called upon to integrate the consideration of the conservation and sustainable use of biological resources into national decision-making and adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on this type of natural resources.

Specifically, the Convention on Biodiversity imposes some concrete approaches to conservation on States. First of all, it obliges them to promote *in situ* conservation by setting up protected areas and natural habitats. Secondly, State Parties are required to ensure *ex situ* conservation by setting up botanical gardens and gene banks of species. Furthermore, it recommends more global approach to conservation per ecosystem, in lieu of conservation per species. States are also required to set up biological resources monitoring systems in their territories. This international instrument recognizes the role of local communities and their know-how in long-term natural biological resource conservation.

The Conference of the Parties (COP 2) adopted a declaration on forest biodiversity in 1995 and clearly underscored the key role that forests play in maintaining global biodiversity. COP 3 drew up a programme of work in 1996 relating to forest biodiversity. COP 4 considered forests as one of the three key items on the agenda of future Conferences of the Parties. Lastly, the financing of

²⁰ See Schwarzenberger, G, *The Inductive Approach to International Law* (1965), cited by International Law Association, *supra* n.1; *supra* n. 13.

²¹ See Burley, J, ‘Forest biological diversity: An Overview’, *Unasylva* No 209, Vol. 53: 6-8.

biodiversity conservation activities and the need to transfer related technologies from developed to developing countries was addressed.

Finally, one can note that although the Convention on Biodiversity does not focus exclusively on forest biodiversity, it however takes it into account. Accordingly, it institutes approaches to the conservation and sustainable use of forest biodiversity.

1.2. The United Nations Framework Convention on Climate Change and the Kyoto Protocol

The Framework Convention on Climate Change adopted in 1992 and its Additional Protocol which was signed in Kyoto in 1997 define general and quite clear obligations of States Parties concerning forests. The aim of this international legal instrument and its additional instrument is to significantly reduce global warming. Accordingly, Member States are required to promote sustainable forest management and reinforce their role as ‘sinks and reservoirs of greenhouse gases’.²² States are also required to promote afforestation and reafforestation in their territories. Lastly, countries are expected to include forest resources in national greenhouse gas emission inventories and elimination strategies.

More specifically, the Kyoto Protocol makes a clear distinction between the obligations of developed countries and those of developing countries. Thus, developed countries are required to promote practices of forest sustainability, renewable energy sources, afforestation, reafforestation, and to adopt measures to mitigate climatic change. From 2006, they were expected to include forest management-related greenhouse gas emissions in their national budgets. Lastly, it encourages co-operation between developed and developing countries.

The Kyoto Protocol institutes a Clean Development Mechanism (CDM) for developing countries. It enables industrialized countries to invest in forestry projects in developing countries and provides possibilities for ‘permit markets - gas emissions reduction’ between developed countries that produce toxic pollutants and developing countries. These projects are expected to fall within the framework of afforestation and reafforestation activities. Carbon markets thus constitute a genuine source of financing to boost silviculture and revive forest plantations in developing countries grappling with structural contingencies related to socio-economic development. Lastly, these countries are expected to also benefit from the transfer of technology and technical expertise.

Although the Framework Convention on Climate Change and the Kyoto Protocol do not specifically target forest management, they consider the promotion of sustainable forest management as an essential tool to reduce global warming.

²² See Schoene, D & Netto, M, ‘The Kyoto Protocol : What does it mean for forest and forestry?’, *Unasylya* No 222, Vol. 56: 3-11; Schoene, D, ‘Policy Impact of the Kyoto Protocol on Sustainable Forest Management’, in *Cross-Sectoral Policy Developments in Forestry*, (eds.) Yves C. Dubé and Franz Schmithüsen (2007).

1.3. The United Nations Convention to Combat Desertification

The United Nations Convention to Combat Desertification was signed in Paris in 1994. The main objective of this Convention is to combat desertification by reducing its continuous advance, particularly in countries situated in the Sahel region of Africa. According to Cullet,²³ one of the weaknesses of this international legal instrument is that the countries affected by desertification are already known. This leads to a lack of interest on the part of the international community. However, the threat and reality of climatic change could cause all countries that consider themselves safe from the natural phenomenon of desertification to rethink their stand.

The provisions of this international instrument regards forest protection and the expansion of forest cover as one of the strategies to check the rapid advance of the desert, notably in view of empirical observation which shows that the gradual progression trend of the desert is not abating.²⁴ In reality, the provisions of the United Nations Convention to Combat Desertification make use of the ecological function of forest resources to combat the natural phenomenon of desertification. Indeed, if forest ecosystems are well managed, they would significantly enhance the stability of soil and its various functions.²⁵ Conversely, deforestation promotes the advancement of the desert and soil degradation through the effects of erosion, soil impoverishment and rural populations whose daily survival depends on the availability of forest resources. This legal instrument therefore suggests ways of reducing the phenomenon of desertification through codes of conduct that they enact for States, local communities and other actors. From the legal viewpoint, the effective application of this Convention depends on the goodwill of Member States. This is another aspect of its weaknesses.²⁶

Articles 9 – 15 of the Convention provide for a co-operation and assistance mechanism for countries experiencing desertification and drought. Thus, these countries can obtain financing for their forestry programmes within the framework of bilateral projects or multilateral mechanisms through IFAD. It can therefore be concluded that the implementation of this legal instrument depends largely on the availability of financial resources as the majority of countries experiencing desertification and drought are also the poorest countries in the world; hence their inability to mobilize sufficient endogenous financing to address this natural calamity.

At any rate, the United Nations Convention to Combat Desertification promotes conservation and sustainable forest management as one of the means to combat or reduce the natural phenomena of desertification and drought.

²³ See Cullet, P, 'Desertification', in *Institutional and Infrastructure Resource Issues II: Conventions, Treaties and other Responses to Global Issues*. Encyclopedia of Life Support Systems (2002).

²⁴ See Adeel, Z., Bogardi, J., Braeuel, C., Chasek, P., Niamir- Fuller, M., Gabriels, D., King, C., Knabe, F., Kowsar, A., Schaaf, T., Shepherd, G & Thomas, R, *Overcoming One of the Greatest Environmental Challenges of our Times: Re-Thinking Policies to Cope with Desertification* (2006) at 2-5.

