

**RADICAL ENVIRONMENTALISM: TACTICS, LEGAL LIABILITY AND  
DEFENCES**

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## Introduction

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*“Bonn - Thousands of police and anti-nuclear radicals fought pitched battles in northern Germany this week as a trainload of plutonium and nuclear waste made its way to its storage site. At least 30 people were injured and as many arrested when young hooded militants firebombed and stoned the heavy security presence to ensure the safe arrival at the Gorleben storage site of the nuclear waste from the French reprocessing plant at La Hague. In the nearby town of Dannenberg demonstrators blocked the rail lines, erected burning barricades and hurled petrol bombs and fireworks at the serried ranks of the police. Fifteen thousand police were deployed to foil the protesters. They used tear gas, water cannon, and baton charges to disperse the protesters. One woman demonstrator had to be rushed to hospital by helicopter. Several other people were seriously injured... [T]he Social Democratic premier of the state of Lower Saxony, where the Gorleben storage facility is situated, lashed out at the protesters, warning that all violent opposition would have to reckon with ‘the resistance of the state’... Earlier this week, a north German court banned demonstrations around the Gorleben site, but the ban failed to deter the rioters.”*

- Mail & Guardian 10 May 1996

Over the past few decades, a global environmental movement has evolved in reaction to the ongoing plundering and pollution of the earth and its resources. Whereas environmentalism was in its infancy a mere century ago, it has steadily grown into a force to be reckoned with by governments and industry. But the growth in environmental awareness represents more than a mere political, social or cultural “trend”. Especially since the 1970’s, the number and membership of organisations concerned with the environment have risen enormously and continue to expand. Environmental awareness has found expression through mainstream environmental movements such as Greenpeace, the Sierra Club and the World Wildlife Fund, to name but a few of the larger and more well known organisations. Grass-roots support for smaller environmental NGO’s have also been on the increase as ordinary people came to be educated on the magnitude of the environmental crisis and the possible influence thereof on them and future generations.

For many environmentalists, however, the moderate stance of the institutional environmental organisations presented an unacceptable compromise to the detriment of the environmental cause. The moderate tactics, bureaucratic organisational structure and administrative rules of mainstream environmental organisations were shunned by a disillusioned new breed of environmentalist who prefers direct-action over compromise, head-on confrontation above empty talk, and law-breaking forceful tactics in stead of lobbying. The arrival of the age of radical environmentalism caused the wider environmental movement to split along fundamental ideological and tactical lines.

The most widely supported ideological underpinning of the radical environmental movement is that of deep-ecology.<sup>1</sup> This biocentered consciousness emphasises the intrinsic value of all natural things and is founded on the philosophy that man is no more important than any other species. As such it is in direct contrast to anthropocentric and utilitarian philosophical theories which, in the view of the radical environmentalist, encourage the destructiveness and wastefulness of industrial society even as they seek to reform it.

There are a few factors that distinguish the radical environmental movement from more mainstream groups, the most notable being a strong emphasis on confronting environmental problems through no-compromise direct-action tactics, including breaking the law. Furthermore, the main goal of radical protests is the preservation of biological diversity, and increasingly the focus of radical actions is also directed towards anti-nuclear and anti-development protesting. A third and very distinguishing characteristic of radical environmentalism is that most radicals act on their own without direction from an organisational hierarchy.<sup>2</sup> It is generally thought by radicals that organisational direction would only hamper them in acting on their impulsive conscience-driven direct-action campaigns and that their mobilisation would be slowed down by procedure and hierarchy. For this reason, groups who are associated with radical environmental tactics, classify themselves as radical environmental *movements*, rather than organisations. Although this description of the radical environmental movement may lead to visions of anarchy and general lawlessness, it must be kept in mind that even radicals have a distinct unifying and guiding ethic which is mainly founded on their ideological beliefs. These unwritten ethical rules would, for instance, lay down guidelines as to the extent to which violence may be employed to achieve environmental reforms. Radicalism, therefore, does not necessarily have to imply anarchy, but is merely meant to describe a movement which carries their theories and convictions to their furthest and most extreme application, and which demands fundamental and wide-spread changes and reforms.

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<sup>1</sup> For a detailed discussion of this ideology, refer to List **Radical environmentalism: philosophy and tactics** (1993) 17 and Lewis **Green delusions: an environmentalist critique of radical environmentalism** (1992) 28.

<sup>2</sup> Switzer **Environmental politics: domestic and global dimensions** (1994) 28. There are a few other practical and ideological differences between mainstream and radical groups which are omitted for the purposes of the present discussion.

A less flattering description of the radical environmental movement coined by their opponents is that of “ecoterrorists” committing “ecotage”: terrorists who make use of intimidation, sabotage and violent tactics in order to force environmental change.<sup>3</sup> The aggressive and sometimes illegal tactics of the radical environmental movement have attracted much media coverage in the past, but increasingly the attention which radicals are attracting originates from governments and law enforcement authorities. As the tactics of radicals become more destructive and as the increasing disillusionment and frustration of the environmentally conscious break into civil disobedience and even violence, prosecuting authorities are feeling the pressure from powerful industry-, property- and development-groups to hold liable those responsible for the disruption and damages suffered, and to put in place sanctions to deter possible damage-causing radical environmental tactics.<sup>4</sup>

This paper will focus on those tactics of radical environmentalists which have legal implications and which may lead to criminal or civil liability.<sup>5</sup> It will also touch on certain legal defences which have been employed by radical environmentalists, and which could potentially be employed by them in order to escape liability. The paper is not meant to be a complete guide to tactics, liability and defences, but as far as possible the most important of these have been highlighted. It should be noted that the development of the radical environmental movement and the resulting legal dilemmas have been most prominent in the United States and therefore this paper will refer mainly to the law surrounding radical environmentalism as experienced and interpreted in that country.

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<sup>3</sup> Cason “Spiking the spikers: the use of civil RICO against environmental terrorists” 1995 (32) **Houston Law Review** 745 746. The term “ecoterrorist” have also been used in a context quite different from the current context, namely to describe those entities who commit acts of environmental sabotage. One only need to think back to the Persian Gulf War when hundreds of oil wells were deliberately set ablaze by the Iraq government, causing widespread pollution.

