



**ASIA PACIFIC FORUM**  
ADVANCING HUMAN RIGHTS IN OUR REGION

# Human Rights and the Environment

## Final Report and Recommendations

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### **APF 12**

The 12th Annual Meeting of the Asia Pacific Forum  
of National Human Rights Institutions

Sydney, Australia, 24-27 September 2007

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## The Asia Pacific Forum of National Human Rights Institutions

Established in 1996, the Asia Pacific Forum of National Human Rights Institutions (APF) is a regional membership based organisation that supports, through cooperation, the establishment and development of national human rights institutions that protect and promote the human rights of the peoples of the region.

The APF is comprised of independent national human rights institutions (NHRIs). Full members of the APF are those NHRIs that have been established in compliance with the minimum standards of the UNGA endorsed 'Principles relating to the status of National Institutions' ('Paris Principles').

The APF plays a unique role in developing human rights dialogue, networks and practical programmes of support, and, through its member NHRIs, is well positioned to directly influence the development of human rights law and practice in the Asia Pacific.

## The Advisory Council of Jurists

The Advisory Council of Jurists (ACJ) advises the APF on the interpretation and application of international human rights standards. The ACJ is comprised of eminent jurists who have held high judicial office or senior academic or human rights appointments.

The establishment of the ACJ reflects the Forum Council's recognition of the need for access to independent, authoritative advice on international human rights questions and to develop regional jurisprudence relating to the interpretation and application of international human rights standards.

The ACJ has considered six references: education (2006); torture (2005); anti-terrorism legislation and the rule of law (2004); trafficking of women and children (2002); death penalty (2000); and the regulation of child pornography on the internet (2000).

The meeting of the ACJ in 2007 were made possible with the support of the MacArthur Foundation.

Further information about the ACJ is available at: [www.asiapacificforum.net/acj/](http://www.asiapacificforum.net/acj/)

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*As many as 13 million deaths could be prevented every year by making our environments healthier. Women and children make up a disproportionate number of those at risk and the lives of four million children under five years could be saved by addressing environmental risks.*

*In the least developed countries, one third of deaths and disease are a direct result of modifiable environmental factors, that is, environmental factors that are realistically amenable to change using available technologies, policies and preventative and public health measures”.*

*World Health Organisation,  
10 Facts on Preventing Disease through Healthy Environments<sup>1</sup>*

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<sup>1</sup> Ref: [http://www.who.int/features/factfiles/environmental\\_health/en/index.html](http://www.who.int/features/factfiles/environmental_health/en/index.html).

## Membership of the ACJ

Current members of the ACJ are:

- Professor Andrea Durbach (Australia,<sup>2</sup> (President 2007/8\*))
- Dr Qasim Hashimzai (Afghanistan)
- Mr Fali S Nariman (India)
- Professor Jacob E Sahetapy (Indonesia)<sup>3\*</sup>
- Dato' Ranita Mohammed Hussein (Malaysia)\*
- Mr Jugnee Amarsanaa (Mongolia)\*
- Hon Mr Daman Nath Dhungana (Nepal)\*
- Justice Susan Glazebrook (New Zealand)\*
- Mr Sedfrey A Ordoñez (Philippines)
- Professor Nohyun Kwak (Republic of Korea)\*
- Mr Nihal Jayamanne PC (Sri Lanka)\*
- Professor Vitit Muntarbhorn (Thailand)\*

During the reporting period, the Advisory Council welcomed two new members, Dato Ranita Mohammed Hussein (Malaysia) and Mr Nihal Jayamanne PC (Sri Lanka). The ACJ bade farewell to retiring members, Dato' Mahadev Shankar (Malaysia) and Mr Ragendra KW Goonesekere (Sri Lanka). The Advisory Council was also saddened to farewell Mr Segfrey A Ordoñez (Philippines), who had been a valued and long-serving member, and who passed away in 2007.

## Acknowledgements

The Advisory Council of Jurists would like to thank its President, Professor Andrea Durbach, for her skilful chairmanship of the ACJ during the term of this reference.

The Jurists were greatly assisted in their deliberations by presentations from Alice Palmer (Law Institute of Victoria), Professor Matthew England (University of NSW (UNSW) Centre for Climate Change Research), Professor Anthony Zwi (UNSW School of Public Health and Community Medicine) and Matthew Zagor (Australian National University (ANU)). The APF was also assisted greatly by Justice Pain, (NSW Land and Environment Court), Don Anton, (ANU) and Professor Ben Boer (University of Sydney).

The Jurists would like to express their gratitude to Mr Greg Heesom and Ms Christina Trahanas for their assistance during the meeting and in preparing drafts of this report. Valuable assistance was also provided by Mr Kieren Fitzpatrick, Director, Asia Pacific Forum. The Jurists also wish to acknowledge the able and expert assistance provided by the staff of the Australian Human Rights and Equal Opportunity Commission, in particular, Ms Saima Bangash, during their 2007 meeting.

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<sup>2</sup> Chair of the ACJ 2007/8

<sup>3</sup> \* - denotes attendance at the 2007 ACJ Meeting

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# PREFACE

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## The Reference on Human Rights and the Environment

At the 11th Annual Meeting of the APF held in Fiji in August 2006, Forum Councillors decided to formulate an ACJ reference on human rights and the environment.

The Secretariat prepared draft terms of reference that were subsequently adopted by the APF in February 2007. The terms of reference asked the Advisory Council of Jurists to advise and make recommendations on a variety of issues including: the application of existing human rights to address environmental concerns; the obligations of States and non-State actors for environmental harms; and in the absence of an existing right, the value of elaborating a human rights to an environment of a particular quality.

## Terms of reference

1. Whether a right to an environment of a particular quality exists either in international human rights instruments, or in customary international law;
2. Any existing human rights that may be used to address environmental concerns;
3. The nature and scope of the right to life and whether this right may be used to address environmental harms;
  - a. how international human rights instruments have defined the 'right to life';
  - b. the nature and scope of the right to life in customary international law as it relates to the condition of the environment
  - c. the extent to which environmental harms that affect human life violate human rights law;
4. The nature and scope of the responsibility of a State to protect its citizens from environmental damage that may be detrimental to human life, where that damage is caused not only by:
  - a. the State, but also by;
  - b. non-State actors who undertake public or private projects;
5. Whether international legal instruments, or international customary law, impose obligations on non-State actors to protect human rights. The ACJ is asked to consider what mechanisms exist to address such violations.
6. Whether a State has an obligation in international law to control activities within its jurisdiction that might cause environmental harms that undermine the right to life in another State;
7. Whether a State has an obligation in international law to protect its citizens from violations to their right to life that are caused by environmental harms originating either in the territory of another State, or in international air or water space. The ACJ is asked to consider what mechanisms exist to address such violations.
8. In the context of environmental harms to human life, what additional value would there be in having a specific right to environment."

## Country Questionnaire

To assist in consideration of the reference, a questionnaire was distributed to the APF's member NHRIs asking them to outline the laws and practices relating to human rights and the environment in their State. The questionnaire sought information on, amongst other things:

- constitutional provisions
- legislation
- case law
- the interpretation of State obligations
- State, NGO and other action to protect the environment
- NHRI activities
- reports by local, national or international NGOs.

## Structure of the Paper

There are four parts to this paper.

- Part 1 addresses the terms of reference, providing the ACJs response to each question as well as a summary of their reasoning.
- Part 2 contains a list of the ACJ recommendations on activities that NHRIs might undertake in promoting the human rights issues that arise in the context of this reference.
- Part 3 provides a comparative summary of the country information provided by member NHRIs in response to the questionnaire distributed prior to the ACJ meeting.
- Part 4 contains a summary of participatory rights that may be invoked to promote human rights and environmental protection.

A separate annex contains a table of relevant human rights and environmental treaties highlighting membership within the APF region;

## Supporting Documentation

This Final Report should be read in conjunction with the ACJ Reference Paper. The reference paper provides more detailed information on international, regional and domestic human rights and environmental law regimes. A copy of this report and the Reference Paper is available at:

# PART 1 – CONSIDERATION OF THE TERMS OF REFERENCE

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## Right to an environment of a particular quality

### Question

Whether a right to an environment of a particular quality exists either in international human rights instruments, or in customary international law

### Response

The ACJ is of the view that a human right to an environment of a particular quality does not yet exist in international human rights instruments or in customary international law. The developments described below demonstrate that there is clear international concern about the state of the environment and its effect on humankind. However, while there have been attempts to enunciate a principle about environmental harms affecting human rights at the international level, there remains a lack of consensus amongst states and regions about whether, and if so, how such a right should be articulated.<sup>4</sup>

### Background

#### Treaty Law

International human rights instruments – the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) – codify fundamental human rights including some that rely on environmental quality for their full realisation. Examples of the latter include the right to life and the right to health. A number of other human rights instruments include provisions that refer to, or rely on, environmental quality for their full enjoyment. However, existing international human rights instruments do not articulate, nor can they be used to characterise exhaustively, a distinct human right to an environment of a particular quality.<sup>5</sup>

#### Customary Law

There are a number of existing principles of customary international law that relate to the environment. Customary international law places an obligation on states to prevent extraterritorial harm, including environmental harm. First enunciated in the *Trail Smelter Case*,<sup>6</sup> this principle has since been supported by judicial and arbitral decisions, such as the International Court of Justice's ('ICJ') *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* which noted the importance of respect for the environment for human survival. These cases have not however articulated a specific right to an environment of a particular quality.<sup>7</sup>

#### Trends

Significant developments in environmental law have led to the enunciation of a number of rules and principles. These rules and principles, though perhaps not yet universally endorsed, enjoy

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<sup>4</sup> Human Rights and the Environment: Reference Paper. Asia Pacific Forum of National Human Rights Institutions (APF), 2007. pp. 29–30.

<sup>5</sup> Ibid 26.

<sup>6</sup> *Trail Smelter Case*. 3 RIAA 1905. Ref. also: Sands, *Principles of International Environmental Law*, Cambridge 2003. p. 26.

<sup>7</sup> [1996] ICJ Rep 226 @ 241.

broad support in practice and are increasingly included in international instruments and statements. Amongst others, these principles include:

- The polluter pays principle;
- The precautionary principle; and;
- The principle of intergenerational equity.<sup>8</sup>

Further developments include the global move to address the effects of climate change via the United Nations Framework Convention on Climate Change 1992,<sup>9</sup> and its Kyoto Protocol,<sup>10</sup> the latter of which contains specific emissions reduction targets for States parties.