²⁵ See Nordeim- Larsen, C., Carrigiani, E & Herodote, P, 'The United Nations Convention to Combat Desertification: A Global Framework for Cross- Sectoral Policy Coordination Addressing Sustainable Forest Management', in *Cross- Sectoral Policy Developments in Forestry*, (eds.) Yves C. Dubé and Franz Schmithüsen (2007).

²⁶ See *supra* n. 22

1.4. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES was signed in Washington (USA) in 1973. The objective of this international legal instrument is to regulate international trade in plant and animal species which are threatened by overexploitation. CITES does not forbid trade in species, but seeks to control it through the institutionalization of a permit system. This involves the institutionalization of a system of authorization to enhance the control of international trade in species listed in appendices. In that connexion, CITES includes three annexes which draw a distinction between three levels of threat:

- Annex 1, provided for by Article 2 (1) includes the most endangered species, or the most affected by commercial activities. The trade in and exploitation of these species is prohibited;
- Annex 2, provided for by Article 2 (2) comprises two types of species: those that are not threatened, but are likely to become so due to uncontrolled commercial exploitation, and those whose trade is free in principle, but which are subject to the system of control;
- Annex 3 includes species that run a possible risk. These species are protected by regulations of Member States.

The annexes of CITES contain a good number of forest wildlife resources. This certainly contributes to the protection and sustainability of the said species. Paradoxically, very few tree species (just over 16) are listed therein.²⁷ This situation stems from controversies relating to the inclusion of certain tree species in the list because they are also economically valuable to economic operators of the sector. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) certainly contributes to the overall process of forest resource sustainability through the trade arrangements it has instituted.

1.5. Convention on Wetlands of International Importance (RAMSAR)

The objective of the Convention on Wetlands of International Importance which was signed in 1971 is to ensure the conservation and rational management of wetlands, especially as these areas are the natural habitat of birds. In fact, wetlands are essential biotopes for the survival of many plant and animal species. However, they are also an important place for human activities, notably fishing, farming, wood harvesting, and leisure, and hence a source of threats against plant and animal species. The protection of RAMSAR sites through this Convention is therefore an appropriate response to various threats. This requires the Member States of this legal instrument to adopt requisite measures at the national and international levels.

Certain zones classified within the framework of the RAMSAR Convention are in reality forest ecosystems, which are for the most part mangroves, deltas and swamps. It is worth mentioning that the main target of the Convention which was initially limited to birds was later extended to

²⁷ See *supra* n. 17.

all wetlands which could be considered to be of international importance. Thus in 1999, new criteria were added to widen the targets of RAMSAR. Sites likely to be classified are therefore those that meet the following requirements: provide a habitat for endangered, vulnerable species, or any endangered species-group; provide a habitat for huge amounts of plant and animal species for biodiversity conservation. The contracting parties are subject to three main obligations. The first is the obligation to promote the rational use of wetlands. The second is the obligation to designate wetlands of international importance with a view to including them in the RAMSAR list. The last obligation relates to international co-operation between countries. The RAMSAR Convention, through the protection of wetlands including certain forest ecosystems therefore promotes the sustainability of forest resources.

1.6. Convention on the Protection of the Underwater Cultural Heritage

The goal of this Convention which was adopted in 1972 is to protect ‘world heritage’ in the cultural and natural domains. The Convention produces a correlation between nature and culture. It is therefore considered to establish a synthesis between the two major components of the ‘heritage of humanity’. The initiative was based on the acknowledgement of the existence of many threats to universal cultural and natural heritage. In concrete terms, the Convention draws up the World Heritage List in accordance with the directives and criteria used to include a given site therein.

With respect to natural heritage and forest resources, these directives provide that sites included in the world heritage should “be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals” or “contain the most important and significant natural habitats for in-situ conservation of biological diversity...”. Thus, more than 41 sites in the tropical forest region were given the designation of ‘World Heritage’.²⁸ In addition to these, more than 61 other sites in non-tropical forest regions have been included in this list. The Convention prescribes obligations to contracting parties which in return intervene to protect threatened sites on behalf of the international community.

By selecting sites that provide a habitat for forest ecosystems, the Convention on the Protection of the Underwater Cultural Heritage promotes the sustainability of forest resources. The designation of world heritage awarded for this purpose is particularly sought after by several sites throughout the world.

²⁸ See *supra* n. 17.

1.7. International Tropical Timber Agreement

The first International Tropical Timber Agreement was signed in 1983 and it entered into force in 1985. Subsequently, it was renegotiated in 1994, and this version came into force in 1997. The last agreement was signed in 2006. This agreement is actually a series of agreements that follow quite specific cycles. The main objective of this Agreement is to promote trade in tropical timber and its derived-products. Incidentally, the aim is to ensure that the forest resources of tropical timber-producing Member States are exploited in a sustainable manner. This international instrument therefore gathers tropical timber-producing and consumer countries round the same table in order to attain this main objective and to rationalize world trade in tropical timber.

With regard to sustainable forest management, this Agreement is one of the first legally binding instruments to use this terminology. In this respect, Article 1 (h) of the 1983 version states that the objective of the International Tropical Timber Agreement is “to encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned.”

The terminology was made clearer in Article 1 of the 1994 version of the Agreement although it is possible to establish a link with this terminological improvement made two years after Rio 1992. The objective of the Agreement, as stipulated in Article 1 (l), is to “Encourage members to develop national policies aimed at sustainable utilization (...) conservation of timber producing forests and their genetic” and “maintaining the ecological balance in the regions concerned.”

Lastly, Article 1 (d, l, m) of the last version of the 2006 Agreement states clearly, specifically and delicately that the International Tropical Timber Agreement 2006 aims at “Enhancing the capacity of members to implement strategies for achieving exports of tropical timber and timber products from sustainably managed sources; Strengthening the capacity of members for the collection, processing and dissemination of statistics on their trade in timber and information on the sustainable management of their tropical forests; Encouraging members to develop national policies aimed at sustainable utilization and conservation of timber producing forests, and maintaining ecological balance, in the context of the tropical timber trade.” In concrete terms, the ITTO, which is the administrative intergovernmental organization of this cycle of agreements, has developed a series of sustainable forest management tools which it places at the disposal of its Member States.²⁹ The important methodological tools developed by this organization include guidelines, principles, criteria and indicators for sustainable forest management, etc. Lastly, this organization also plays a very important role as a sponsoring body by financing projects and studies in various tropical-timber producing Member States which also come under the traditional objectives of timber trade and sustainable forest management.