<sup>4</sup> Correll “No peace for the greens: the criminal prosecution of environmental activists and the threat of organizational liability” 1993 (24) **Rutgers Law Journal** 773 774.

<sup>5</sup> Whilst this paper will concentrate on the negative aspects and consequences of radical environmental actions, there is no denying their many successes on the environmental front, their commitment to the environmental cause, and their role in the wider environmental movement.

Finally, the relevance of the radical environmentalist phenomenon in South Africa will be discussed in the context of the American experience, and the emerging constitutional and human rights culture locally. In conclusion, an attempt will be made to place the phenomenon of radical environmentalism into perspective by examining the legitimacy and role of radical environmental movements in a modern world in need of workable strategies to attain sustainable development. In doing so, reference will be made to the standing of radicalism in the NGO- and international environmental community, and the possible contribution which it can make to a global environmental transformation.

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## **Tactics and Liability**

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### **1. Introduction**

The tactics of radical environmentalists are varied in character and intent. The character of the strategies employed by the various radical movements or groupings differs depending on the demands, urgency and nature of the environmental problem about to be protested, the financial resources of the movement, the number of supporters and its infrastructure. The character of radical tactics is also greatly influenced by the specific character and focus of the environmental group. The second level on which tactics vary is that of intentional content. Some tactics are meant to peacefully inform, educate and propagate whilst other strategies are devised to confront the problem in a direct, often aggressive fashion. Radical actions could erupt spontaneously, motivated by anger and frustration, but mostly they are pre-meditated, well-planned and targets the environmental threat directly.

Although environmental radicals are notorious for their use of civil disobedience and “ecotage”, they make use of a mixture of lawful and unlawful tactics to optimise their chances of successfully confronting the environmental threat. However, as will be shown later,<sup>6</sup> the overall strategy of the radical environmental movement (a strategy based on deep-ecology and direct-action) may actually work counter-productively to the detriment of the

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<sup>6</sup> **Infra** p 25.

wider environmental cause and does not necessarily contribute to the concept of sustainable development.<sup>7</sup>

A representative sample of some of these tactics will now be discussed with occasional reference to the legal implications thereof and the legal liabilities which may follow thereon.

## 2 Civil Disobedience

The roots of modern civil disobedience can be traced back to the Gandhian philosophy of non-violent civil disobedience.<sup>8</sup> As envisioned by Gandhi, civil disobedience entails open and non-violent violation of the specific law against which a citizen objects. In theory, such action would then capture public attention, encourage and provoke societal debate, persuade others as to the merits of the protesters' cause and eventually bring about lasting social and political reform.<sup>9</sup>

The modern manifestation of civil disobedience has retained most of the Gandhian qualities and motivations and can be defined as a form of conscientious, public and non-violent protest against a law, policy, act or decision which the protester considers morally unjust.<sup>10</sup>

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<sup>7</sup> Section 24 of the **Constitution of the Republic of South Africa of 1996** (hereafter referred to as the "**Constitution**") has incorporated this concept into the human rights- and environmental debate by stating that: "Everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Although a definitive definition of "sustainable development" remains elusive, the Brundtland definition is generally accepted as capturing the essence of the term as being "economic development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs" - see Syngellakis "The concept of sustainable development in European Community law and policy" 1993 **The Cambrian Law Report** 24 61.

<sup>8</sup> See generally on Gandhian philosophy and its modern day relevance to civil disobedience, Lippman "Reflections on non-violent resistance and the necessity defense" 1989 (11) **Houston Journal of International Law** 277 278.

<sup>9</sup> Lippman "Civil resistance: revitalizing international law in the nuclear age" 1992 (13) **Whittier Law Review** 17 36.

<sup>10</sup> Katz "Civil disobedience and the first amendment" 1985 (32) **UCLA Law Review** 904 905.

Note the expansion of the definition as compared to that of Gandhi's. No longer are specific laws and statutes the only objects of protests, but also policies and decisions. The latter, namely protest against a specific policy, act or decision, is the manner in which civil disobedience manifests itself in most instances of radical environmental protests. The protester would challenge the legitimacy of a given policy, act or decision through the violation of a law that is not itself challenged.<sup>11</sup> This form of protest would be categorised as indirect civil disobedience and protesters would consequently face prosecution for their violation of a diversity of laws such as those directed at trespassing, public order and safety, administration of justice and the protection of reputation. However, as soon as protesters turn to physical violence and malicious damage to property, they would be regarded as overstepping the traditional boundaries of civil disobedience.

Civil disobedience mostly take on the form of pickets and demonstrations. Whilst these types of protest action are immensely popular as strategies to popularise the environmental cause, the legal implications of these strategies are usually negligible. The situation does change however, when protesters hold illegal marches or trespass on property where protests are prohibited. Furthermore, pickets and demonstrations present protesters with the ideal forum to vent their opinions, sometimes resulting in hate speech, seditious comments, inflammatory talk and libellous statements. These by-products of pickets and demonstrations may potentially lead to criminal and civil liability.

Other manifestations of civil disobedience which have evolved from the more traditional forms of the tactic, are those of blockades, occupations and tree-sittings.<sup>12</sup> As direct-action tactics, these strategies have historically proven very effective to prevent, delay or otherwise impede potentially environmental damaging actions. The rationale is to present a physical obstacle in the way of those who are regarded as environmental perpetrators to continue

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<sup>11</sup> Cavallaro "The demise of the political necessity defense: indirect civil disobedience and *United States v. Schoon*" 1993 (81) **California Law Review** 351 352.

<sup>12</sup> "Tree sitting" is a type of occupation where radicals would seek out strategically important trees that were allocated for felling and these trees would then be occupied for days and sometimes weeks by willing volunteers. To remove activists from their platforms in the trees is usually a dangerous, costly and frustratingly difficult operation. Tree sitting has been perfected to an artform by the Earth First! (always with the exclamation mark) movement.



with their environmentally exploitative work. Besides the economic damage (in terms of lost production, delays etc.) for which the protesters may theoretically be held liable, blockaders, occupiers and tree-sitters are more often than not also trespassing on private or government property.