A further example includes the international legal regime developed to control the transport and disposal of chemicals, pesticides and hazardous waste. These regimes are particularly concerned with the impact of hazardous waste on humans and their immediate environment, and have significant international and regional support, having been adopted by almost all Member States of the APF region.<sup>11</sup>

Within the Asia Pacific region, ministerial conferences on the environment, organised by the United Nations ('UN') Economic and Social Commission, have resulted in the Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific 1990 and the subsequent Ministerial Declaration on Environment and Development in Asia and the Pacific 2000. These Declarations highlight the need for individuals and non-government organisations ('NGOs') to be informed of environmental problems relevant to them, to have the necessary access to information, and to participate in the formulation and implementation of discussions likely to affect their environment, but do not seek to elaborate a human right to environmental quality.

Sub-regionally, the ASEAN Charter specifically lists as one of its objectives, the promotion of sustainable development to protect the environment and quality of life. At a practical level, initiatives such as the Pacific Islands Framework for Regional Action on Climate Change variability and Sea Level Rise (2006-2015) seeks to further address the impact of climate change through an integrated, multi-stakeholder approach that links specific sectors such as agriculture; energy; forestry and land use; health; coastal zone management; marine ecosystems; ocean management; tourism and transport.

Constitutional provisions, national laws, policies and practices also deal with the environment, however most are couched in regulatory terms rather than in a rights-based framework.<sup>12</sup> In this context, there have been constructive developments in relation to procedural rights: access to information, public participation in decision-making and access to remedies.

### **An emerging right**

Calls for a human right to an environment of a particular quality have found voice in a variety of United Nations ('UN') declarations, resolutions and statements of principle, (including the preventive principle).<sup>13</sup> These may support the view that a human right to environmental quality

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<sup>8</sup> For a further discussion on rules and principles, see Sands, above note 6, pp. 230 - 291 .

<sup>9</sup> The United Nations Framework Convention on Climate Change 1992 (entered into force on 21 March 1994).

<sup>10</sup> Kyoto Protocol

<sup>11</sup> See, eg, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (entered into force 5 May 1992); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 (entered into force 24 February 2004); Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region 1995 (entered into force 21 October 2001).

<sup>12</sup> Asia Pacific Forum, above n 4, 32–3. For a list of some constitutional provisions see *ibid* 93–9.

<sup>13</sup> *Ibid* 24. For the preventative principle, which imposes the obligation to prevent, reduce, limit or control activities that cause or may cause damage to the environment in violation of accepted international standards, see also Sands, above at note 6, pp 246-251).

is emerging, (see for example the various declarations of principle at the international level, including those which emerged from the 1972 Stockholm Conference on the Human Environment ('Stockholm Conference'), the 1992 Rio Conference on Environment and Development ('Rio Conference') and the 2002 World Conference on Sustainable Development).

Some regional treaties already contain a specific human right to environmental quality. Article 24 of the African Banjul Charter on Human and Peoples' Rights refers to a right of peoples to have a "generally satisfactory environment favourable to their development",<sup>14</sup> whereas Article 11 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights contains an individual right to live in a healthy environment.<sup>15</sup>

Notwithstanding these developments, there appears to be no international or regional consensus. Indeed, the characterisation of the right in existing regional instruments, as variously an individual or collective right, highlights the continuing uncertainty at the international and regional level. Furthermore, there is also a divergence of views, from support for a human right to environmental quality in the 1970s, towards support for sustainable development following the Rio Conference in 1992.

That said, an area where greater agreement exists is in relation to procedural rights: access to information, public participation in decision-making and access to remedies. Developments in this area may evidence support for an emerging procedural right and perhaps the future development of a specific human right to an environment of a particular quality, (see annex 4 for a more detailed commentary on procedural rights and a checklist of essential elements).

## Recommendations

A list of recommendations is contained in Part 2. Recommendations relevant to this term of reference include:

- 1.1. Advocacy of a human right to environment
- 1.2. Content of a human right to environment
- 1.4. Protection of the environmental generally
- 2.1. Review of domestic regulation

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<sup>14</sup> Ibid 26–7.

<sup>15</sup> '[e]veryone shall have the right to live in a healthy environment and have access to basic public services. The States Parties shall promote the protection, preservation and improvement of the environment' Ibid 27. See also ibid 34

## Use of Existing Human Rights<sup>16</sup>

### Question 2:

What existing human rights may be used to address environmental concerns?

### Response

A range of civil, political, economic, social and cultural rights rely on environmental quality for their full realisation. This connection may facilitate the use of human rights to address environmental concerns. These include the rights to: life; health, adequate standard of living (including food, clothing and housing); family life and privacy; property; culture; freedom from discrimination; self-determination; and just and favourable conditions of work.

There has been an innovative application of existing human rights to address environmental concerns, and in some instances courts have given a broad interpretation of these rights to facilitate environmental protection. However, the ACJ is of the view that the use of existing rights does not provide a comprehensive regime for the protection of an environment to the degree necessary to ensure the full realisation of human rights.

### Background

#### General

Various UN treaty bodies, including those under the ICCPR and ICESCR, the Convention on the Elimination of Discrimination Against Women ('CEDAW') and the Convention on the Rights of the Child ('CROC') have, in their general comments and in responses to country reports, stated that environmental factors and environmental degradation impact adversely on the realisation of human rights. Table 1 below lists relevant provisions in the major human rights treaties which may require a degree of environmental quality for their full realisation.

#### Health

The right to health is recognised in ICESCR, CEDAW and CROC. By way of example, ICESCR, article 12 states: '[t]he States Parties ... recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.<sup>17</sup> It also elaborates ways in which states can 'achieve the full realization of this right', including improving all aspects of environmental and industrial hygiene, and preventing, treating and controlling diseases.<sup>18</sup>

At the regional level, the European Charter, the African Charter and the Americas' Protocol of San Salvador all recognise a right to health and the state's concomitant obligation to protect and improve health, including through addressing environmental factors.<sup>19</sup>

Furthermore, general comments and decisions from both UN and regional treaty bodies, and domestic courts have recognised the need for the state to address environmental problems

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<sup>16</sup> (Note: the Right to Life is dealt with in the following section in response to Term of Reference Question 3);

<sup>17</sup> Asia Pacific Forum, above n 4, 37.

<sup>18</sup> Ibid 37–8.

<sup>19</sup> See, eg, European Social Charter art 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights arts 10, 11; African Banjul Charter on Human and Peoples' Rights art 16. Asia Pacific Forum, above n 4, 38.

impacting on health.<sup>20</sup> Within the region, a number of states report introducing health assessments into their environmental impact assessment processes.<sup>21</sup>

### **Adequate Standard of Living**

Article 11(1) of ICESCR recognises ‘the right of everyone to an adequate standard of living’, which includes a right to food, housing and water.<sup>22</sup> Similar recognition is found in other international instruments. CESCR General Comment No. 12 affirms that the right, which is “indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights”, requires the adoption of appropriate environmental and social policies, at both the national and international levels.<sup>23</sup>

### **Cultural (and Indigenous) Rights**

ICCPR, Article 27 protects the right of minority groups, including Indigenous groups, to enjoy their own culture, to profess and practise their own religion, and to use their own language. Environmental contamination or environmentally destructive activities may affect a minority groups’ traditional practices, such as hunting, fishing and land ownership and use, which are a manifestation of their culture. The UN Human Rights Committee has stated that the enjoyment of these rights may require positive legal measures of protection and means to ensure the effective participation of minority communities in decisions (including environmental decisions) which affect them.<sup>24</sup> Conversely, there is a tension between traditional subsistence activities that may threaten the environment, and the broader community aims to protect the environment. Recognising this tension, International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries provides that the subsistence and traditional activities of indigenous peoples shall be recognised as important factors in maintaining culture, economic self reliance and development.<sup>25</sup>

The jurisprudence of the UN Human Rights Committee and Inter-American Commission of Human Rights provide strong support for the proposition that environmental harm may violate Indigenous rights to culture.<sup>26</sup> More recently, The UN Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007, contains specific protections against environmental harms that would threaten the traditional way of life of Indigenous people.

### **The Right to Privacy**

Article 27 of ICCPR protects people from ‘arbitrary or unlawful interference with [their] privacy, family, home or correspondence’. Similar protections are found in regional instruments. In Europe, the relevant right in the ECHR has been used extensively to address environmental concerns impacting on privacy occasioned by air and noise pollution and contamination by hazardous substances.<sup>27</sup>

### **The Right to Work**

Article 7 of ICESCR requires States Parties recognise ‘the right of everyone to just and favourable conditions of work’, including ‘safe and healthy working conditions’. Working

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<sup>20</sup> See for example: *Minors Oposa v. Secretary, Department of Environment and Natural Resources (DENR)*, 307/93, 33ILM 173 (1994).

<sup>21</sup> See for example Thailand. Asia Pacific Forum, above n4, 172.

<sup>22</sup> Committee on Economic, Social and Cultural Rights, General Comment No 15: The Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11 (2003).

<sup>23</sup> CESCR General Comment No. 12, Para 4. E/C.12/1999/5, 12 May 1999

<sup>24</sup> UN Human Rights Committee, General Comment 23. CCPR/C/21/Rev.1/Add.5.

Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument>

<sup>25</sup> Article 23, Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organisation. Adopted on 27 June 1989. Available at <http://www.unhchr.ch/html/menu3/b/62.htm>. Issues relating to traditional land ownership have been recognised by the UN in its report on Sustainable Development and Small Island Developing States, and in the Beijing Statement on Combating Desertification and Promoting Sustainable Development.

<sup>26</sup> UNHRC General Comment No. 23. The Rights of Minorities. CCPR/c/21/Rev1/Add.5 @ para 7. See also Asia Pacific Forum, above n 4. pp. 42–4, 45–6.

<sup>27</sup> *Arrondelle v United Kingdom* (1982) 26 DR 5; *Powell and Rayner v United Kingdom* (1990) 172 Eur Court HR (ser A); *Baggs v United Kingdom* (1987) 52 DR 29; *Hatton v United Kingdom* (2002) 34 EHRR 1.

conditions may be affected adversely by environmental factors such as exposure to hazardous or toxic substances or working conditions.<sup>28</sup>

### The Right to Property

Though article 17 the UDHR provides that everyone has a right to own property and that no one shall be deprived of their property without compensation, ICESCR and ICCPR do not provide an individual or private right to property.<sup>29</sup> Nevertheless, regional instruments do provide rights to ownership or enjoyment of property. The Inter-American Court for Human Rights has stated that the granting of logging concessions on traditional Indigenous lands (which led to environmental degradation and pollution) violated the right to property in the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>30</sup>

### Displaced Peoples

Significant concerns arise in relation to the protection of people displaced due to environmental factors; in particular people who are:

- part of large scale internal displacement or forced across national boundaries and unable to return, or
- rendered stateless as a result of rising sea levels.