²⁹ ‘Principles, Criteria & Indicators of Sustainable Management of Tropical Forests’, ITTO (2003).

2. Review of the States practice of sustainability derived from conventions

International judges in *The North Sea Continental Shelf Case* explained the general conditions that State practice must fulfil to become an international customary standard as follows:³⁰

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even the habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of a legal duty”.

Legal theory has deduced three main requirements from this reasoning of the ICJ which State practice must fulfil to produce a customary norm, namely frequency; representativeness; and uniformity.³¹

2.1. Requirement of frequency of the practice of forest sustainability

The condition of frequency of practice is that which requires the conduct of States to be constant and continuous over time. This enables the drawing of a distinction between practices that can give rise to a customary norm and simple isolated actions carried out by States. This is strengthened by the frequency of practice. To avoid any speculation with regard to the maximum duration required for a practice to become part of the process of formation of a customary rule, the ICJ makes the following clarifications:³²

“Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, States practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked”. With regard to this requirement, it is possible to ask if States practice with regard to forest sustainability derived from international conventions is frequent and constant as time goes on.

³⁰ See *supra* n. 13.

³¹ See *supra* n.14; Brownlie, I, *Principles of Public International Law* (2003) at 6- 12; Henkaerts, J.M, ‘Study on Customary International Humanitarian Law: A Contribution to Understanding and Respect for the Rule of Law in Armed Conflict’, *International Review of the Red Cross*, Vol. 87. No 857: 175- 212.

³² See *supra* n. 13.

The review of the abovementioned international legal instruments shows that the concern of the international community about the sustainable management and conservation of forest resources started a long time ago. The first signs of this concern began to take concrete form firstly through the preparation and signing of the RAMSAR Convention in 1971. In this respect, this agreement appears as one of the pioneer instruments for the protection of wet ecosystems which provide a habitat for a large portion of forest biodiversity. This will of the international community continued with the adoption of a series of international treaties: on the natural heritage in 1972; CITES in 1973; the International Tropical Timber Agreement in 1983; biodiversity in 1992; climatic change in 1992 and its protocol in 1997 and the Struggle to combat desertification in 1994. In other words, since 1971 till date, the protection of forest ecosystems has been the focus of discussions in the international community, through the conservation of target endangered species. This justifies the setting up of several international legal instruments to enhance the conservation of forest resources and global environment in the long-term. According to Carruthers et al,³³ the signing of environment treaties promotes and establishes regulatory frameworks through which international activities aimed at protecting the global environment are carried out. Multilateral agreements on the environment are therefore dynamic instruments.

Beside the setting up by the community of these international legal instruments for the protection of the environment of States, and eventually forest resources, major world forums like Stockholm in 1972, Rio in 1992 and Johannesburg in 2002 were also platforms during which issues of international law and other actors once more made various commitments to ensure the rational and sustainable management of forest biodiversity. This definitely symbolizes a certain form of regularity in the practice of States during the last forty years. Moreover, this universal awareness on forest biodiversity is expressed in Principle 4 of Stockholm as follows: “Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors.” As far as Rio Summit is concerned, the major outcomes stemming from UNCED with implication on forests were : Chapter 11 of Agenda 21, on combating deforestation; Non- legally –binding Forest Principles; The CBD; and the Framework Convention on Climatic Change (UNFCCC). Furthermore, the intensification of activities relating to the setting up of such international agreements is a kind of recognition by each participating State that problems of forest biodiversity often transcend national borders.

This assessment induces one to state that States practice with regard to forest sustainability was, and is regular and permanent in keeping with the requirement of international jurisprudence.³⁴ However, these actions seem to evolve according to new ad hoc socio-economic, political, scientific and ecological circumstances which affect both the overall ecosystem and humanity.³⁵ Thus, these environmental protection instruments can be considered as ‘adaptive international regulations’. In reality, the constant adjustment and modification of environmental regulations as it appears through legal instruments today, is due partly to the fact that proposed solutions to the

³³ See Carruthers, C., Le Bouthillier, Y., Daniel, A., Bernstein, J & McGraw, D, *Accords multilatéraux sur l'environnement: Manuel du négociateur* (2007) at 8- 13.

³⁴ See *supra* n.13.

³⁵ See *supra* n.4.

ills that affect forest ecosystems do not last.³⁶ It is therefore necessary to constantly develop new adaptive strategies as time goes on. Thus, forest conservation and sustainable management cannot be an exception to this logic of changing adaptation to socio-political and ecological realities.

2.2. Requirement of representativeness of practice of forest sustainability

International judges' demand that States practice can generate an international customary norm should be representative of States or regroup the "most interested States".³⁷ According to legal theory, it is not possible for a practice to be universal or have the unanimous support of all States throughout the world.³⁸ Therefore, one can question whether States practice concerning forest sustainability is representative of today's international community?

To address this issue, it is necessary to use statistics on the state of the world's forests.³⁹ In this respect, the situation of the ratification of various international conventions is as follows:

- i) The RAMSAR Convention has already been ratified by 161 countries and territories throughout the world, including 46 countries in Africa; 30 in Asia; 40 in Europe; 18 in Central and North America; 16 in Oceania and 12 in South America;
- ii) The Convention on the Protection of the Underwater Cultural Heritage has already been ratified by 191 countries throughout the world, that is, 12 countries in South America; 22 in Oceania; 23 in Central and North America; 41 in Europe; 44 in Asia and 50 in Africa;
- iii) CITES has been ratified by 177 countries and self-governing territories throughout the world, distributed as follows: 12 States in South America; 15 in Oceania; 22 in Central and North America; 40 in Europe; 36 in Asia; and 52 in Africa;
- iv) The Tropical Timber Agreement negotiated in 2006 includes 81 countries, namely 43 (tropical) producers and 38 consumers;
- vi) The Convention on Biological Diversity was ratified by 197 States and territories: 52 countries in Africa; 45 in Asia; 41 in Europe; 22 in Central and North America; 25 countries and territories in Oceania; 12 in South America;
- vii) The Convention on Climate Change was ratified by 197 States and territories: 12 States in South America; 25 in Oceania; 23 in Central and North America; 41 in Europe; 44 in Asia; and 52 in Africa;
- viii) The United Nations Convention to Combat Desertification was ratified by 199 States and self-governing territories, namely 53 in Africa; 46 in Asia; 40 in Europe; 23 in Central and North America; 25 in Oceania and 12 in South America.