### **3 Monkeywrenching, Sabotage and Destruction of Property**

The single most important reason for the bad reputation of direct-action environmental movements is their use of vandalism, sabotage and other militant-style actions to achieve their goals. The term “monkeywrenching” is widely used as a collective description for acts of violence, or threats of violence against inanimate objects, although the original term refers to a method devised and practised by Earth First! activists to destroy or render useless machines, bulldozers, road-building equipment or other such objects in an attempt to halt environmental destruction and development.<sup>13</sup>

When questioning monkeywrenchers on the motives behind their tactics, the reply will undoubtedly be that monkeywrenching is a tactic of last resort: a final step in the defence of the wild when all other reasonable measures have failed. But this would not be entirely truthful since monkeywrenching has become the tactic of choice for many radicals who believe that other

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<sup>13</sup> Earth First! is also famous for its use of a method termed “tree spiking”: the practise of driving nails or spikes into trees to prevent or hinder milling and logging. The spike doesn’t harm the tree but can damage expensive saws if not removed (at great expense) prior to milling. But Earth First! are not the only radicals accused of monkeywrenching and sabotage: The Sea Shepherd Society is notorious for its daring and highly controversial strategies to save marine mammals from slaughter and has been involved in a number of incidents where drift net fishing boats and other sea going vessels have been rammed or caused to sink by deliberate acts of ramming or sabotage. The Sea Shepherds justify their strategies by arguing that the killing of marine mammals is a crime against international law, a crime against nature and a crime against future generations. In analysing the possible liability of a group such as the Sea Shepherds, international law considerations are very important since many of their operations take place on the open seas or in foreign countries. Despite their open acceptance of responsibility for their acts of sabotage, the Sea Shepherds have never been prosecuted. The apparent reasons behind the failure to prosecute the perpetrators are firstly the fact that certain industries such as the Icelandic whaling operations are indeed illegal under international law and secondly the allegation that certain countries would rather look the other way than be tried in an open court where the atrocities committed by their fishing industries are publicly exposed.

measures are doomed to failure and are consequently not worth exploring. This attitude has brought discredit to radical movements who are accused of violating the principles of non-violence which is very much part of the wider environmental movement's ideology. In response hereto, monkeywrenchers will reply that their violence is only directed at inanimate objects and great care is taken to minimise the possible threat of injury to people.<sup>14</sup>

It is not necessary to discuss in any detail the criminal and delictual consequences of monkeywrenching tactics - trespass, malicious damage to property, conspiracy, sabotage, even possibly assault - these consequences are obvious and as shown later, its perpetrators are usually left without defence.<sup>15</sup>

#### 4 Media and Publicity

Although radical environmentalists are best known for their direct-action approach to issues, they also aim, on a more abstract level, to market their no-compromise environmental ethic through the press, radio, television and other mass-communication media. Isolated protests, no matter how carefully orchestrated and executed, have little impact if not publicised. Media interest is also not very difficult to elicit with the inherently dramatic and headline-grabbing nature of radical tactics. Hence the media has arguably become the most powerful tool in the radical environmentalists' tool box and the use and abuse of the media runs like a golden thread through most radical operations. In recognising the public education potential of the media, coverage of environmental protests is often actively sought by the organisers thereof. The marketing sophistication of radical environmentalists has developed to such an extent that protests operations are usually chosen carefully, taking into consideration both the target and the message of the protest in order to optimise the promotion of their cause.<sup>16</sup>

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<sup>14</sup> Correll (n 4) 785 fn 66.

<sup>15</sup> Although some believe that monkeywrenching should rather be likened to civil disobedience than terrorism, and should be afforded some legal protection since it contributes to the democratic processes. See in general Young "Monkeywrenching and the processes of democracy" 1995 (4) **Environmental Politics** 199.

<sup>16</sup> Some environmental organisations such as the Sierra Club even advertise courses in media training in their club's newspaper. See 1996 (3) **The Planet**.

Furthermore, radical tactics often invite violence and hard-handed action from law enforcers. Although blockade- and occupation-campaigns are usually non-violent, protesters who resist removal from the scene of the blockade or occupation or who resist arrest, must often be forcibly and violently removed by law enforcers. In its turn, these acts of violence attract media coverage. Scenes of violence against peaceful protesters not only create sympathy and support for the protesters' cause, but can also have the effect of severely damaging the corporate image and reputation of developers, industry and law enforcers (and thus, by implication, governments). Bad publicity could potentially lead to boycotts of goods and services and so translate into financial losses for industry. For governments, negative publicity may have political consequences and could result in loss of political support both locally and internationally.<sup>17</sup>

## **5. Economic Sabotage**

Most businesses operate on a relatively small margin of net profit which is extremely vulnerable to outside tampering. A determined campaign of monkeywrenching or civil disobedience could have a disastrous financial impact on such businesses. Environmentally exploitative corporations could be forced to expand their security efforts and related expenses through persistent and repeated acts of radical tactics since the cost of delays, repairs and breakdowns, lost production and counter-tactics which must be employed to, for instance, remove blockaders, will all have to be taken into account when budgets are drawn up for future projects. Although some damage may be repaired by compensation received from insurance companies, recurrent damage may cause insurance premiums to increase or coverage being withdrawn. All of these factors combined eventually cut into the profit of the industry. This type of action has been termed "economic sabotage" and the idealised outcome of this tactic is to cause development projects to become too expensive to pursue because of the higher risks and the higher costs that accompany such projects.

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<sup>17</sup> A recent example which comes to mind, is the uproar which followed the French government's decision to continue with its nuclear-testing program at the Mururoa atoll in the Pacific ocean, despite considerable national and international resistance.

## 6 Courtroom Battles and Frivolous Litigation

The courtroom provides the environmental activist with a forum which is public, independent and ordered, and where activists can present their cause and vent their frustrations freely and without undue interference. These qualities combined in a single institution must necessarily attract the attention of social groupings such as the radical environmental movement which frequently find themselves in a marginalised and disempowered position because of their extremist views and absence of mainstream resources. Especially when prosecuted for their unlawful radical actions, radical environmentalists may (ab)use the courtroom for their own purposes by presenting defences and arguments which are sure to attract attention, but rarely succeeds in winning acquittal.