For those *internally* displaced as a result of environmental factors, existing protection under applicable human rights instruments still apply and may be utilised to address environmental concerns. This approach has been reinforced in more recent developments, including the UN Office for the Coordination of Humanitarian Affairs' ('OCHA') Guiding Principles on Internal Displacement 1998.

For those *externally* displaced, the UN Human Rights Committee ('UNHRC') in General Comment 31 indicates that State Parties to the ICCPR are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm either in the country to which removal is contemplated or in any country to which the person may be subsequently removed.<sup>31</sup>

In the same General Comment, the UNHRC states that the enjoyment of ICCPR rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction, power or effective control of the State Party.<sup>32</sup>

### Procedural Rights

Procedural rights are fundamental to the ability of people to protect themselves from environmental harms. The three component rights that assist affected persons in this regard are:

- the right to access to information;
- the right to participate in decision-making; and
- the right to access to justice or remedies.

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<sup>28</sup> Committee on Economic and Social Rights, Committee on Economic and Social Rights Takes up Report of Cyprus, UN Doc HR/ESC/98/28 (1998) <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/269317572467906E802566C1003DF573?opendocument>> at 30 August 2007; Philippe Sands, Principles of International Environmental Law (2nd ed, 2003) 638. For a list of all ILO Conventions relating to workplace safety see <<http://www.ilo.org/ilolex/english/subjlst.htm>> at 11 September 2007.

<sup>29</sup> Asia Pacific Forum, above n 41.

<sup>30</sup> Ibid 42.

<sup>31</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [12].

<sup>32</sup> Ibid [10].

Recognition of these rights is found in articles 19, 25 and 14 of the ICCPR respectively, with similar recognition in regional instruments including the American Convention on Human Rights.

The importance of access to information in environmental matters was first clearly elaborated in the Rio declaration, principle 10 of which states that “environmental issues are best handled with participation of all concerned citizens” and principle 20 and 22 which specifically refer to the need to ensure the participation of indigenous peoples and women.<sup>33</sup> Effective procedural rights also provide a degree of accountability and transparency that may help to address institutional corruption, (discussed below at page 22).

In 1998, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters entered into force. It is recognised as the most significant articulation of procedural rights in the environmental context, and, though a regional treaty developed under the auspices of the UN Economic Commission for Europe, it is open for signature by any country.

Further commentary on procedural rights and their essential elements can be found in Annex 4

### **Other areas of international law**

Provisions exist in other areas of international law that may assist in addressing environmental concerns. International humanitarian law provides one such example. Article 35.3 of Protocol 1 Additional to the Geneva Conventions of 1949 prohibits the employment of methods of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment. Furthermore, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which has as its objective, the prevention of environmental modification techniques as a weapon of war.

## **Recommendations**

A list of recommendations is contained in Part 2. Recommendations relevant to this term of reference include:

- 1.3. Application of existing rights
- 2.1. Review of Domestic Regulation
- 2.4. Procedural rights
- 3.1. Domestic Implementation
- 4.2. Public Awareness

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<sup>33</sup> See Rio Declaration on Environment and Development. A/CONF.151/26 (Vol. I). 12 August 1992. Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. See also ILO 169, above note 25, Art 15.

**Table 1: Human rights provisions dependent on environmental quality for their realisation and enjoyment**

		Afghanistan	Australia	India	Indonesia	Jordan	Malaysia	Maldives	Mongolia	Nepal	New Zealand	The Philippines	Qatar	Republic of Korea	Sri Lanka	Thailand	Timor L'Este	Palestine
<b>Convention</b>	<b>Provisions</b>	<b>States Parties</b>																
International Covenant on Civil and Political Rights	Art. 1, Art. 2, Art. 3, Art. 6, Art. 17, Art. 19, Art. 21, Art. 22, Art. 25, Art. 27.	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
International Covenant on Economic, Social and Cultural Rights	Art. 1, Art. 3, Art. 6(b), Art. , Art. 10, Art. 11, Art. 12, Art. 15	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
Convention on the Elimination of All Forms of Racial Discrimination	Art. 2, Art. 5(b), Art. 5(d).	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Convention on the Elimination of All Forms of Discrimination against Women	Art. 2, Art. 3, Art. 7, Art. 12, Art. 14.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
Convention on the Rights of the Child	Art. 2, Art. 3, Art. 6, Art. 16, Art. 22, Art. 24, Art. 27, Art. 29(e), Art. 30, Art. 32, Art. 34 – 36), Art. 38.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Convention on the Rights of Persons with Disabilities	Art. 10, Art. 11, Art. 17, Art. 21, Art. 25, Art. 27, Art. 28, Art. 29, Art. , Art. , Art. ,	x	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	x	-

## Right to Life

### Question 3

What is the nature and scope of the right to life and can this right be used to address environmental harms, particularly:

- how have international human rights instruments defined the 'right to life';
- what is the nature and scope of the right to life in customary international law as it relates to the condition of the environment;
- the extent to which environmental harms that affect human life violate the right to life

### Response

The right to life is a fundamental part of customary international law, and is included in the primary international human rights instruments. For example, art 6(1) of ICCPR states '[e]very human being has the inherent right to life', which 'shall be protected by law', and '[n]one shall be arbitrarily deprived of his life'.<sup>34</sup> The right to life is a peremptory norm, which means that there can be no derogation, even in times of emergency.<sup>35</sup> The right to life is also included in a significant number of regional instruments and national constitutions.

Traditionally, the right to life has been interpreted as the right to be free from the immediate and arbitrary deprivation of life. That is, the right protects individuals from acts like forced disappearances, extrajudicial executions and other similar threats.<sup>36</sup> Environmental harms differ from these types of violations because they do not involve the use of lethal force by the state; instead, they often arise from legal activities by state and non-state actors, and are not specifically targeted at individuals.<sup>37</sup>

While the right to life has more recently been interpreted in some jurisdictions to encompass longer term and latent harms leading to the eventual deprivation of life and/or very serious injury, given its provenance and relatively restrictive interpretation to date, the ACJ is of the view that reliance on the right to life is insufficient to address environmental harms in all relevant circumstances.

## Background

### The Right to Life in Human Rights Treaties

The right to life is protected in a variety of international and regional instruments including the UDHR (Art. 3), the ICCPR, (Art. 6), and CROC, (Art. 6), and in various regional instruments including the European Convention on Human Rights (Art. 2), the American Declaration of the Rights and Duties of Man (Art. 1); the American Convention on Human Rights (Art. 4); and the African (Banjul) Charter on Human and Peoples' Rights (Art. 4).

### Positive Obligations to Protect the Right to Life

Article 2 of the ICCPR obliges the State to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant".<sup>38</sup> The obligation to 'respect' rights is interpreted as requiring States not to violate human rights

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<sup>34</sup> Asia Pacific Forum, above n 4, 56.

<sup>35</sup> ICCPR, Art. 4(2).

<sup>36</sup> Asia Pacific Forum, above n 4, 56–7.

<sup>37</sup> Ibid 58.

<sup>38</sup> ICCPR, Art. 2(1).

themselves. The obligation to 'ensure' rights is interpreted as requiring States to prevent other actors from violating human rights.

In General Comment 6, discussing the positive obligations imposed on States to protect the right to life, the UN Human Rights Committee refers to, amongst other things, the obligations to prevent, investigate and provide remedies for breaches. With regard to the former obligation, this might include the introduction of legislation, regulatory regimes or policies to address particular threats.

### Interpretation of the Right to Life

The right to life has historically been viewed in the context of the use of lethal force by States against its citizens. However, the UN Human Rights Committee has specifically warned against a narrow interpretation of the right to life,<sup>39</sup> and states that the obligation on States is not simply to refrain from taking life, but also to take positive measures to protect life.<sup>40</sup> The threat posed by nuclear weapons is a case in point. The UN Human Rights Committee has noted that nuclear weapons do not only threaten the right to life because they may be used during hostilities; they threaten the right to life by potentially contaminating the environment with radiation. If such an interpretation is correct, pollutants contaminating the environment with a comparable effect may also be seen as a threat to the right to life.<sup>41</sup> In each case however, the severity and extent of harm will determine whether the right to life has been violated.<sup>42</sup>

Regional systems have also considered a broader interpretation, with the AICtHR interpreting the right to life as beyond a right to physical survival, to include a right to a dignified existence.<sup>43</sup> The ECHR has also addressed a number of non-traditional threats to the right to life, such as nuclear testing and the regulation of essential services, and has held that a State has an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction<sup>44</sup> and against any dangerous activity, public or private.<sup>45</sup> This has been considered to include regulation, such as in connection with the treatment of patients in both public and private hospitals.<sup>46</sup> It has also been extended to an obligation to provide information about possible threats to life.<sup>47</sup>

In the Asia Pacific region, courts, tribunals and other decision makers are testing more innovative interpretations encompassing quality of life issues. The Indian Courts have perhaps been most successful. The constitutionally protected right to life has been interpreted by the courts as implicitly including the right to a clean environment. In *Charan Lal Sahu v Union of India*, the Supreme Court interpreted the provision to include the right to a wholesome environment.<sup>48</sup> In *Subhash Kumar v State of Bihar*, the Supreme Court extended this approach,

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<sup>39</sup> See: UN Human Rights Committee, General Comment No. 6: The Right to Life, U.N. Doc. HR/GEN/1/Rev1 at 6 (1994) at paras 1 and 5.

<sup>40</sup> Ibid, at para 5.

<sup>41</sup> Asia Pacific Forum, above n 4, 58, 62–3.

<sup>42</sup> See generally ibid 57–8, 62–3, 66.