Statistics on the ratification of international legal instruments show that participation in these six international conventions is representative of the quasi-totality of countries in the world.

³⁶ See Prieur, M, *Droit de l'Environnement* (2001) at 3- 10.

³⁷ See *supra* n. 13.

³⁸ See *supra* n. 14; *supra* n. 12.

³⁹ See *supra* n. 18.

Countries and territories that accede to the said multilateral agreements are located in all the geographical regions of the world. There is therefore a dual qualitative and quantitative representation of the different countries and continents that accept and share the objectives and ideas that underlie these legal instruments. Accordingly, the aforementioned international agreements have a broad and universal scope. Thus, it can be asserted that States practice with regard to forest sustainability is general because it is shared by the quasi-totality of countries that make up the international community. It would therefore be logical to qualify any norm resulting from such a universal practice as 'General'.

However, it is necessary to draw attention to two major aspects that stand out from this global drive for forest ecosystem preservation. Firstly, the Tropical Timber Agreement does not actually have a global scope because it relates mainly to the commercial aspect of tropical forest products, while the sustainable management aspect is only incidental. It regroups producers and consumers, who seek to defend their commercial interests. Secondly, it is necessary to indicate that in the case of the Convention on Climate Change, the Additional Protocol adopted in Kyoto in 1997 is plagued by non-ratification by a certain number of major countries, notably the United States, which is one of the major polluters in the world.⁴⁰ Thus, in the case of the Kyoto Protocol, all "particularly interested States" do not seem to want to contribute to general practice, even though the instrument is already in force. In effect, there is a kind of 'persistent objection' to this protocol and any practice related to it by some States. These States do not want to apply a norm deduced from the implementation of the Kyoto Protocol.

2.3. Requirement of uniformity of practice with regard to forest sustainability

The requirement of uniformity of States practice demands that State actions should be fairly homogeneous and constant as any discrepancy in a given conduct can be considered as any other practice. Uniformity is therefore the concordance between successive State actions which must be similar to each other.⁴¹ However, the notion of uniformity does not exclude and or disregard the social reality of the violation of prescribed norms.

Within the framework of States practice relating to forest sustainability as derived from related legal instruments, uniformity can be assessed with regard to form and content. Firstly, from the formal perspective, State practice consisted not only in participation in various multilateral conferences to negotiate these instruments through national ratification procedures which often gave rise to stormy debates in certain parliaments, and to table related instruments in appropriate secretariats and led to the adoption of policies, legislations, programmes and strategies in each of the Convention's signatory States. Its national measures demonstrate beyond ratification/membership, the will of each of such States to own/internalize the objectives of the conservation and sustainable management forest biodiversity. There is therefore relative

⁴⁰ See Brunnée, J, 'The United States and International Environmental Law: Living with an Elephant', *EJIL* (2004), Vol.15 No 4: 617- 649..

⁴¹ See Daillier, P & Pellet, A, *Droit international public* (2002) at 322- 335.

homogeneity in State decisions to promote the long-term preservation of all endangered forest resources.

With regard to the content of the practice of sustainable forest management derived from international agreements, one can note that there are indeed disparities. Firstly, each of the legal instruments recommends conservation and rational management techniques that can sometimes conflict with each other. In reality, however, these approaches and techniques are complementary. For example, there is no major contradiction between a wetland that has been declared as a RAMSAR site to be declared later as a natural heritage of humanity and a protected area (Convention on Biological Diversity): this would be a triple status to enhance the protection of resources. Secondly, another kind of heterogeneity can also appear in the contents of State practice, in view of the specific socio-political and ecological factors of each area, country and geo-botanical zone. In this respect, a site declared as a natural heritage of humanity situated in Central Africa, a tropical forest zone, will have a management plan whose content is different from that of a homologous site located in a temperate forest zone in Europe because the forest biodiversity management strategy must be adapted to ecological and socio-political realities.⁴² Plant and animal species are therefore not the same; climatic conditions, soil, the population, political and economic organization differ. However, Judge Weeramanty emphasizes the nourishing and beneficial effects of socio-cultural differences in the development of international environmental law when he states that:⁴³ “In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, The Americas, the Pacific and Australia, in fact, the whole world. This is a rich source which modern environmental law has left largely untapped”. In this respect, he argues that: “As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts and inspirational standards”.

At any rate, the requirement of the uniformity of States practice concerning forest management is relatively homogeneous with regard to their formal nature and set objectives. On the other hand, there are certain disparities in the content of State practice concerning sustainability. This is mainly attributable to existing heterogeneous socio-political and ecological realities throughout the world.

3. Discussion on States practice concerning forest sustainability derived from related conventions

As we pointed out in the introduction, several past works,⁴⁴ considered the concept of sustainable forest management in the provisions of various international legal instruments in force as imperfect, weak and inadequate. This thesis is based mainly on the assessment that none of the

⁴² See Pokomy, B., Cayres, G., Westphalem, N., Segebart, D., Drude, R & Steinbrenner, M, *Adaptative Collaborative Management: Criteria and Indicators for Assessing Sustainability* (2003) at 3 – 8.

⁴³ See Weeramanty, C.G, ‘Individual Opinion of Judge Weeramanty’, in *Case Concerning The Gabčíkovo- Nagymaros Project* (Hungary v Slovakia), ICJ Rep. 1997.