Courtroom battles are not only fought by environmentalists when on trial for their unlawful radical actions, but some environmental organisations may actually frivolously institute proceedings and make use of other legal manoeuvring to forestall, delay or prevent environmental destruction, even though there may be little chance in law of actually succeeding in a civil action.<sup>18</sup>

## 7 Organisational Liability

So far, liability has been discussed with reference to the individual activist and unlawful actions taken by such individuals. However, even though radical environmentalists shy away from traditional organisational structures such as those found in mainstream environmental organisations, there are definite structures in place for many of the so called "movements". The direct, no-compromise actions of radicals are also highly visible through the media

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<sup>18</sup> Scarce **Eco-warriors: understanding the radical environmental movement** (1990) 73. This type of tactic has jokingly been called "paper monkeywrenching". Legitimate environmental actions and other legal measures instituted by environmental organisations are not meant to be included as a radical tactic, although mainline environmental entities such as the Environmental Defense Fund and the Sierra Club Legal Defense Fund has it as their main objective to facilitate environmental litigation: See Robinson and Dunkley **Public interest perspectives in environmental law** (1995) 49 for more information on these and other legal defence funds.

coverage that it receives, and as the numbers of radicals continue to increase, the threat that they present to government and industry likewise increase.

The unease and disruption which is caused by no-compromise environmental action have given rise to an environmental backlash in the United States, orchestrated mainly by big business and industries who aim to discredit environmental organisations, assert unlimited rights for property owners and reduce governmental regulation over industry. Naturally governments also have their own interests to protect: that of saving face in a potentially embarrassing political situation where a group of "hooligans" with unconventional tactics take on government and industry in an environmental battle. One can also not ignore the very real fact that governments are property owners with economic, military and other such interests to protect.

All of the above factors combined have prompted an investigation in the United States into the possible prosecution of identifiable radical environmental organisations for the illegal actions of its supporters and members when the organisation had knowledge of, and consented to, the actions of their members. The first issue that arises when contemplating the prosecution of environmental organisations, is whether the organisation is a legal entity capable of being held accountable and liable. Some organisations such as Greenpeace are incorporated non-profit organisations, but most radical groupings operate mainly as unincorporated associations. There would be no question that an organisation such as Greenpeace - which despite their mainstream image, is also known for their rather daring and sometimes illegal actions - could theoretically be held liable and prosecuted by virtue of their legal status as a corporation. The difficulty with regards to organisational liability does, however, arise with regard to unincorporated associations, roughly defined as a group of people joined together to meet common objectives.<sup>19</sup>

In the United States, an unincorporated association's liability is analogous to that of a multi-member partnership, where liability for acts of other members done in the course and scope of the association's business, is awarded to each member of such organisation. If the organisation carried out an illegal action in co-operation with its members, or merely gave

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<sup>19</sup> Correll (n 4) 796.

advice regarding or encouraging the illegal act, it may theoretically be held liable under criminal and civil law. The principles which seem to underlie the willingness to hold liable unincorporated associations, is that of conspiracy, incitement and agency.<sup>20</sup>

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## Defences

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### 1 Introduction

Although it may be true that the modern ideology of civil disobedience has its roots in Gandhian philosophy, his assertion that disobedients should concede their guilt and not present a legal defence, has been mostly dismissed by modern day environmental activists.

For many years, environmental activists have tried without much success to develop a theory upon which to legally justify their violation of the letter of the law. Any success which they have had in avoiding delictual or criminal liability has, however, been limited to exceptional cases. This obstacle has all but deterred environmental activists from presenting a defence, and in response to the challenge to legally justify their actions, various innovative and creative defences have been invoked. It is however, undoubtedly true that in most cases, the presentation of a defence is not necessarily a serious attempt at escaping liability, but rather an attempt at slowing down the wheels of justice whilst using the trial court as a political forum in which to publicly fight their cause.

In the following discussion, certain of the more popular defences which have been employed by environmental activists in civil and criminal matters will be discussed.

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A general discussion on these principles is undertaken in Correll (n 4). In the aforementioned article, the following examples are cited (on 802): A corporation which suffered damages at the hands of radical environmental activists could join Earth First! or its leader Dave Foreman in a civil action for damages, alleging that Foreman incited the activists to do damage or that the activists were agents of Earth First! (The last-mentioned movement is particularly notorious for its advocacy and open promotion of destructive and illegal radical tactics, especially by distributing detailed manuals that describe the illegal techniques designed to guide the radical activist to reach her goals. Most of these manuals carry a disclaimer...). An organisation protesting missile or nuclear testing could for instance be cited as a defendant for advocating interference with legitimate governmental activities.

## 2. Necessity Defence

The defence of necessity arises when, confronted with a choice between suffering some evil and breaking the letter of the law in order to avoid it, the environmental activist chooses the latter alternative. Underlying the defence is the social policy which argues that the promotion and achievement of higher values at the expense of lesser values ought to be brought about by the law, and that society will benefit from this, since the greater good for all is accomplished by the intentional violation of the letter of the law. In these circumstances it is thought that it would be unjust to strictly apply the law.<sup>21</sup>

It is understandable that environmental activists could be attracted by the possibilities which the necessity defence presents. It is also almost predictable that no respectable judiciary in the world would fall for such an obvious abuse of a defence which is intended to be applied in only the most exceptional of cases. To do otherwise would be to invite anarchy. Despite considerable judicial resistance, activists in the United States of America have persisted in their use of the defence, if only to attract media attention to their cause. Although they have enjoyed limited success in applying the defence, American trial courts have consistently denied environmental activists (and activists protesting various other causes) the necessity defence by nullifying their submissions on almost every element of their defence.<sup>22</sup>

Although the elements required to satisfy the necessity defence varies from state to state in the USA, there are a few elements which are common to most of them.<sup>23</sup> The first of these is that the defendants relying on the defence of necessity must have been confronted by a *choice of evils* and they must have chosen the lesser evil (the lesser evil being an intentional defiance of the law). This element does not usually present an obstacle for defendants, since courts mostly acknowledge that the harm perceived by environmental activists and which the activists are protesting or attempting to prevent, is generally greater than the harm caused by

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<sup>21</sup> Cavallaro (n 11) 353.

<sup>22</sup> Lippman (n 9) 80.