<sup>43</sup> Ibid. See also *Indigenous Community of Yakye Axa v Paraguay*, 6 February 2006, Interpretation of the Judgement on the Merits, at para 160 - 167. However, note that in a statement likely to be echoed in European jurisdictions, the Belgian Courts have specifically rejected such an approach to the right to life in the European Convention: "le droit à la vie au sens de l'article 2 de la Convention de sauvegarde des droits de l'homme n'est que le droit à la vie physique au sens usuel du terme et non le droit à une vie que l'individu concerné peut subjectivement qualifier de 'décente'". "the right to life in Article 2 of the Convention on the Rights of Man is the right to physical life, in the usual sense of the term, not the right to a quality of life that the individual in question would consider decent" (informal translation). (Belgian Court of Cassation, Judgment of 5 February 1985, Cassl, Pasicrisie Belge, Dr. I at 670, 680

<sup>44</sup> See: *L.C.B. v The United Kingdom*, 23413/94, [1998] ECHR 49 (9 June 1998), and *Calvelli and Ciglio v Italy*, 32967/96, [2002] ECHR 3 (17 January 2002). This case involved the child of a serviceman who had been present at nuclear tests. The child developed leukaemia, which she attributed to her father's possible exposure to radiation. The Court ultimately found that there was no violation of her right to life because the evidence available to the State did not suggest that the father had been exposed to dangerous levels of radiation. The Court did find that the State is obliged to take appropriate steps to safeguard the lives of those within its jurisdiction, and suggested, without deciding, that it could be argued that had the State believed that she was at risk of a life threatening illness due to her father's radiation exposure, the authorities would have been obliged to provide this information to her parents whether or not they believed that it would assist the applicant (at para 40). See also *Calvelli and Ciglio v Italy*, at para 49.

<sup>45</sup> *Oneryildiz v Turkey*, 48939/99, [2004] ECHR 657 (30 November 2004).

<sup>46</sup> *Calvelli and Ciglio v Italy*, op. cit., Note 159.

<sup>47</sup> *L.C.B. v The United Kingdom*, op. cit., Note 159.

<sup>48</sup> *Charan Lal Sahu v Union of India* (1990) AIR SC 1480 in Razzaque, above n 346.

holding that realisation of the right to life encompassed the enjoyment of pollution-free water and air for full enjoyment of life. In addition to confirming the link between a healthy environment and the realisation of the right to life, the case is also important in that it recognises a positive obligation on the State to address environmental harms, including through the effective implementation of extant laws and policies.<sup>49</sup>

Other courts have also pursued this approach. The Malaysian Court of Appeal has interpreted the right to life broadly as extending beyond mere existence to the quality of life, and '[including] the right to live in a reasonably healthy and pollution free environment'.<sup>50</sup> However, in a more recent case, the Malaysian Court of Appeal reinterpreted the right to life in a more restricted manner.<sup>51</sup> These types of approaches are relatively novel and unique to a small number of jurisdictions.<sup>52</sup>

### **Consideration of the Right to Life and the Environment**

ICJ Judge Weeramantry has drawn a strong connection between the enjoyment of the right to life and the quality of the environment, stating that the protection of the environment is "a sine qua non for numerous human rights such as the right to health and the right to life itself".<sup>53</sup>

However, actual determinations on the relationship between the right to life and the environment have been limited. With regard to the UN Human Rights Committee, communications have frequently been declared inadmissible for technical reasons, such as a failure to exhaust domestic remedies. Notwithstanding this, the Committee has affirmed a connection between the condition of the environment and the right to life in a number of cases.<sup>54</sup>

At the regional level, the European system has been reluctant to consider cases on the basis of the right to life. It has however held that severe environmental pollution may affect an individuals' well-being and prevent them from enjoying their homes in such a way as to affect their 'private and family life'. This however highlights a unique focus by the European system on the right to respect for privacy, family life and the home.

In the Inter-American system, the right to life has been interpreted broadly, the AICtHR having stated that the fundamental right to life includes not only the right of every human being not to be deprived of life arbitrarily, but also the right that s/he will not be prevented from accessing conditions of life that guarantee a dignified existence. This interpretation is peculiar to the Inter-American system and may result in broader protections against environmental harms than those provided in other systems.

### **Criteria relevant to assessing a potential breach of the right to life.**

Cases before the UN Human Rights Committee suggest a number of criteria applicable in the consideration of complaints alleging a breach of the right to life. These include that:

- the risk to life must be actual or imminent;
- the applicant must be personally affected by the harm;
- environmental contamination with proven long-term health effects may be a sufficient threat, however, in this context, there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment;
- a hypothetical risk is insufficient to constitute a violation of the right to life; and

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<sup>49</sup> *Subhash Kumar v State of Bihar* (1991) AIR SC 420; (1991) (1) SCC 598 in Razzaque, above n 346.

<sup>50</sup> Asia Pacific Forum, n 4. 123.

<sup>51</sup> Ibid 124–5.

<sup>52</sup> Ibid 58–9, 65–6.

<sup>53</sup> C G Weeramantry J, (separate opinion) *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97 at 110; 37 ILM 162 at 206 (1998).

<sup>54</sup> Communication No. 35/1978, U.N. Doc. CCPR/C/12/D/35/1978. *E.W. et al. v the Netherlands*, Communication No. 429/1990, U.N. Document CCPR/C/47/D/429/1990, *Aalbersberg et al. v the Netherlands*, Communication No. 1440/2005, U.N. Document CCPR/C/87/D/1440/2005. *Bordes and Temeharo v France*, Communication No. 645/1995, U.N. Document CCPR/C/47/D/645/1995 at para 5.5. *E.H.P. v Canada*, Communication No. 67/1980, U.N. Document CCPR/C/17/D/67/1980 at para 8.

- cases challenging public policy will, in the absence of an actual or imminent threat, be considered inadmissible.

## Recommendations

A list of recommendations is contained in Part 2. Recommendations relevant to this term of reference include:

- 1.3. Application of existing rights
- 2.1. Review of domestic regulation
- 2.4. Participatory rights
- 3.1. Domestic implementation
- 4.2. Public awareness

## State Responsibility

### Question 4:

What is the nature and scope of the responsibility of a State to protect its citizens from environmental damage that may be detrimental to human life, where that damage is caused by:

- the State, but also by;
- non-State actors who undertake public or private projects<sup>55</sup>

### Response:

A state is responsible for every act or omission which constitutes a breach of any international obligation of that state, including human rights violations.<sup>56</sup> A state is also responsible for the actions of organs of the state, as well as for non-state actors exercising governmental authority or where the state uses its control of an entity to achieve a particular result.<sup>57</sup>

States are not otherwise responsible for the actions of non-state actors, however, they may be liable for their failure to ensure appropriate control or regulation where the action of a non-state actor in its private capacity violates human rights.

## Background

### General Obligations

Since the right to life is part of customary international law (indeed, the right to life is jus cogens or a peremptory norm), even states that are not parties to the ICCPR and ICESCR are bound to respect and ensure the enjoyment of this right.

More generally, three levels of obligations are imposed on states with regard to human rights, namely obligations to respect, protect and fulfil all human rights. The obligation to respect

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<sup>55</sup> The question refers to environmental damage that is detrimental to human life. The ACJ has therefore assumed that the environmental damage must be of such significance as to have breached the right to life, as guaranteed by art 6(1) of ICCPR, and/or other rights such as the right to health guaranteed by arts 11(1) and 12(1) of ICESCR.

<sup>56</sup> See the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 in Asia Pacific Forum, above n 4, 63.

<sup>57</sup> See the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001*.

requires states to refrain from interfering directly or indirectly with the enjoyment of human rights. The obligation 'to protect' requires states to take measures that prevent third parties from interfering with human rights. The obligation 'to fulfil' contains obligations to facilitate, provide and promote human rights.<sup>58</sup>

To the extent that environmental harms breach rights guaranteed under ICCPR, art 2(1) of that Covenant places an obligation on States Parties to respect rights guaranteed by the Covenant and to guarantee them to all individuals in their territory and subject to their jurisdiction. Article 2(3) of ICCPR requires states to ensure an effective remedy for persons whose rights have been violated.

Such rights may be secured by legislative, judicial, administrative and other appropriate measures, and States must take positive measures to secure rights, including protecting individuals against violations by non-state actors.<sup>59</sup>

To the extent that environmental harm represents a violation of rights guaranteed under ICESCR, art 2(1) of that Covenant requires states to take steps to realise progressively, and to the maximum of their available resources, the full realisation of those rights, including through the adoption of legislative measures.

UNHRC General Comment 3 on ICESCR provides that states must take appropriate administrative, financial, educational and social measures to secure the progressive realisation of the rights guaranteed under the Covenant. Remedies may include judicial remedies.

Damage to the environment by natural forces may also impact adversely on the realisation of rights contained in both the ICCPR and ICESCR. In keeping with this link states also have a responsibility to mitigate the effects of natural disasters. In this regard the Hyogo Declaration and Framework for Action 2005 - 2015 highlight the connection between sustainable development and disaster risk reduction, which is particularly relevant to the small island states in the Asia Pacific region.<sup>60</sup>

### **When Are Human Rights Violations Attributable to a State?**

States are responsible for every act or omission which constitutes a breach of any international obligation of the state, including human rights violations. In this regard, states are responsible for the actions of organs of the state.<sup>61</sup> Whether an actor is an organ of the state depends on the internal laws of that state; however, these internal laws cannot operate to shield the state from responsibility for actors that are de facto public functionaries.<sup>62</sup> In addition, it is a well established principle of international law that the activities of public officials or entities are still attributable to the state even though their activities may be outside their legitimate capacity, provided that the public officials or entities acted as authorised officials or entities.<sup>63</sup>

States are also responsible for non-state actors (including state-owned or state-controlled companies) undertaking public functions, or where the state exercises effective control over

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<sup>58</sup> See UNHRC General Comment 14 on *ICESCR* on the right to health.

<sup>59</sup> See UNHRC General Comment 31 on *ICCPR*.

<sup>60</sup> Refer Hyogo Framework for Action 2005 - 2015 <<http://www.unisdr.org/wcdr/intergover/official-doc/L-docs/Hyogo-framework-for-action-english.pdf>> (last accessed 3 June 2008) at [4]. See also United Nations "Report of the World Conference on Disaster Reduction" (16 March 2005) A/CONF.206/6 at 16(i) (Disaster Reduction Conference Report) at 8. Priorities for action for 2005-2015 include the need to bolster international co-operation in environmental actions as this will help to stimulate capacity building and the sharing of knowledge on disaster risk reduction. In particular, for disaster prone countries such as SIDS (Small Island Developing States), a unified, multi-hazard approach to disaster risk mitigation should be included in policies and plans relating to sustainable development and disaster relief. A gender perspective as well as plans and policies which consider cultural diversity, age and the vulnerability of certain groups and how these factors may impact on plans and policies surrounding disaster risk reduction should be developed. Most importantly for the Pacific, SIDS were identified as requiring particular attention due to the vulnerability of island states which is disproportionate to their ability to respond and rebuild after disasters. The issue of debt sustainability is also crucial for disaster risk management and the Priorities for Action approve of the enhanced Heavily Indebted Poor Countries Initiative which enables a wider group of countries to qualify for increased debt relief.<sup>60</sup>

<sup>61</sup> *Ibid* 64.