⁴⁴ See *supra* n.17; Capistrano, D., Kanninen, M., Guariguata, M., Barr, C., Sunderland, T & Raitzer, D, *Revitalizing the United Nations Forum on Forests: Critical Issues and Ways Forward* (2007) at 2- 5

current international treaties integrates all the multi-functional aspects of forest resources.⁴⁵ Consequently, this analysis will rather focus on the concrete and effective manifestations of the practice and its legal consequences.

3.1. Manifestations of the States practice of sustainability derived from conventions

The States practice of sustainable forest management manifests itself through various concrete actions that cannot be listed in this short analysis. However, two types of manifestations can be highlighted here, namely sub-regional initiatives and national measures to promote sustainable forest management.

3.1.1. States and regional dynamics of forest sustainability

According to Martin,⁴⁶ regional approaches to the conservation and sustainable management of forest resources reinforce national initiatives and international commitments made by States in multilateral circles. Thus, political and legal arrangements of States at the regional or sub-regional level supplement national actions and enhance the global processes of sustainable forest management initiated by the international community. In this respect, the collective action of States to preserve forests which are at the intermediate level, facilitate osmosis between the national and the global, hence their importance. In this respect, three regional initiatives can be highlighted.

First, the case of Central America is of great interest. The main policy and legal trends in sustainable forest management dynamics within the framework of the Amazonia Basin is found in the corpus of the Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations adopted in 1993, signed under the auspices of the Central American Council of Forest. It is also found in the Convention for the Conservation of Biodiversity and Protection of Priority Areas, signed within the framework of the Council of the Central American Council of Forests and Protected Areas. However, it is necessary to state that these sub-regional legal instruments fall within the dynamics of inter-State action centred on the Amazon Cooperation Treaty (ACT). This regional institution with headquarters in Brazil comprises four commissions, namely the Economic, Social, Education and Environment Commissions. The Environment Commission is the operational framework for enhancing forest sustainability in the region. The concrete results of this co-operation to promote forest sustainability is include the setting up of a regional network of co-operation for the management of national parks, plant and wildlife protected areas;⁴⁷ the setting up of The Mesoamerican Biological Corridor (MBC); the design of the criteria and regional indicators of

⁴⁵ See Higman, S., Mayers, J., Bass, S., Judd, N., & Nusbaum, R, *The Sustainable Forestry Handbook: A Practical Guide for Tropical Forest Managers on Implementing New Standard* (2005) at 4- 18.

⁴⁶ See Martin, M.R, 'Regional approaches: Bridging national and global efforts', *Unasylva* 218, Vol.55: 3- 5.

⁴⁷ See *supra* n. 18.

sustainable forest resource management; work on the harmonization of forest management legislations and policies; work on systems of certification adapted to the regional context.⁴⁸

The second case that is of great interest is the European Union. Indeed, the European Union has intervened on many occasions in the forest management of its Member States at various stages of its development. These interventions can be seen in the drafting of several directives and other instruments.⁴⁹ Its legal instruments concern various aspects relating to the management of the forest heritage of Member States. These include regulations aimed specifically at combating various vectors that destroy the forests of Member States. Examples relating to the promotion of sustainability include Council Directives No. 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds and No. 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, and the contribution of Member States to various Ministerial Conferences on the Protection of Forests in Europe (MCPFE). These are perfect illustrations of the Community's resolve to protect forest and promote sustainability. However, additional legal elements relating to forest conservation and sustainability can be extracted from 'The Council Resolution of 15 December 1998 on a Forestry Strategy for the European Union' and the 'European Union Forest Action Plan'. One of the success stories of these dynamics of State action within the European Union is certainly the 'Natura 2000 Network' through which this organization seeks to preserve biodiversity through the conservation of natural habitats, flora and fauna in the whole of its region.

Lastly, the countries situated in the Congo Basin, grouped into the sub-regional organization known as the Central African Forest Commission (COMIFAC), initiated the community management of the world's second largest tropical forest unit after Amazonia in the mid 1990's. Thus, the Conference on the Dense and Humid Forest Ecosystems of Central Africa (CEFDHAC) was set up in 1996 to serve as a platform for exchange and discussions between States and other actors involved in forest management. The second inter-State action to enhance sustainable forest management in Central Africa is the Yaoundé Declaration. In fact, a summit of the Heads of State of the sub-region took place in March 1999 in Cameroon, to examine major issues related to the conservation and sustainable management of forest resources in the Congo Basin. At the end of the summit, the Yaoundé Declaration was adopted. Its objective is to set up a political and institutional framework for the management of community actions in order to reduce major threats to the forest stands of Central Africa.

The third high point was the signing by the Heads of State of the sub-region in February 2005 in Brazzaville of the Treaty on the Conservation and Sustainable Management of Forest Ecosystems in Central.⁵⁰ This sub-regional legal instrument entered into force in January 2007. Concerning results, countries in the Congo Basin have set up the Network of Protected Areas in Central

⁴⁸ See Aguilar, G & Gonzalez, M, 'Regional Legal Arrangements for Forests: The Case of Central America', in *Assessing the International forest Regime*, (ed.) Richard G. Tarasofsky (1999).

⁴⁹ See Cirelli, M.T & Schmithüsen, F, *Tendances du droit forestier: Europe Occidentale* (2001) at 15 -21.

⁵⁰ See Assembe, M.S, 'Dynamiques de gestion transfrontalière des forêts du bassin du Congo : Une analyse du Traité relatif à la conservation et la gestion des écosystèmes forestiers d'Afrique Centrale, 2/1 *Law, Environment and Development Journal*,(2006) p.106.

Africa (RAPAC); landscapes made up of trans-border protected areas; a collective action convergence plan; harmonization of policies and legislations; the Network of Parliamentarians for the Sustainable Management of Central African Forest Ecosystems (REPAR).

These three cases of sub-regional groupings for the promotion of forest conservation and sustainable management certainly contribute to the development of States practice, commitments and main principles stated in various international conventions. It is thus possible to identify the two main characteristics of such sub-regional initiatives. In effect, in Central America and Central Africa, dynamics of action for the promotion of forest sustainability are based on legally binding instruments. These two binding agreements and the European Union Resolution of 15 December 1998 are outcomes of global conventions on the protection of forest biodiversity. In this respect, each preamble clearly evokes the United Nations Charter; forest principles adopted in Rio in 1992; the Convention on Biodiversity; the Convention on Climate Change; the Convention to Combat Desertification, etc.