<sup>23</sup> See in general Cavallaro (n 11) 356; Bettigole "Defending against defense: civil resistance, necessity and the United States military's toxic legacy" 1994 (21) **Boston College Environmental Affairs Law Review** 667 677 and Lippman (n 9) 79.

the unlawful acts of the activists.<sup>24</sup> Of course it is only logical that the element will become increasingly difficult to satisfy as the radical nature of the activists' actions escalate, the reason being that the choice of values of the activists may become suspect and the reasonableness of their convictions may be difficult to prove. Secondly it is required that the defendants must have been faced with a *clear and imminent harm or danger*. This element is arguably the greatest impediment to the successful appeal on the necessity defence. Most environmental activists would submit that the harms which they are directing their actions against, are inevitable and unavoidable. However, the imminence requirement is usually interpreted by the judiciary as meaning "immediacy in time and place" - an interpretation that disqualifies the application of the defence in most cases.<sup>25</sup> The next element requires that the defendants reasonably anticipated there to be a *causal relationship* between their conduct and the harm sought to be averted. In other words, the defendants must reasonably have expected that the conduct will be effective as the direct cause of abating the danger and avoiding the harm. The inherently intricate nature and scale of most environmental dilemmas make this requirement virtually impossible to satisfy. By interpreting the causality requirement rigidly, it has been argued that courts overlook the fact that acts of civil disobedience have historically served as a catalyst for social change in the United States.<sup>26</sup> The last element of necessity that need to be proven is that the defendants had *no legal alternatives* to violating the law and in abating the danger. Regardless of the practicality of alternative measures to avoid the harm, courts have rigidly applied this requirement of the defence and have demanded that defendants exhaust all possible legal recourses before turning to non-legal acts of civil disobedience. Strictly applied, courts can in hindsight always find that the defendant could have taken recourse to just one more legal measure before turning to lawbreaking alternatives.<sup>27</sup>

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<sup>24</sup> Schulkind "Applying the necessity defense to civil disobedience cases" 1989 (64) **New York University Law Review** 79 106.

<sup>25</sup> Schulkind (n 24) 96.

<sup>26</sup> Lippman "The necessity defense and political protest" 1990 (26) **Criminal Law Bulletin** 317 347.

<sup>27</sup> Lippman (n 26) 349.



### 3 International Law Defence

It is generally accepted that an individual is not a subject of international law, and that an individual may not rely on law contained in human rights conventions unless it is legally incorporated into the domestic law of his or her country. Despite these accepted rules of international law, it has been argued by environmental activists that the individual has been transformed into an active role player in the protection of international human rights. This contention is, in their view, supported by the pronouncements of the Nuremberg Tribunal which, besides trying and convicting war criminals, also established broad principles of the international law and human rights. Of particular interest to environmental activists is the pronouncement of the Nuremberg Tribunal that individuals have certain international obligations which transcend their obligations under domestic law. In other words, individuals are firstly subjects of the universally accepted and applicable human rights law and only then subjects of their respective domestic laws.<sup>28</sup>

Under the international law defence it is contended that, whilst a certain act of civil disobedience is violative of domestic laws, it can be justified since it was intended to prevent acts of ongoing criminal activity on the part of the government.<sup>29</sup> It is said by these environmental activists that the government denies them the human rights protection which is afforded to every person under the international law and that the government's foreign policies may infringe on the internationally recognised human rights of those outside their country's borders as well. In this respect it should be noted that the international law defence has typically been invoked in cases where prosecution has followed on acts of civil disobedience in protest of nuclear weapons policies.<sup>30</sup> These civil disobedients believe themselves to be under a duty to violate domestic laws in order to ensure adherence to international law.

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<sup>28</sup> For a general discussion on the implications and relevance of the Nuremberg trials, see Lippman "Towards a recognition of the necessity defense for political protesters" 1991 (48) *Washington and Lee Law Review* 235 236 and Lippman (n 8) 283.

<sup>29</sup> Lippman (n 8) 282.

<sup>30</sup> **Ibid.**

In the United States of America, the judiciary has consistently rejected the applicability of the international law defence. It has done so by firstly denying the defendants standing to raise such a defence, since it is contended that the defendants lack the right to question the legality of their government's actions at home and abroad because the defendants had not been personally required to engage in such illegal activities, and secondly by invoking the political question doctrine. In terms of this doctrine, courts do not have the jurisdiction to question the legality under international law of matters relating to defence and foreign policy. These functions are constitutionally committed to the political branches of government and the courts may not be seen to intrude thereon.<sup>31</sup>

#### 4 Freedom of Expression and Demonstration

During his presidential election campaign in 1992, President Bill Clinton is reported to have said that "...it is no accident that in those countries where the environment has been most devastated, human suffering is the most severe; where there is freedom of expression and economic pursuit, there is also determination to use natural resources more wisely".<sup>32</sup> Besides the fact that the environment itself has now become a recognised human rights concern world-wide, the right to have one's environment protected must be accompanied by the full range of political rights to give any substance thereto. Free expression, assembly, demonstration, picketing and petition can, and must play an important role in deterring the abuse of power by the state administration and by industry.

Whilst it has to be recognised that freedom of expression and other such freedoms do in fact contribute to the formation of pro-environmental government policy and public opinion, the lengths to which these freedoms and rights can be protected and guaranteed, must be questioned when the issue of civil disobedience is brought into the equation. Many acts of civil disobedience involve infringement on other constitutionally protected rights, or on rights which are protected under common law or statute.

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<sup>31</sup> Lippman (n 8) 294 and Lippman (n 26) 341.

<sup>32</sup> Kane "Promoting political rights to protect the environment" 1993 (18) **The Yale Journal of International Law** 389 390.