<sup>62</sup> *Ibid* 65.

<sup>63</sup> *Ibid* 65-6.

those actors. The UN Human Rights Committee has held the state responsible for the activities of private actors where private actors implement state legislation, such as the running of prisons.<sup>64</sup> The ECHR has held the state responsible for the activities of private actors where their activities relate to human rights obligations of the state, such as education and legal aid.<sup>65</sup>

States are not responsible for the acts of non-state actors undertaken in the non-state actor's private capacities;<sup>66</sup> however, the State may be liable for its failure to take appropriate measures or exercise due diligence to prevent, punish, investigate or redress the harm caused by the acts of private persons or entities where those acts violate human rights.<sup>67</sup> The obligations on the state to protect, respect and fulfil human rights, as discussed above, are essential in determining when a state will be responsible for failing to prevent or address violations of human rights by non-state actors.<sup>68</sup>

### **Applicable Environmental Principles**

State responsibility should be interpreted consistently with key principles of international environmental law. These key principles include:

- Preventive Action: the obligation to prevent, reduce, limit or control activities that cause or may cause damage to the environment in violation of accepted international standards;
- Precautionary: where there is potential for environmental harm, scientific uncertainty does not excuse inaction; those engaging in activity should mitigate the likelihood of environmental harm, unless they can prove the absence of harm;<sup>69</sup>
- Polluter-pays: the polluter is responsible for the harms they cause and for its rectification; and
- Common but differentiated responsibility: in the pursuit of sustainable development, all states should act to prevent damage to the environment, bearing in mind that developed countries should take a lead role due to the pressures their societies have and continue to place on the global environment and of the technologies and financial resources they command

### **The failure of state regulation**

While many factors influence the capacity of the State to effectively regulate the unsustainable exploitation of the environment, corruption figures prominently. No State is immune from corruption. Corrupt practices impact adversely on individual citizens, the broader community and the environment, with reports and cases documenting the negative impact on the realisation of human rights. Examples that have come before regional and domestic fora include: the inappropriate granting of concessions to exploit public or private land, particularly land occupied by indigenous peoples, the illegal dumping of toxic waste, and the approval of property developments in the absence of, or in contradiction to relevant environmental impact assessments.

The state has a duty to protect and promote human rights and NHRIs should consider the role they might play in advocating for regulation against corrupt practices that impact on the realisation of human rights. In particular, NHRIs could encourage the use of and implement procedural rights, which may be used to keep the public and private sector accountable for their actions. See Part 4 for a description of the key elements of relevant participatory rights.

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<sup>64</sup> Asia Pacific Forum, above n 4. 66.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 69.

<sup>67</sup> Ibid 55, 69.

<sup>68</sup> Ibid 69-70.

<sup>69</sup> There is significant support for the application of the precautionary principle where the potential environmental harm is serious and irreversible, (see Rio Declaration, Principle 15). However, there is a divergence in support for a broader application of the principle, with opponents citing a lack of clarity and the potential for over-regulation. For a further discussion on this principle, refer to Sands, above at note 6, pp 266-279.

In recognition of the problems posed by corruption generally, the international community adopted the *United Nations Convention against Corruption*,<sup>70</sup> which aims:

- '[t]o promote and strengthen measures to prevent and combat corruption more efficiently and effectively';<sup>71</sup>
- '[t]o promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption';<sup>72</sup> and
- '[t]o promote integrity, accountability and proper management of public affairs and public property'.<sup>73</sup>

Some of the measures that States Parties to the Convention should implement include:

- developing and maintaining anti-corruption policies and practices 'that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability';<sup>74</sup>
- developing and promoting accounting, auditing, behavioural and reporting standards in the private sector: for example, through codes of conduct or through laws requiring disclosure of company finances;<sup>75</sup>
- promoting the participation of individuals and groups outside the public sector 'in the prevention of and fight against corruption';<sup>76</sup> for example, by '[u]ndertaking public information activities that contribute to non-tolerance of corruption, ... [and] public education programmes, including school and university curricula';<sup>77</sup>
- establishing anti-bribery laws for the public and private sectors;<sup>78</sup> and
- encouraging international cooperation to combat corruption.<sup>79</sup>

## Remedies

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by UN General Assembly Resolution 60/147 on 16 December 2005, state that principles underlying the remedies for violations of human rights law include:

- the victim's right to equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered; and
- access to relevant information concerning violations and reparations mechanisms.

The Guidelines indicate that a variety of remedies should be available to victims of human rights violations, including restitution, compensation, rehabilitation; and, satisfaction and guarantees of non-repetition. Any remedies should be provided in a non-discriminatory manner.<sup>80</sup>

## Recommendations

A list of recommendations is contained in Part 2. Amongst others, recommendations relevant to this term of reference include:

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<sup>70</sup> Entered into force 14 December 2005.

<sup>71</sup> *United Nations Convention Against Corruption* (entered into force 14 December 2005) art 1(a).

<sup>72</sup> *Ibid*, art 1(b).

<sup>73</sup> *Ibid*, art 1(c).

<sup>74</sup> *Ibid*, art 5.

<sup>75</sup> *Ibid*, art 12.

<sup>76</sup> *Ibid*, art 13.

<sup>77</sup> *Ibid*, art 13(1)(c).

<sup>78</sup> *Ibid*, art 15, 21.

<sup>79</sup> *United Nations Convention Against Corruption* (entered into force 14 December 2005) ch IV.

<sup>80</sup> See arts 2(1) and 26 of *ICCPR*, art 2(2) of *ICESCR*, art 2 of *CERD*, art 2 of *CEDAW*, and art 2 of *CROC*.

- 1.3. Application of existing rights
- 2.1. Review of Domestic Regulation
- 2.2. Development of Domestic Regulatory Regimes
- 2.3. Court and Tribunals
- 2.4. Participatory rights
- 3.1. Domestic Implementation
- 3.2. Issues affecting Implementation
- 3.3. Environmental Impact Assessment
- 3.3. Mobilising all Stakeholders
- 5. Displaced persons
- 6.1. Millennium Development Goals

## Obligations of Non-State Actors

### Question 5:

Do international legal instruments, or international customary law, impose obligations on non-State actors to protect human rights – the ACJ is asked to consider what mechanisms exist to address such violations

### Response

Non-state actors are under an obligation 'to respect' (rather than protect) international human rights law and international humanitarian law.<sup>81</sup> Non-state actors rarely have any direct responsibility under international law because these obligations are generally imposed directly on states.

Despite the longstanding recognition of the role that corporations can and do play in the realisation of human rights, international law does not yet directly impose obligations on corporations for the protection of human rights. This situation poses a number of difficulties for the effective promotion and protection of human rights where they may be undermined by the actions of corporations, and where the State has failed to fulfil its responsibility to effectively regulate, and provide remedies in relation to violations by, non-state actors.

More recently, the international community has sought to encourage respect for human rights by non-State actors through the development of voluntary guidelines and industry codes.

### Background

There have been some international statements and declarations attempting to impose liability for human rights violations on private actors. For example, art 18 of the UN General Assembly Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms states that individuals, groups, institutions and NGOs have a responsibility to promote the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realised. Whilst this Declaration does not specifically articulate a binding obligation on corporations to respect or protect human rights, it does call on them to respect those rights.<sup>82</sup>

In some cases, the UN Security Council has taken measures against non-state actors in regard to human rights violations, including through the imposition of criminal sanctions. Individual

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<sup>81</sup> Ref. preambular paragraph 8 to the Universal Declaration of Human Rights. Asia Pacific Forum, above n 4, 74.

<sup>82</sup> Ibid.

responsibility for criminal acts is also a key feature of international humanitarian law, which was clearly established in the Nuremberg and Tokyo war crimes trials. The concept of individual responsibility has since been clarified and expanded through the development of statutes for, and decisions arising from, international criminal tribunals and courts. To date, that responsibility has covered individuals rather than corporate entities.<sup>83</sup>

### **Environmental Treaties imposing Liability**

Many environmental treaties include provisions imposing liability for environmental harms on private actors.<sup>84</sup> These treaties set standards for private actors, but do not directly impose obligations on them. Rather, they empower States to take action against those liable for private harms.

Other treaties require States to legislate to provide protection. For instance, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal requires all States Parties to introduce legislation to prevent and punish the improper movement and disposal of hazardous wastes.

### **Other Initiatives Promoting Corporate Accountability**

Other initiatives that have sought to influence non-state actors to respect human rights include:

- the UN Global Compact;<sup>85</sup>
- the UN Principles for Responsible Investment:(‘UNPRI’) 2006;<sup>86</sup>
- the Global Reporting Initiative;<sup>87</sup>
- ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy;<sup>88</sup>
- the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights;<sup>89</sup> and
- the OECD Guidelines for Multi National Enterprises (MNEs).<sup>90</sup>

Various mechanisms associated with international financial institutions, including the World Bank and Asian Development Bank, and with international trade institutions including the WTO

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<sup>83</sup> Ibid 74-5.

<sup>84</sup> The following provision from the International Convention on Civil Liability for Oil Pollution Damage is typical: “The owner of a ship at the time of an accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident. See also: the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1969 International Convention on Civil Liability for Oil Pollution Damage (and its 1984 Protocol), the 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, and the 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

<sup>85</sup> Corporations voluntarily declare their commitment to 10 universally accepted principles, which include support for and respect of human rights, and improvements in environmental responsibility. Ref: <http://www.unglobalcompact.org/>

<sup>86</sup> The Principles provide a menu of possible actions for incorporating environmental, social and corporate governance issues into mainstream investment decision-making and ownership practices

<sup>87</sup> The Global Reporting Initiative (GRI) developed a sustainability reporting framework that sets out the principles and indicators that organizations can use to measure and report their economic, environmental, and social performance Ref <http://www.globalreporting.org/>

<sup>88</sup> Calls on MNEs to respect the sovereign rights of States and to respect the Universal Declaration of Human Rights and corresponding International Covenants Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labour Office, Geneva, 4th ed., 2006.