Consequently, it is possible to conclude that the dynamics of the collective action of States to protect forests in the European Union, Central Africa and Central America are concrete illustrations of the practice of forest sustainability ensuing from legal instruments related to the forestry. In addition, they are an indispensable link between national and global strategies for the promotion of biodiversity. Furthermore, as the specific cases of Central Africa and Central America illustrate, the States of these two sub-regions have given up parts of their sovereignty over forest resources through the creation of supranational jurisdictions and adoption of binding legal agreements to coordinate national strategies, harmonize and find suitable solutions to problems related to the collective management of forests. In other words, tropical countries that are generally opposed to the adoption of a global convention on sustainable forest management however accept binding legal obligations emanating from sub-regional treaties. This paradoxical attitude of States that provide a habitat for very large stocks of the forest biodiversity of the universe is related to their awareness that in the field of international relations, the formulation of norms generally conceals struggles that usually oppose major groups of countries on the world scene.⁵¹ Perhaps, tropical countries would like to give up part of their sovereignty over forest biodiversity in their territories only in exchange for a corresponding, proportional and non-residual counterpart.

3.1.2. National measures relating to forest sustainability

Each of the seven international instruments reviewed within the scope of this analysis imposes obligations on States that may appear to be general, but are capable of enhancing the conservation and rational use of forest biodiversity. The enactment of global obligations is justified by the fact that most of these agreements are framework conventions which outline

⁵¹ See Ranjeva, R & Cadoux, C, *Droit international public* (1992) at 21- 24.

guiding principles. For Kiss,⁵² this is a special legal technique of international environmental law. It is incumbent upon each Member State to give a clear and precise content and meaning to the key principles stated in the aforesaid international treaties. However, there are several fairly clear obligations on States relating to conservation and sustainable use of forest resources, notably the CITES and RAMSAR Conventions. In concrete terms, within the framework of RAMSAR, each country is expected to promote forest conservation and sustainability through the development of strategies and national programmes, to allocate wetlands and cooperate with the rest of the international community. Signatories to the Convention for the Protection of the World Cultural and Natural Heritage have similar obligations. In effect, at the request of a State, eligible sites must be “eminently representative” of ecological and biological processes of ecosystems. Where a site is selected, the country undertakes to protect and preserve the said area on behalf of humanity. For its part, CITES, through the updating of its three lists, has institutionalized a regulation for the collection of samples of plant and wildlife species destined for trade which depends on ecological realities.

The Convention on Climate Change and the Convention to Combat Desertification also recommend signatory States to take precautionary measures to anticipate, prevent or minimize certain factors that damage the global ecosystem. The Convention on Biodiversity clearly recommends the development and adoption of national conservation strategies, plans and programmes and the sustainable use of biodiversity. Countries are also required to identify and control the constituent elements of biodiversity. Lastly, it suggests approaches to conservation and sustainability that integrate prevention and precaution, impact assessment studies, participatory management through the involvement of native and local communities, etc. Admittedly, as Louka points,⁵³ the international legal instrument on biological diversity does not establish uniform standards of management, but it gives each Member State the possibility of preserving its natural resources “as far as possible and as appropriate”, by putting in place measures and national actions that are suitable and adapted to socio-political, economic and especially ecological realities.

The commitments made by States in the aforementioned treaties and related obligations have led to the development of new legal, political and institutional frameworks at the local level. In this respect, the evaluation made by FAO emphasizes that:⁵⁴ “Legal, policy and institutional framework is perhaps the most important factor in setting the stage for sustainable forest management. Positive change is evident in all regions. There are signs of political commitments towards sustainable forest management in the vast majority of countries. In the 15 years since the United Nations Conference on Environment and Development (UNCED), most countries have enacted new more progressive forest laws and policies. Over 100 countries have established national forest programme in an attempt to manage forests more holistically”. A detailed examination of the aforesaid national policy, legal, and regulatory reforms reveals some aspects that are common to several States. In effect, with regard to substance, new policies and

⁵² See Kiss, A, ‘Les traités- cadre : Une technique juridique caractéristique du droit international de l’environnement’, *AFDI* (1993,) 792- 797.

⁵³ See Louka, E, *International Environmental Law: Fairness, Effectiveness, and World Order* (2006) at 4 – 95.

⁵⁴ See *supra* n.18

legislations are fed by the concepts of conservation and sustainable management of forest resources. With regard to procedure, participatory approaches are institutionalized with the introduction of decentralization, devolution of responsibilities in the management of forests and their privatization,⁵⁵ the systematic institution of impact assessment studies in exploitation-related activities and the search for a kind of environmental justice/equity.

The conservation of forest ecosystems was integrated into the legal and policy instruments in force in several countries such as those in the Congo Basin (Cameroon, the Democratic Republic of Congo, Gabon, the Republic of Congo, Equatorial Guinea, the Central African Republic), through the techniques of allocating, management of forest stands and the creation of the protected areas.⁵⁶ (i) Concerning the allotment of areas and management of forest stands, it is worth pointing out that the ecologically rational management of forest stands requires that the areas are properly allocated, according to specific procedures and techniques. Similarly, the technique of allotment necessitates the institutionalization of forest management plans. Various public authorities were fully aware of this dual requirement for the allotment and management of forest areas; hence, it was included in various policy documents and translated into various legal provisions. It is henceforth possible to draw a distinction between the classification of forests according to the methods of use (protection forests, production forests, and recreational forests) and that based on the land tenure system (forest estates of the State and of decentralized public bodies, community forests and individual or private forests). Furthermore, sustainable forest management is based mainly on forest inventories, planning and long-term management of all activities in a given area, (ii) the setting up of protected areas is the second method that underlies the concept of forest ecosystem conservation, proposed in several international agreements such as the Convention on Biodiversity. In the specific example of Central African States, there are several categories of protected areas, notably national parks, wildlife reserves, game reserves, game-ranches, zoological gardens, wildlife sanctuaries, and buffer zones. These different categories of protected areas are subject to forest management requirements.