In the United States, freedom of speech is guaranteed by the First Amendment to their Constitution.<sup>33</sup> It is also recognised that other forms of dissent such as picketing or holding a public march have the protection of the First Amendment, and are lawful. Civil disobedience on the other hand, involves a purposeful violation of the law and although civil disobedients argue that their acts of indirect civil disobedience is worthy of constitutional protection as “speech” since it is intended to convey a political opinion or meaning, American courts have mostly refused to recognise the First Amendment as a defence in civil disobedience situations.<sup>34</sup>

The most popular theory on the purpose of freedom of expression in the United States, is that of the “marketplace of ideas” or the “free trade in ideas”. Under this view, freedom of expression promotes free competition and testing of ideas. The ultimate outcome of this exchange of ideas is theorised to be the truth.<sup>35</sup> Many civil disobedients would argue that their actions are in line with the purposes and values underlying the concept of freedom of expression and that their activities have the potential of widening public concern, which in turn, may lead to a re-examination of governmental and social policies. They may also argue that if society suppresses what is seen to be unfavourable and unpopular opinions and arguments, and if courts fail to exonerate those who make controversial statements, it may frequently suppress truth itself.<sup>36</sup>

Why then, if it is indeed so that civil disobedients’ actions promote the values and purpose at the heart of freedom of expression, are they mostly denied a successful appeal on the freedom of expression defence? The answer undoubtedly lies in the limitations that are placed - not only on how far one may stretch this right in terms of the contents of the message - but also on the definition of what constitutes “expression”. In the United States the violation of a law not aimed at the denial of speech (such as trespass laws) is not

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<sup>33</sup> **United States Constitution**, Amendment I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances”.

<sup>34</sup> Katz (n 10) 904.

<sup>35</sup> Barron and Dienes **First amendment law in a nutshell** (1993) 9.

<sup>36</sup> Spitz “Eschewing silence coerced by law: The political core and protected periphery of freedom of expression” 1994 (10) **South African Journal on Human Rights** 301 305.

pardoned by their courts merely because protesters were exercising what they perceived to be their “right” to freedom of expression and demonstration. A distinction is made in American law between pure speech and symbolic speech. The first of these enjoy virtually full protection, being for instance oral speech and leaflets. The protection granted to symbolic speech (non-verbal conduct such as demonstrations and pickets) on the other hand, is rather more limited.<sup>37</sup> Of course it has to be recognised that many radical environmental protests involve a mixture of speech and conduct.

Where are the boundaries then, between lawful and unlawful expression and demonstration? In the United States, the first boundary seems to be drawn in response to the concept of the “public forum” as opposed the “non-public forum”. Although the distinction between the two is rather unclear, it has been proposed that public forums are public premises and places whereto the public are freely admitted and have unrestricted access for the purposes of expression.<sup>38</sup> City parks, streets and squares are, in terms of this rather vague definition, so-called “public forums” and the public may exercise their freedom of expression at such places without restriction or sanction. Non-public forums would include property owned by private entities, government owned property and facilities at which the purpose and normal activities of the facilities would be interfered with had the public been granted open access thereto for the purposes of expression. Picketing, protesting and expression of ideas would be regarded as unlawful at these “non-public forums”.<sup>39</sup>

But would the sidewalk in front of the local nuclear plant, or the bridge giving access to a controversial waste incinerator also be open to the protesters? More often than not, special laws and regulations are in place to prohibit access to some types of state-owned facilities: a practice that has come in for severe criticism. It has been argued that if a protester can prove in court that, for instance, a trespass regulation at a nuclear plant had been enacted with its specific and only purpose being to keep out protesters, he or she would be in a position to appeal successfully on his or her right to freedom of expression. In other words, the constitutionality of the regulation is attacked on the ground that it is aimed at the denial of free speech and expression. In theory this argument may seem plausible, but in the United

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<sup>37</sup> Katz (n 10) 907.

<sup>38</sup> Barron and Dienes (n 35) 199.

<sup>39</sup> Katz (n 10) 912.

States the judiciary has dismissed it, merely stating that "...property owned or controlled by the government which is not a public forum may be subject to a prohibition of speech, leafleting, picketing or other forms of communication without running afoul of the First Amendment".<sup>40</sup>

A second and more abstract restriction on freedom of expression (in contrast to the physical "public forum" restriction), is the restriction which is placed on the content of statements and ideas. It is difficult to imagine that any fault could be found with statements (either verbal or symbolic) purely relating to the environment: critical social commentary should be protected under a freedom of speech guarantee. However, when the contents of the message conveyed by radical environmentalists are that of incitement to violence or is libellous and defamatory of nature, a constitutional right to freedom of expression may not be enough to legally pardon those responsible for the statements.

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### **Environmental Radicalism in South Africa**

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In South Africa, environmental groups certainly play a minor political role compared to the role of environmental groupings in particularly the United States and Europe. They have little influence on governmental- and business decision-making processes and even less prominence in the popular media. Although environmental awareness has become very politically correct in recent years in this country, the same grass-roots commitment and mobilisation as witnessed in the United States and Europe seems to be absent. No wonder that radical environmentalism is a concept somewhat foreign to South Africans. What then is the relevance of this paper if radical environmentalism is virtually unheard of locally?

Acts of rather unusual environmental protest have come and gone in the South African context, and although the protests may not have been as outright and aggressive as are found in the United States for example, they could have been defined as radical environmental actions taken by groups or individuals with particularly strong sentiments for

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<sup>40</sup>

**Ibid.**

their environment.<sup>41</sup> To dismiss the possible emergence of radical environmentalism in this country as being remote and thus irrelevant, would be a premature statement, especially in light of the considerable historical successes which civil disobedience have enjoyed on other political and social levels. The continued frustration with the slow pace of reform and the distrust of the apparent commitment of government to political and social issues have already shown to lead to vigilantism and social anarchy by ordinary citizens.<sup>42</sup> It also stands to reason that the transformation of South Africa to a truly free and democratic country may convince some environmental fundamentalists to come out of the closet and openly protest for environmental causes.

The manner in which the South African judiciary may respond to the challenges that radical social action present could be predicted with reasonable certainty if inspiration is drawn from the American experience and from the new constitutional dispensation. As far as the legality or illegality of radical actions are concerned, there cannot be much debate on the definite law-breaking nature of some radical actions. If the defences of necessity, international law and freedom of expression and demonstration are appealed on by South African radicals in an attempt to mitigate the law-breaking nature of their tactics, chances are that they will face the same rejection of their defences as their American counterparts. In this context, the possible impact of the South African constitutional provisions regarding limitations on human rights<sup>43</sup> and the interpretation of the Bill of Rights<sup>44</sup> must necessarily come into play. These

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<sup>41</sup> One only needs to think back to the much publicised illegal occupation of the “White House” by demonstrators protesting the proposed development of the Oudekraal hotel project at the foot of Table Mountain’s Twelve Apostles (during May 1996). Whilst the National Parks Board was fighting in the courts to obtain an interdict suspending the development, these demonstrators presented a physical obstacle preventing the demolition of the house, and were an embarrassing political thorn in the side of the developers.