<sup>89</sup> Developed by the UN Sub-Commission on the Protection and Promotion of Human Rights, the Norms provide an authoritative and comprehensive interpretation of a corporation’s responsibilities under international human rights law, and incorporate many of the best aspects of existing voluntary initiatives. UN Economic and Social Council. E/CN.4/Sub.2/2003/12/Rev.2. 26 August 2003

<sup>90</sup> The Guidelines, adopted by Governments and directed to MNEs, are intended to promote respect for the human rights of those affected by the activities of MNEs and to ensure that their activities are undertaken in a manner consistent with the host government’s international obligations and commitments”. OECD Guidelines, Part II(2). [www.oecd.org/daf/investment/guidelines](http://www.oecd.org/daf/investment/guidelines)

and GATT Agreements, can and do impact on the activities of non-state actors, by, for example, conditioning lending on appropriate environmental behaviour by non-state actors.

### **National Laws**

At the national level, many states have extensive legislative and regulatory regimes addressing the environment and pollution. Amongst other things, these include regulatory regimes limiting emissions and imposing conditions on the handling and disposal of hazardous waste. In many instances, if a company breaches these limits they may be held liable, fined and their directors may be imprisoned. Broader industrial regulation, including occupational health and safety rules, may also address environmental hazards.

Individuals may also use private law actions, such as the tort of nuisance, to seek redress from state and non-state actors who have caused environmental harm, where this harm fits into the strictures of the various causes of action.

Some States have also implemented relevant laws with extra-territorial effect. For example, the United States' ('US') Alien Torts Claim Act provides that federal courts shall have cognizance of "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States".<sup>91</sup> The US Supreme Court has interpreted provisions quite narrowly; however, a number of environmental cases have been brought before the US courts on the basis of environmental harms committed by US companies, operating outside the US territory.<sup>92</sup>

### **Recommendations**

A list of recommendations is contained in Part 2. Amongst others, recommendations relevant to this term of reference include:

- 1.3. Application of existing rights
- 2.2. Development of Domestic Regulatory Regimes
- 2.4. Participatory rights
- 3.2. Issues affecting Implementation
- 3.3. Environmental Impact Assessment
- 4.1. Engaging with key stakeholders
- 4.2. Public Awareness

## **State Responsibility for harm affecting another State**

### **Question 6:**

Does a State have an obligation in international law to control activities within its jurisdiction that might cause environmental harms that undermine the right to life in another State?

### **Response**

States have an obligation under international law to control activities within their jurisdiction that may cause environmental harm that undermines human rights.

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<sup>91</sup> Alien Tort Claims Act (ATCA), 28 U.S.C. §1350.

<sup>92</sup> Asia Pacific Forum, above n 4, 77-78.

## Background

The ICJ has held that Article 74 of the UN Charter obliges every State not to knowingly allow “its territory to be used for acts contrary to the rights of other States”.<sup>93</sup> Similarly, the obligation of all States to protect within their territory, the rights of other States, and in particular, their right to integrity and inviolability in times of peace and war has been recognised by the Permanent Court of Arbitration.<sup>94</sup>

With regard to State action impacting on the environment and rights in territory external to the State, the seminal case is the *Trail Smelter Arbitration*<sup>95</sup> which held that a State cannot use or permit the use of its territory in such a manner as to cause injury to another state. In 1972, the position was affirmed in Principle 21 of the Stockholm Declaration, which provided that:

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

In 1995 this principle had become well accepted and was confirmed in the ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, which stated:

*The existence of the general obligation of States to ensure that activities within its jurisdiction and control respect the environment of other States or areas beyond national control is now a part of the corpus of international law relating to the environment.*<sup>96</sup>

## Cooperation within the region

In the region, the *Association of South East Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution* of 25 November 2003 binds States Parties to take action on pollution resulting from land and forest fires. It includes provisions on monitoring, assessment, prevention, technical co-operation and simplified customs and immigration procedures for disaster relief.

## Recommendations

A list of recommendations is contained in Part 2. Amongst others, recommendations relevant to this term of reference include:

- 1.3. Application of existing rights
- 2.2. Development of Domestic Regulatory Regimes
- 2.4. Participatory rights
- 3.2. Issues affecting Implementation
- 3.3. Environmental Impact Assessment
- 4.1. Engaging with key stakeholders
- 4.2. Public Awareness

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<sup>93</sup> *United Kingdom v Albania*. 1949 ICJ reports 4.

<sup>94</sup> *Palmas Case*. Perm. Ct. Arb. 1928, 2 U.N. Rep. Intl. Arb. Awards 829.

<sup>95</sup> *Trail Smelter Arbitration* (U.S. v Can.) (1941) 3 U.N.R.I.A.A. 1938 (1949).

<sup>96</sup> 1996 ICJ Reports 241 @ para 29.

## State responsibility to act in relation to harms originating outside the State

### Question 7:

Does a State have an obligation in international law to protect its citizens from violations to their right to life that are caused by environmental harms originating either in the territory of another State, or in international air or water space – what mechanisms exist to address such violations?

### Response

States have obligations under international law to protect their citizens (and individuals in their territories) from violations to their right to life that are caused by environmental harm wherever such harm originates. This is because states have a responsibility to respect, protect and fulfil all human rights – see the answer to term of reference 4.

### Background

In principle, state responsibility for an environmental harm remains, regardless of whether the harm is felt externally or internally. An affected state may seek remedies from the state causing harm through a variety of mechanisms as listed in chapter 6 of the UN Charter. These may include recourse to the International Court of Justice.

An affected state may also be in breach of its human rights obligations to individuals within its territory if it fails to take action against the state that is responsible for the harm.

In some cases, citizens of the state affected by such harm may resort to remedies available in the state causing the harm; (see for example the US Alien Torts Claim Act discussed above at question 5) however there are often practical impediments in undertaking such actions.

While an affected state may take action against a polluting state, the affected state may still need to take domestic measures with the aim of limiting the impact of the harm to its citizens and its territory. Failure to do so may breach obligations to its own citizens.

### Environmental Harms in International Waters

The UN Convention on the Law of the Sea<sup>97</sup> lays down the fundamental obligation of all states to protect and preserve the marine environment. It further urges all states to cooperate on a global and regional basis in formulating rules and standards, and to take measures to protect the marine environment.

With regard to environmental degradation caused by shipping, UNCLOS provides that it is the duty of the 'flag state' to enforce the rules adopted for the control of marine pollution from vessels, irrespective of where a violation occurs. This serves as a safeguard for the enforcement of international rules in waters beyond the national jurisdiction of the coastal state, that is, on the high seas.

The Convention also gives enforcement powers to the 'port state', or the state where a ship is destined. The port state can enforce any type of international rule or national regulations adopted in accordance with the Convention, or applicable international rules, as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals. In doing so, it incorporates a method developed in existing Conventions for the enforcement of treaty obligations dealing with shipping standards, marine safety and pollution

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<sup>97</sup> Entered into force 16 November 1994.

prevention. It also provides an alternative approach, addressing the failure of flag states to fulfil their obligations outside their territorial waters, particularly when those states run 'flag of convenience' regimes. There are a range of other maritime conventions that further deal with marine pollution.<sup>98</sup>

Agreements between states also deal with environmental problems in inland water bodies. Of relevance is the *Convention on the Protection and Use of Transboundary Water Courses and International Lakes*,<sup>99</sup> which advocates measures to prevent, control and reduce any transboundary environmental impact.

In the Asia Pacific region, the *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995* addresses the issue of prevention and cessation of environmental harms pertaining to the Mekong River Basin. This Agreement also addresses state responsibility for damage to the environment and amicable settlement of disputes in conformity with the *UN Charter*. Within the Pacific, regional agreements address a variety of issues including the transportation of hazardous waste and the conservation of migratory fish stocks.<sup>100</sup>

### **Environmental Harms in Air and Space**

In relation to air and space, the most pertinent instrument is the *Convention on International Liability for Damage Caused by Space Objects*<sup>101</sup> to which some Asia Pacific countries are parties. The basic principle is that States Parties bear international responsibility for all space objects which are launched within their territory.<sup>102</sup>

## **Recommendations**

A list of recommendations is contained in Part 2. Amongst others, recommendations relevant to this term of reference include:

- 1.3. Application of existing rights
- 2.2. Development of Domestic Regulatory Regimes
- 2.4. Participatory rights
- 3.2. Issues affecting Implementation
- 3.3. Environmental Impact Assessment
- 4.1. Engaging with key stakeholders
- 4.2. Public Awareness

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<sup>98</sup> See for example, the *International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto*, which aims to prevent and minimise pollution of the marine environment by ships from operational or accidental causes. A relevant organisation is the International Maritime Organisation, which promotes cooperation on this issue.

<sup>99</sup> Entered into force 6 October 1996.

<sup>100</sup> See for example the *Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radio Active Waste and to Control the Transboundary Movement of Hazardous Waste within the South Pacific Region*, and the *Convention for the Conservation of Highly Migratory Fish Stocks in Western and Central Pacific Ocean*.

<sup>101</sup> Entered into force 1 September 1972.

<sup>102</sup> With regard to atmospheric pollution, see also the 1993 *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* @ <http://www.ctbto.org>

# Value of a Human Right to an Environment of a Particular Quality

## Question 8:

In the context of environmental harms to human life, what additional value would there be in having a specific right to environment?

## Response

Despite the fact that a number of existing rights can be invoked in relation to environmental harms affecting human life, the ACJ considers that such an approach fails to afford a cohesive, comprehensive and effective framework for the protection of human life when affected by environmental harms. In addition, international and national environmental laws often foster a regulatory rather than a participatory or rights based framework. These laws may not sufficiently protect and promote the participation of individuals, communities and peoples in decisions on matters affecting the environment.

The value in elaborating a human right to an environment of a particular quality therefore would be to ensure that the impact of the environment on the enjoyment of fundamental human rights is better recognised. Environmental disputes, once the preserve of a minority of scientists and environmentalists, then come within a broader framework and human rights become a legitimate consideration in relevant disputes about relevant environmental matters.<sup>103</sup> Furthermore, the existence of a defined human right provides an opportunity for proactive engagement prior to the violation of that right, avoiding the need for significant injury before action can be taken.<sup>104</sup>

## Background

### Recognition of the link between human rights and the environment

As previously stated, the importance of the environment to the realisation of human rights has been clearly articulated by ICJ Judge Weeramantry in his statement that damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>105</sup>

While not all commentators agree, with many cautioning against the proliferation of rights, the ACJ is not of this view. Nor are the 56 countries that recognise a right to a clean and healthy environment in their respective constitutions.