The concept of sustainable forest management, for its part, is regarded in several countries like those of Central Africa as the rational and sustainable exploitation of forest resources to improve the wellbeing of the local population; enhance the development of the national economy; the wood industry sub-sector;⁵⁷ long-term preservation of forest biodiversity for the needs of future generations. In this respect, States have included in national legislations, a series of elements that are indispensable for sustainable management such as logging licenses; procedures of access to resources; sustainable management standards, the obligation of a management plan; forest taxation, incentives to encourage investments, and a repressive legal arsenal in the event of non compliance with legal and regulatory provisions. Spilburg observed that many governments are adopting and using today C & I tools to help them regulate the practices of forest users and

⁵⁵ See Ribot, J.C, *Democratic Decentralization of Natural Resources: Institutionalizing Popular Participation* (2002) at 5- 8; Larson, A, 'Democratic Decentralization in the Forestry Sector: Lesson Learned from Africa, Asia and Latin America', in *The Politics of Decentralization: Forests, People and Power*, (eds.) Carol, J.P. Colfer and D. Capistrano (2005).

⁵⁶ See 'Les Forêts du Bassin du Congo: Etat des Forêts 2006', CBFP (2006). Available at : www.cbfp.org.

⁵⁷ See *supra* n.55.

report on the status of their forests to international processes and *fora*.⁵⁸ Other measures consist, for example, in updating annual CITES lists in accordance with the socio-ecological realities of the country and drawing up national reports on the biodiversity situation. It is also worthy to note that systems for the verification of sustainable forestry management, which are currently in fashion, such as the certification of audits, now have recourse to certain principles and provisions stated in CITES, the Convention on Biological Diversity and other international instruments, to issue their green labels.⁵⁹ This is certainly another form of ownership of the concept of forest sustainability by non-State Stakeholders. Lastly, within the specific framework of RAMSAR,⁶⁰ there are now more than 1 722 sites throughout the world, several of which are mainly focussed on the protection of forest biodiversity.

Finally, this non-exhaustive list of national measures shows the ground covered in sustainable forestry and biodiversity management by various States throughout the world. Actually, the different actions of States at national level aimed to promote the protection of forest resources contribute to the development of the practice of sustainability initiated through sustained and appropriate ratification by the adoption and implementation of national measures in compliance with the provisions of conventions.

3.2. Preliminary consequences of the practice of forest sustainability

At the legal standpoint, several early and partial consequences can be deduced from the effectiveness of forest sustainability as derived from the implementation of certain international conventions. It is worth mentioning that the preliminary and partial nature of this analysis is due to the fact that scientific knowledge on various forest biodiversity species is still embryonic,⁶¹ the sustainable management of forests cannot be considered at the present stage as an exact science, and the development and consolidation of international environmental law is dependent on this.⁶² One should therefore not try to end the exploration of issues related to this area because what is certain today could be challenged by future data.

Firstly, the effectiveness of States practice of sustainable forest management derived from related international agreements has a knock-on effect on the legal status of this concept. Indeed, many observers who analyzed the ICJ ruling in *The Gabčíkovo-Nagymaros Case*,⁶³ concluded that there is no fixed and clear legal status for the 'matrix concept of sustainable development' from which the concept of forest sustainability is derived.⁶⁴ This analytical assessment is largely based on the

⁵⁸ See Spilisbury, M.J., *The Sustainability of forest Management: Assessing the Impact of CIFOR's Criteria and Indicators* (2005) at 4- 7.

⁵⁹ See *supra* n. 44.

⁶⁰ See 'The List of Wetlands of International Importance', RAMSAR (2008). Available at: www.ramsar.org

⁶¹ See *supra* n.44.

⁶² See *supra* n. 35; *supra* n.3.

⁶³ *Case Concerning the Gabčíkovo- Nagymaros Project* (Hungary v Slovakia 1997), ICJ Rep.1997 Available at:www.icj-cij.org.

⁶⁴ See Vaughan, L, 'Sustainable Development and Unsustainable Arguments', in *International Law and Sustainable Development: Past Achievements and Futures Challenges*, (eds.) Alan Boyle & Freestone David (1999); Birnie, P & Boyle, A, *International Law and the Environment* (2002) at 79- 88.

fact that the concept of sustainable development lacks specific substance and procedure.⁶⁵ Conversely, the concept of sustainable forest management, when translated into States practice, has a clear legal and fixed status in most national legislations in force in several countries, and in the two related sub-regional treaties in force in Central America and Central Africa. In this regard, the legal substance of the concept of sustainable forest management is based on the principles and standards of conservation and rational exploitation of forest resources while its procedure centres around the methods of participatory management, access to resources and benefits for present and future generations, as well as the conduct of impact assessment studies, etc. Accordingly, the States practice of forest sustainability derived from international legal instruments has an undeniable legal status in several countries in the World.

Secondly, the foregoing shows that the States practice of sustainable forest management is consistent, representative and relatively uniform. Understandably, it is producing an international customary norm of forest sustainability. In this respect, the related multilateral treaties from which current States practice is derived plays a catalytic role in the development of emerging rules of forest sustainability. In other words, the international agreements cited in this paper truly constitute the historical source of current States practice and could subsequently contribute to the development of the emerging customary rule of forest sustainability. It worth pointing out that from now on there is a kind of nourishing dialectic between the said conventions and States practice,⁶⁶ which could logically develop into customary norms. However, this will be possible only if legal theory and the jurisprudence of international law once more admit a small distortion in its fairly rigid foundation.⁶⁷ This relates to the requirement of uniformity in international law. As earlier pointed out, States practice as regards sustainable forest management is possible only at the formal level and that of international community objectives. In substance, however, forest sustainability must adapt to the ecological, socio-political and economic realities of the local context. The recent data partly account for the few disparities in the implementation of sustainable management norms in States. However, the influence of factors inherent in the national sovereignty of natural resources should not be down played.⁶⁸ But, the convergence of policies and harmonization of legislations are ongoing in various geographical regions such as Central Africa and Central America. Thus, inter-States regional agreements for the protection of forest ecosystems must be considered as laboratories for the development of international environmental law and not as instruments that contribute to the collapse of international law.⁶⁹

Thirdly, the interaction between conventional rules and creation of new customary rules leads to closer relationships. Conventional norms can therefore be considered as ‘precedents’ in the

⁶⁵ See Sands, P, ‘International Courts and the Application of the Concept of “Sustainable Development”’, *Max Planck UNYB* 3: 389- 406.