<sup>42</sup> The PAGAD (People Against Gangsterism and Drugs) movement is an excellent example of how citizens can, and do, take the law into their own hands in the struggle for a social cause.

<sup>43</sup> Section 36 (1) of the **Constitution**: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

provisions will have a deciding role in determining the contents of rights, and the extent to which the rights may be legally exercised. The impact which international and foreign law will have on the interpretation of legislation and human rights can also not be underestimated.<sup>45</sup> It is therefore not unreasonable to predict that the South African response to radical environmentalism may well be the same as that of the international community.

When the necessity defence is considered, it is possible to draw similarities between the South African and the American elements of the defence.<sup>46</sup> Considering the fact that both countries are clearly entrenched in a tradition of strictly and conservatively interpreting the defence in order to avoid the possible abuse thereof, the outcome of an appeal on the defence locally will almost surely have the same outcome as in the United States.

The elevation of the status of international law in South Africa, and the country's fairly recent re-entry into the global human rights arena must raise the question whether a theoretical opportunity is created for civil disobedients in South Africa to successfully make use of the international law defence. Taking into account that our courts may consider foreign law in the interpretation of the Bill of Rights,<sup>47</sup> and further considering the extensive body of case-law relating to the international law defence in the United States of America, it is reasonably foreseeable that the South African courts may draw judicial inspiration from their more experienced American counterparts. In doing so, our courts will in most probability deny civil disobedients the international law defence, especially since the same

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<sup>44</sup> Section 39 (1) of the **Constitution**: "When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law".

<sup>45</sup> Besides the reference which is made to international and foreign law in Section 39(1) of the **Constitution**, Section 233 demands the following: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

<sup>46</sup> On the possible interpretation of the elements of necessity in South African law, see in respect of the "choice of evils" element, Neethling, Potgieter and Visser **Deliktereg** (1992) 82 and Snyman **Strafreg** (1992) 127. In respect of the imminence requirement, see Burchell, Milton and Burchell **South African criminal law and procedure (Vol I)** (1983) 340 and Neethling, Potgieter and Visser 81. On causality, refer to Burchell, Milton and Burchell 341.

<sup>47</sup> Section 39(1)(c) of the **Constitution**.

considerations which are employed by the United States judiciary to exclude the defence (standing and the political question doctrine), are equally applicable locally.<sup>48</sup>

Certain guidelines and limitations provided for in the Constitution takes an edge off the speculation in respect of the judicial response to an appeal on the guaranteed freedoms of expression, assembly, demonstration and picket<sup>49</sup> in a civil disobedience set-up. When considering the nature of demonstrations and pickets, courts will take cognisance of the qualifying words "peacefully and unarmed" which are included in Section 17 of the Constitution. The right to freedom of expression is equally qualified with the exclusion of "propaganda for war" and "incitement of imminent violence" from the protection which Section 16 offers the protester. Radical environmentalists practising civil disobedience will undoubtedly have a hard time convincing any court under the present constitutional circumstances that their disruptive demonstrations, pickets and inflammatory speeches should enjoy constitutional protection. The "clear and present danger" test developed by United States courts may well be applied locally to distinguish between protected and unprotected speech. In terms of this test, speech will be unprotected and lead to liability if it is directed to inciting or producing imminent lawless action and if it is furthermore likely to incite or produce such action.<sup>50</sup> Clearly the framers of our Constitution, by their inclusion of restrictions to the freedoms of expression and demonstration, spared our courts from going through a few evolutionary legal stages before arriving at the same conclusions as their American counterparts. As far as libellous and defamatory statements (against alleged environmental perpetrators or the government) are concerned, South African courts have already indicated that the common law principles relating to this area of the law must and will be influenced by the spirit, provisions and values of the Constitution and especially the Bill of Rights. The influence of human rights provisions on the common law will not only bring about a revolution in the political arena where vigorous, free and robust criticism of the exercise

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<sup>48</sup> It is an internationally recognised principle that individuals do not have standing in matters relating to international law. Furthermore, the "act of state" doctrine would locally prohibit courts from interfering in governmental acts performed in the course of its relations with another state or the subjects of another state.

<sup>49</sup> Sections 16 and 17 of the **Constitution**.

<sup>50</sup> Spitz (n 36) 324.



of power is now encouraged,<sup>51</sup> but also in the horizontal relationship between private individuals in defamatory disputes.<sup>52</sup>

In short, the introduction of a rather liberal Bill of Rights in the final Constitution will eventually contribute to the evolution of environmental consciousness as people are educated on their civil, political and social rights. Although the full impact of Section 24 of the Constitution<sup>53</sup> has yet to be determined and interpreted by our courts, the inclusion of such a third generation right may inspire ordinary people to fight for what has constitutionally been guaranteed and to protest the all too often infringements thereon. South African environmentalists may just be testing the water at the moment, but the time may yet come where environmental protesters will take the plunge and go a step beyond what is regarded as legally accepted means of protest.

A question which must come to mind is whether the provisions of Section 24 of the Constitution may in itself provide a defence to radical environmentalists. If all persons have a right "...to an environment that is not harmful to their health or well-being...", can they take such steps as they deem fit in order to protect that right? Or can radicals rely on their right to "...have the environment protected..." as justification for radical actions taken in defence of nature? Surely not. It is preposterous to even suggest that the framers intended citizens to be entitled to enforce constitutionally protected rights through self-styled, law-breaking social action. In a democratic dispensation in which constitutionalism and the rule of law is cherished, dissatisfied citizens are given an opportunity to present and remedy their environmental grievances in a variety of legally accepted manners. None the least of these avenues which are open to environmentalists is that of litigation. Aggrieved radicals may now turn to courts to protect not only their own personal- or group rights, but also those of others.<sup>54</sup> Section 38 of the Constitution also paves the way for public interest litigation and grants generous **locus standi** to natural and juristic persons. It can therefore no longer be argued by environmentalists that they are legally paralysed to take environmental issues to

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<sup>51</sup> **Holomisa v Argus Newspapers Limited** 1996(6) BCLR 836 (W).