Within the APF, the following States have constitutional provisions dealing with protection of the environment: Afghanistan,<sup>106</sup> India,<sup>107</sup> Mongolia,<sup>108</sup> The Kingdom of Nepal,<sup>109</sup> The Republic of

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<sup>103</sup> Boyle and Anderson, *Human Rights Approaches to Environmental Protection*. Oxford 1996. p. 26-27

<sup>104</sup> Atapattu, Sumudu, "The Right to a Healthy Life or the right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law", 16 Tul. Envtl. L. J. 65.

<sup>105</sup> Refer page 19 above. C G Weeramantry J, (separate opinion) *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97 at 110; 37 ILM 162 at 206 (1998).

<sup>106</sup> "the State shall adopt and implement the necessary measures for the protection of nature, natural wealth and reasonable utilization of natural resources, improvement of the living environment, prevention of pollution of water and air, and the conservation and survival of animals and plants", (chap. II, art. 32)

<sup>107</sup> "to endeavor to protect and improve the environment and to safeguard the forests and wild life of the country", (Part IV, Article 48A).

<sup>108</sup> "the citizens of Mongolia shall enjoy . . . the right to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance", (Chapter Two, Article 16(2)).

Korea (South Korea),<sup>110</sup> The Republic of the Philippines,<sup>111</sup> The Democratic Socialist Republic of Sri Lanka,<sup>112</sup> The Kingdom of Thailand.<sup>113</sup>

With the Asia Pacific region more broadly, the following non-member states have some form of constitutional protection of the environment: Cambodia; Islamic Republic of Iran; Lao People's Democratic Republic; The Federated States of Micronesia; The Republic of Palau; Occupied Palestinian Territory; The Independent State of Papua New Guinea; Qatar; Saudi Arabia; Republic of China (Taiwan); Timor l'Este;<sup>114</sup> United Arab Emirates; The Republic of Vanuatu and The Socialist Republic of Vietnam.

## Defining a Right to Environmental Quality

The international community has long sought to define a human right to environmental quality.

First, the Stockholm Declaration referred to "an environment of a quality that permits a life of dignity and well-being". In 1993, the UN World Commission on Environment and Development report proposed a right to "an environment adequate for . . . health and well-being". In 1992, the Rio Declaration coupled environment and development, endorsing the principle of 'sustainable development', that is, development that meets the developmental and environmental needs of present and future generations. In 1994, the report of the UN Special Rapporteur on Human Rights and the Environment included the proposed right to a secure, healthy and ecologically sound environment, (Principle 2).

Developments have also occurred at the regional and national level and these have been equally diverse. While both the Inter-American and African human rights instruments recognise a human right to environmental quality, the former recognises an 'individual', and the latter, a 'peoples' right. At the national level, over 27% of national constitutions define a right to a clean and healthy environment but in a variety of ways.<sup>115</sup> For further information in regard to national developments, see the ACJ Reference Paper: Human Rights and the Environment.<sup>116</sup>

## Issues to be addressed

The ACJ is of the view that any attempt to define a human right to environmental quality must address the following issues:

- The right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity.
- The state's responsibility to protect, preserve, remediate and improve the environment, noting the principle of common, but differentiated responsibility
- The responsibility of all individuals, communities, peoples and other non-state actors to respect, protect and preserve the environment, and remedy any degradations of the environment for which they have been responsible.

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<sup>109</sup> "give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and . . . [to] make arrangements for the special protection of the rare wildlife, the forests and the vegetation", (Part 4, Article 26).

<sup>110</sup> "to a healthy and pleasant environment", Chapter II, Article 35(1).

<sup>111</sup> "the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature", (Article II, Section 16).

<sup>112</sup> State shall protect, preserve and improve the environment for the benefit of the community", (Chapter VI, Article 27(14)).

<sup>113</sup> the promotion, maintenance and protection of the quality of the environment in accordance with persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life", (Chapter V, Section 79).

<sup>114</sup> "all have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations", (Title III, Article 61(1)).

<sup>115</sup> Further information is available in the Reference Paper: Human Rights and the Environment at Part 2. Ref. note 4 above.

<sup>116</sup> . Asia Pacific Forum, above n 4

- The right of all individuals, communities, peoples and other non-state actors to full information about environmental issues, the right to participate in decision-making processes on environmental issues and the right to access remedies.
- The potential conflict between environmental protection and the right to culture. This will require an assessment and balancing of the needs of particularly vulnerable groups including indigenous peoples, women and children, caste and minority groups.
- The needs of groups that are disproportionately affected by environmental harms, and groups, including indigenous peoples, that have a special cultural and spiritual connection with the environment.
- Specific protection for environmentally displaced and affected persons, including a guarantee of their resettlement in a manner that enables the continuation of their culture, traditional means of livelihood and a guarantee of their human rights. To the extent possible, there should be a protection against displacement, and the preservation of traditional means of livelihood and culture.
- The principle of international solidarity, shared responsibility and the provision of aid, including capacity-building and technical assistance, in respect of environmental harm and disasters.
- The balance between the right to sustainable development and environmental protection.
- The state's obligation to implement, regulate, enforce and provide remedies in relation to the rights enumerated above.

## Recommendations

A list of recommendations is contained in Part 2. Amongst others, recommendations relevant to this term of reference include:

- 1.1. Advocacy of a human right to environment
- 1.2. Content of a human right to environment

## PART 2 - RECOMMENDATIONS

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### Human Right to the Environment

#### 1.1 Advocacy of a human right to environment

The indivisibility and interdependence of human rights has long been recognised. In addition, and as has been indicated above, many human rights rely on environmental quality for their full realisation, a point clearly recognised by Justice Weeramantry of the ICJ (see above at page 19). The ACJ's primary recommendation therefore is that NHRIs advocate the adoption and implementation of a specific right to an environment conducive to the realisation of fundamental human rights.

#### 1.2 Content of a human right to environment

The ACJ is of the view that any attempt to define a human right to environmental quality must address the following issues:

- The right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity.
- The state's responsibility to protect, preserve, remediate and improve the environment, noting the principle of common, but differentiated responsibility.
- The responsibility of all individuals, communities, peoples and other non-state actors to respect, protect and preserve the environment, and remedy any degradations of the environment for which they have been responsible..
- The state's obligation to regulate and enforce the responsibilities enumerated above.
- The right of all individuals, communities, peoples and other non-state actors to full information about environmental issues, the right to participate in decision-making processes on environmental issues and the right to access remedies.
- The state's obligation to enforce and appropriately regulate the rights enumerated above.
- The potential conflict between environmental protection and the right to culture. This will require an assessment and balancing of the needs of particular groups including Indigenous people, women and children, castes, vulnerable groups and minority groups;
- The needs of groups that are disproportionately affected by environmental harms, and groups, including indigenous peoples, that have a special cultural connection with the environment.
- Specific protection for environmentally displaced and affected persons, including a guarantee of their resettlement in a manner that enables the continuation of their culture, traditional means of livelihood and a guarantee of their human rights. To the extent possible, there should be a protection against displacement, and the preservation of traditional means of livelihood and culture.
- The principle of international solidarity, shared responsibility and the provision of aid, including capacity-building and technical assistance, in respect of environmental harm and disasters.
- The appropriate balance between the right to sustainable development and environmental protection, the latter of which may impact adversely on vulnerable and disadvantaged groups, particularly in developing communities.

- The elements described above require effective implementation and enforcement, consistent with the principles of international environmental law outlined above.<sup>117</sup> Implementation and enforcement mechanisms must not only address domestic factors but also the potential for environmental degradation to impact beyond the national borders.

### 1.3 Application of existing rights

NHRIs should consider how environmental issues impact on the realisation of the human rights they are mandated to uphold, and how these issues may be addressed in their general work. In the absence of an existing right to an environment of a particular quality in international or domestic law, institutions are encouraged to interpret and apply existing human rights as encompassing protection from environmental factors that impinge on the full realisation of those rights

### 1.4 Protection of the Environment Generally

While a human right to an environment of a particular quality is advocated, the protection of the environment in and of itself remains highly relevant. Where its mandate so permits, an NHRI should not be constrained from advocating for broader rights relating to environmental protection, nor from urging the ratification and implementation of existing international laws dealing with the environment. (Note: A table at Annex 1 provides an indicative list of relevant environmental treaties and states parties from the Asia-Pacific region.)

## Implementation of the right

### 2.1 Review of Domestic Regulation

NHRIs are urged to encourage their states to review their national laws and policies, as appropriate, in order to recognise and guarantee the right to an environment of a particular quality as a human right

### 2.2 Development of Domestic Regulatory Regimes

NHRIs are urged to encourage their states to adopt such a right via laws, policies, arrangements and/or treaties at national, regional, bilateral and multilateral levels.

### 2.3 Court and Tribunals

NHRIs are urged to encourage their states to consider the establishment of 'green benches' – environmental specific courts, tribunals or judicial panels.

### 2.4 Participatory rights

Critical to the effective realisation and exercise of a right to the environment is the existence of procedural rights, such as the right to access information, to participate in decision-making and to access remedies, as is provided for in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>118</sup> ('Aarhus Convention').

#### 2.4.1 Assessment of existing procedural rights

National Human Rights Institutions ('NHRIs') should conduct an assessment of existing participatory rights, as they are used in the context of environmental matters within their own national system. This may be conducted by assessing the implementation and enforcement of existing participatory rights on the basis of their adherence to the general principles articulated in Part 4 of this paper. NHRIs should advocate for changes to address gaps in implementing and enforcing participatory rights relating to the environment.

#### 2.4.2 Adoption of procedural rights

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<sup>117</sup> Refer above at page 22. For a further discussion of relevant principles, refer to Sands, above at note 6, pp 231 - 289.

<sup>118</sup> Entered into force 30 October 2001. Further information including the text of the treaty can be found at <http://www.unece.org/env/pp/>

NHRIs are urged to encourage their states to accede to the Aarhus Convention or to develop a similar legal framework for participatory rights at either the domestic or regional level.

## Use of existing laws

### 3.1 Domestic Implementation

Given that all countries in the Asia Pacific region already have a variety of laws and policies on the environment, NHRIs should urge the authorities to strengthen implementation of such laws and policies in a human rights sensitive manner, including by maximising access to information, public participation and the availability of remedies.