⁶⁶ See Sands, P, ‘Treaty, Custom and the Cross- fertilization of International Law’, *Yale Human Rights & Development Law Journal*, Vol.1: 85- 109.

⁶⁷ See Bodansky, D., Brunnée, J & Hey, E, ‘International Environmental Law: Mapping the Field’, in *International Environmental Law: The Oxford Handbook*, (eds.) Daniel Bodansky, Jutta Brunnée & Ellen Hey (2007).

⁶⁸ See Kuokkanen, T, ‘Background and Evolution of the Principle of Permanent Sovereignty Over Natural Resources’, in *International Environmental Law- making and Diplomacy Review* 2005, (ed.) Marko Berglund (2006).

⁶⁹ ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’. Report of the Study Group of International Law Commission (2007), Finalized by Martti Koskenniemi.

development of international customary norms.⁷⁰ It can be deduced from this observation that the multilateral conventions cited above and the emerging norm governing forest conservation and sustainability have a common source of obligation with regard to the same natural resources.

Fourthly, the notion of “particularly interested States” used by international jurisprudence to assess the representativeness of practice in the international community seems to have found its choice field in the environmental domain in general,⁷¹ and forest biodiversity conservation in particular. In this regard, the ratification of multilateral agreements on biodiversity conservation is quite relevant to the development of an international customary norm of sustainable forest management. Although it is still in its budding phase, its framework already exists.

Fifthly, De Sadeler & Born hold that the effectiveness of a norm of international environmental law depends on the level of participation of States concerned, rate of ratification of the agreement, compulsory effect of the obligations stipulated therein,⁷² and the existence of mechanisms for co-operation, financing, control and operational sanctions. Without going into the details of each of these parameters, it is however worth noting that all the conditions for conservation and sustainable management of forest resources are far from being fulfilled at present; hence the contrasting observation made by FAO that:⁷³ “This seventh biannual issue of State of the World’s Forest considers progress towards sustainable forest management at the regional and global levels. The overall conclusion is that progress is being made, but is very uneven”.

In other words, the FAO emphasizes that despite concrete States practice in the area of forest sustainability; various actors have not yet completely adjusted their actions with respect to norms inherent in long-term forest biodiversity conservation. The aforementioned report therefore puts into question in a paradoxical manner the effectiveness of measures adopted at the global, regional and national levels. The study of ITTO had already made the same assessment by identifying several factors that hinder the development of forest sustainability throughout the world, namely armed conflicts and wars; the non-profitability of forest sustainability in terms of returns on initial investments,⁷⁴ felt by States, economic operators and local communities; the status of land on which certain forest stands to be managed are located; persistent illegal forestry harvesting; and insufficient material, human and especially financial resources for forest management operations. These are actions carried out by the community, individuals, States and other actors. Indeed, the development of a new environmental law or the current environmental law alone cannot ensure forest biodiversity conservation.⁷⁵ It is necessary to set up an appropriate system in a given space and time, and a combination of multidisciplinary solutions including law as one of the elements in the chain. In the same way, Ramlogan,⁷⁶ asserted that in the making

⁷⁰ See *supra* n.2.

⁷¹ See *supra* n. 13.

⁷² See *supra* n.3.

⁷³ See *supra* n.18.

⁷⁴ ‘Status of Tropical Forest Management 2005: Summary Report’, ITTO (2006).

⁷⁵ See Hirakuri, S. R, *Can Law Save the Forest? Lessons from Finland and Brazil* (2003) at 1- 7.

⁷⁶ See Ramlogan, R, ‘The Environment and International Law: Rethinking the Traditional Approach’, *Vermont Journal of Environmental Law* (2001- 2002), Vol. 3

process of international environmental law the use of an interdisciplinary approach to build law is more suitable for dealing with environmental problems. This latter statement is valid for building of the international norm of sustainable forests management.

Conclusion

Finally, the brief review of States practice with regard to sustainable forest management as derived from some international agreements shows that it is frequent and representative, relatively uniform at the formal level, and its contents are fairly heterogeneous. Despite this latter disparity regarding theoretical requirements and jurisprudence relating to States practice in international law, the behaviour of forest sustainability is effective in various countries and common throughout the World. Therefore, it can be concluded that the States practice of forest sustainability is emerging as an international custom, provided, once more, that jurisprudence admits that it is impossible to achieve uniformity in actions relating sustainable forest management for objective reasons related to ecological and socio-economic factors. Furthermore, with regard to the uniformity of States practice in international law, Bodansky,⁷⁷ acknowledges the difficulty of achieving homogeneity in the actions of subjects of international law in these terms: “Finally, customary rules represent regularities, but not necessarily uniformities of behaviour”.

Furthermore, in view of the appraisal of the effectiveness and consistency of States practice, it is henceforth possible to envisage the convening of a conference on codification relating to the conservation and sustainable management of forest ecosystems. In this vein, the elements shared by legally binding sub-regional agreements currently into force in Central America and Central Africa,⁷⁸ including the forest principles adopted by UNFF could serve as source materials for the work of Members of the UN International Law Commission (ILC) in the said area. However, this hypothesis which consists in entrusting the mission of conducting negotiation on a binding multilateral agreement on forest resources management devolved on UNFF to the ILC depends on the political contingencies of international relations, and not on international law itself.⁷⁹

⁷⁷ See Bodansky, D, ‘Customary (And Not So Customary) International Environmental Law’, *Global Studies Journal*, Vol. 3: 105- 109.

⁷⁸ See Assembe, M.S, ‘Sustainable Forests Management and States Practice: A Comparative Analysis of Regional Agreements’, forthcoming, *Journal of African and International Law*, No 2.

⁷⁹ *Acknowledgement:*

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