<sup>52</sup> See the Constitutional Court decision of **Du Plessis and Others v De Klerk and Another** 1996(3) SA 850 (CC).

<sup>53</sup> **Supra** n 7.

<sup>54</sup> Section 38 of the **Constitution**.

court. Radical environmentalists, with their emphasis on deep-ecology, should furthermore be particularly pleased about the expansion of the environmental rights clause to also include ecocentric ideals and not only anthropocentrically orientated rights.

Although there is still much uncertainty and speculation as to the impact which the Constitution will have on environmental issues in this country and even uncertainty as to the true interpretation of Section 24, it is for certain that the ideals locked up within it can only be released and made real by the dedicated efforts of environmentally-minded people and organisations from across the ideological and tactical spectrum.

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## **Conclusion**

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It may still be long before environmental issues take their rightful place in the local and world-wide political arena. Until such time, environmental reform and preservation are in the hands of ordinary citizens, non-governmental organisations (NGO's) and grass-roots environmental movements. The radical environmental movement is admittedly a marginal social movement appealing only to an ideological minority, but those who do subscribe to radical thinking and tactics are committed to their cause and remain intense idealists who will stop at virtually nothing to achieve their preservationist goals. For the most part, their approach to confronting environmental problems stems from a rejection of, and impatience with institutionalised democratic and legal processes. This distrust of the systems which are available in a democratic society does however not legally justify their unlawful interventions on behalf of the environment, and may even be at the root of the judiciary's rejection of their defence submissions. Although the eco-ideologies underlying radical environmentalist tactics may be very noble and self-sacrificing, the lawbreaking, criminal and often violent actions of radicals do not only cast a legal shadow over the movement, but also contributes to their political marginalisation and a growing unease regarding the ethical justifications at the foundation of their actions.

Despite the considerable legal objections which can be levelled against radical environmental movements, their established existence and role in the wider environmental movement cannot be dismissed or ignored. They form part of a wider culture of environmental awareness which may

ultimately prove to be the answer to the deepening global environmental crisis. As it becomes increasingly clear that environmental degradation is an international problem that has to be addressed by the international community, it is also apparent that neither an expanded global economy, nor traditional international diplomacy have been able to effectively address the crisis. In fact, international law has mostly failed to provide lasting solutions.

Environmental groups have the ability to link the local to the global by permeating jurisdictional and bureaucratic boundaries where states are reluctant to do so. In doing so, non-governmental groups are gradually replacing states as guardians of the global environment with their ability to fit the biogeographic scale of ecological problems. But herein lies another danger: The actors on the environmental stage represent a diversity of groupings which diversity is derived from differences in organisational culture, size of their support base and budgets, legal status, cultural background, range and scope of activities and fundamental differences in ideology and tactics. Radical environmentalism lies at the very extreme end of this ideological and tactical scale, contrasted with the more moderate environmental groupings at the opposing end. The phenomenon of environmentalism can thus not be seen to be a unitary movement providing the ultimate solution to the deepening environmental crisis.

Although the role and successes of environmental groups in the international environmental debate cannot be denied, ideological and tactical polarisation of environmental movements and NGO's might eventually prove to be one of the central threats to the global environment. Just as fragmentation of environmental management leads to fragmented and ineffective environmental decision-making by governments, the polarisation of environmental groups does not contribute to an integrated and consolidated approach to the environmental crisis that faces the global community.

The ideological diversity found amongst environmental groups can thus potentially have a negative effect on the environmental effort as a whole, and could especially affect the attainment of a sustainable global environment. Sustainability implies a holistic and comprehensive approach to environmental management that may be severely impeded by the tension which exists between ideological opposites each pulling in their own tactical direction. Furthermore it has been suggested that extreme and radical environmental positions only serve to provoke fervent opposition against, and bring discredit to the environmental movement as a whole. This statement

has mostly been dismissed by environmental moderates who are of the opinion that the radical actions by radicals invariably enhance the bargaining position of mainstream, moderate environmental groups.<sup>55</sup> Industry considers mainstream environmentalists to be radical until they encounter real radical activism, and so mainstream groups use radicals as a foil, realising that the activities of such groups cause their own agenda's to be perceived as much more acceptable and reasonable.

A further impediment to sustainability is the fact that environmental groups are often characterised by their emphasis on a single issue. The radical environmental movement is especially guilty of limiting their campaigns to the achievement of narrow and short-term conservation goals. Although many environmental groups derive their legitimacy from their successes in the advancement of a specific cause, their fragmented sticking-plaster approach to environmental problems does not address the wider political and social undercurrents which will cause the problems to relentlessly resurface. To make an impact on the causes of environmental problems and contribute to a sustainable ecology, as opposed to only addressing the symptoms, environmental groups need to re-think and re-formulate their relationships with other groups. Very few existing environmental groups have the resources to facilitate grass-roots direct action campaigns concurrently with political lobbying whilst networking out sideways in an attempt to achieve a holistic sustainable solution. Because of the limited number of environmental groups that have the capacity to operate both vertically and horizontally on the intricate and delicately poised environmental grid, it is imperative that ideological and tactical differences be put aside by environmental groups if a global sustainable environment is ever to be achieved. Only when coalitions are formed between groups with differing skills, approaches, areas of expertise and resources, can the conditions necessary for sustainability be achieved.

Diversity in nature is essential, and so also is diversity amongst environmental groups. Each have their own niche to fill. Whilst the judiciary may frown upon the unconventional and law-breaking tactics of radical environmentalists, very few people do not secretly appreciate and admire the daring and sometimes spectacular stunts of extremists who risk all for a cause that transcends narrow self-interest. But if radical environmentalists are to succeed in preserving an ecologically

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<sup>55</sup> Lewis (n 1) 250.

sustainable development and a habitable earth for all, they must come to the realisation that radical environmental tactics only represents the first step in the fight to solve the bigger problem, and that other, less visible work is required to stem the tide of environmental ignorance and destruction.



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