### 3.2 Issues affecting Implementation

Corrupt practices among state and non-state actors adversely affect the implementation of environmental protection measures. In order to ensure the efficacy of existing and future laws relating to environment, NHRIs should urge States to have regard to the principles and measures in the *United Nations Convention against Corruption*.<sup>119</sup>

### 3.3 Environmental Impact Assessment

In particular, given that many countries have adopted Environmental Impact Assessments ('EIAs'), NHRIs should urge the authorities responsible for EIAs to cover more comprehensively social impact/human rights impact assessment, complemented by relevant measures to improve the quality of the environment. Where states have not already done so, NHRIs should encourage them to introduce EIA regimes.<sup>120</sup>

### 3.4 Mobilising all Stakeholders

NHRIs should encourage countries to mobilise all levels of government and should themselves encourage all relevant stakeholders to promote the implementation of laws and policies protecting a right to an environment of a particular quality. It is only through a comprehensive and cooperative engagement with all stakeholders that rights will be effectively promoted and protected. In this regard, specific attention should be given to indigenous peoples and to particularly vulnerable groups in order to ensure measures do not disproportionately impact upon them.

## Education and public awareness

### 4.1 Engaging with key stakeholders

NHRIs are urged to keep various stakeholders, in particular the corporate and financial sector, well informed of the developments and trends in emerging international standards on corporate responsibility, responsible investment and environmental protection. NHRIs are urged to encourage the financial and corporate sector to comply with these standards. In particular, NHRIs should consider advocating the adoption of triple bottom line reporting, which incorporates expanded criteria for measuring organizational success by assessing not merely financial data, but also the impact of the enterprise on the society and environment within which it operates.

### 4.2 Public Awareness

NHRIs are urged to invoke their education function to raise public awareness of the issues of climate change, environmental obligations and existing community rights. Suggestions include:

- training judges, government officials and lawyers;

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<sup>119</sup> Entered into force 14 December 2005.

<sup>120</sup> With regard to the conduct of Environmental Impact Assessment on land or resources owned by Indigenous peoples, the Secretariat for the Convention on Biological Diversity has prepared voluntary guidelines. Refer: Secretariat of the Convention on Biological Diversity *Akwé: Kon Guidelines* (2004) <<http://www.cbd.int>> (last accessed 10 April 2008).

Deleted: voluntary

- establishing educational programs in schools;
- promoting tertiary programs on the environment and environmental law;
- using the internet and other media to disseminate information and increase awareness of the link between environmental harms and human rights; and
- educating the public on the impact of climate change on the environment both internally and extra-territorially.

## Environmentally displaced and affected persons

### 5. Displaced Persons

Given the increasing impact of environmental degradation and natural disasters in the region, and the resulting displacement of communities and erosion of living conditions, NHRIs are urged to encourage their states to evolve and strengthen humanitarian principles and values, disaster response, disaster preparedness, and health and care in the community;<sup>121</sup> including measures to accommodate displaced persons in a culturally appropriate manner that takes account of their human rights.

## Particular projects of importance in the region

### 6.1 Millennium Development Goals

NHRIs are urged to encourage states to fulfil their commitments under the Millennium Development Goals, and, in particular, in relation to access to water and sanitation, child and maternal mortality.

### 6.2 Cooperative Projects

NHRIs are urged to facilitate the development of particular environmental projects (either individually or in collaboration with other NHRIs) on issues of relevance to their communities, including for example, specific projects on access to water (including clean drinking water), sanitation and air quality, the remedying of environmental degradation and disposal of waste in a sustained manner.<sup>122</sup>

## General

### 7.1 Collaboration

NHRIs are urged to take proactive and innovative measures to promote and protect the environment, including through supporting and initiating a combination of programs and policies best suited to the needs of the individual communities and peoples within their state. NHRIs are urged to consider working in collaboration with other NHRIs, their governments, NGOs, communities, peoples and other members of civil society in the region.

### 7.2 Dissemination

NHRIs should disseminate the recommendations of the ACJ on the right to environment and translate them as appropriate. They should interlink with relevant national authorities and other key actors to discuss and promote implementation of the said recommendations.

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<sup>121</sup> International Federation of Red Cross and Red Crescent Societies, What We Do at: <[http://www.ifrc.org/what/index.asp?navid=04\\_01](http://www.ifrc.org/what/index.asp?navid=04_01)> at 18 October 2007.

<sup>122</sup> See for example the Strategic Action Programme for International Waters of the Pacific Region, 1997. Available at: [http://www.iwlearn.net/iw-projects/sprep/reports/pacificislands\\_sap\\_1997.pdf](http://www.iwlearn.net/iw-projects/sprep/reports/pacificislands_sap_1997.pdf) (last accessed 5 June 2008).

## PART 3 – SUMMARY OF COUNTRY REPORTS

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### Introduction

To assist the Advisory Council of Jurists in its consideration of the reference on Human Rights and the Environment, a survey was distributed to Member National Human Rights Institutions ('NHRIs') requesting information on:

- the relevance of international law in their domestic jurisdictions;
- constitutional provisions, legislation and case law relating to:
  - a right to an environment of a particular quality;
  - protections against environmental harms, which affect human life, health and human rights;
  - the right to life; and
  - obligations on state and non-state actors with respect to the environment;
- reports by local, national or international non-governmental organisations ('NGOs') on environmental harms, which affect the right to life and the right to health in Member States; and,
- the activities of NHRIs with respect to environmental harms.

The responses prepared by NHRIs provided useful indications of the challenges to recognising a right to an environment of a particular quality in Member States. That said, the level of detail provided in each response differed significantly. As such, this section does not purport to provide a comprehensive assessment of the practices of member NHRIs or their states, but rather, a comparative summary that may assist members as they consider the domestic application of the ACJ report and recommendations.

### What are some environmental problems raised by APF members states?

Members reported a range of environmental issues impacting at both the regional and domestic level. Air pollution was reportedly a significant regional problem in South East Asia, while other issues, such as toxic waste, generally remain domestic problems and are addressed within national boundaries. Members indicated that in many cases, the impact of environmental degradation disproportionately affects those who are socially and economically disadvantaged, and minority or marginalised groups in society.

Examples of environmental issues raised APF Member States include:

- air quality/pollution from manmade causes (e.g., cars, factories) and 'natural' causes (e.g., bushfires) – Australia, Malaysia, New Zealand, Palestine, the Philippines, Thailand;
- water supply and water quality – Australia, India, New Zealand, Palestine, the Philippines, Thailand;
- land management and degradation of natural resources – New Zealand, the Philippines;
- climate change – Australia, New Zealand, India;
- waste management – New Zealand, India, Palestine, the Philippines, Thailand;
- public safety arising from rubbish or the construction of dangerous structures in residential areas – India, Palestine, the Philippines;

- chemical pollutants – Australia, Palestine, the Philippines;
- oil spills – the Philippines;
- energy efficiency – New Zealand; and
- the application and use of genetically engineered technology – India.

## Are international treaties and customary international law recognised as a source of law by APF Member States?

The domestic application of international treaties and customary international law is dealt with differently throughout the Asia Pacific region. Some states accept treaties and customary international law as directly binding in their domestic arenas. Other states require international treaties and customary international law to be incorporated in domestic legislation before they are binding at the domestic level. Amongst these states, international treaties and customary international law that have not been incorporated into domestic law may be accorded different status: for example, they may or may not have persuasive force before domestic courts.

In Australia,<sup>123</sup> Malaysia<sup>124</sup> and Thailand,<sup>125</sup> treaties and customary international law are not automatically incorporated into domestic law and are enforceable only when they are incorporated into domestic legislation. In Thailand, treaties may also be implemented domestically, if they are approved by the National Assembly. Unincorporated treaties and customary international law may influence the interpretation of Australian law.<sup>126</sup>

By contrast, the Philippines sits at the other end of the spectrum. Customary international law, general principles of international law, and international jurisprudence are sources of law, and are incorporated into domestic law via the *Constitution*.<sup>127</sup> This would also appear to be the case in Afghanistan, where the *Constitution* provides that the state shall abide by Afghanistan's international law obligations – 'the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights'.<sup>128</sup>

Between these two positions sit New Zealand, India, the Republic of Korea and Afghanistan.

New Zealand has a similar approach to Australia and Malaysia, except that, apart from holding persuasive value, customary international law may be applied directly by courts.<sup>129</sup> So too does India, where the Supreme Court has held that an accepted customary law principle can be accepted as part of domestic law.

Conversely, in the Republic of Korea, international law is subordinate to the *Constitution*, but has the same status as domestic law. International customary law, however, has not been used as a basis for a judicial decision, and the Constitutional Court has denied the use of customary international law in certain circumstances (e.g., as a basis for reparation claims).

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<sup>123</sup> Asia Pacific Forum, above n 4, p. 94.

<sup>124</sup> Ibid 123.

<sup>125</sup> Ibid 176. See also *Thai Constitution 2007* (informal English translation) arts 186.

<sup>126</sup> Ibid 94.

<sup>127</sup> Ibid 157.

<sup>128</sup> Constitution of Afghanistan 1382 art 7.

<sup>129</sup> Asia Pacific Forum, above n 4, p. 137.

### How does this information link with the recommendations?

This information highlights potential limitations in member countries on the recognition of a right to an environment of a particular quality when the putative right is justified on the basis of treaty or customary international law: recommendations 1.1, 2.1, 2.2.

## Do the Constitutions of APF Member States guarantee a right to environment or related rights?

The Constitutions of many Member States variously guarantee a right to life (Malaysia); specific environmental rights (Republic of Korea); or both human rights and environmental rights (Afghanistan, India, the Philippines and Thailand). Conversely, some Constitutions do not provide any explicit human rights or environmental guarantees (Australia and New Zealand).

For those with specific protection:

- The *Constitution* for the Republic of Korea explicitly recognises that '[a]ll citizens have the right to a healthy and pleasant environment' (art 35(1)); however, the benefits associated with this right are yet to be fully realised because the right can only be recognised when its content is defined in domestic legislation. This has not yet occurred.
- The *Constitution of the Philippines* recognises the right to environment by imposing an obligation on the state to 'protect and advance the right of people to a balanced and healthful ecology'. The *Constitution* also recognises a right to health and a right to life.<sup>130</sup>
- The recently passed *Thai Constitution* recognises 'the rights and freedoms of life and person'.<sup>131</sup> In addition to substantive rights, the *Constitution* guarantees relevant procedural rights: e.g., the right of the community 'to participate in the management, maintenance, preservation and exploitation of natural resources and the environment'. For example, a person has a right 'to receive facts, explanation, and reason from [the state]' and 'to voice [their] own opinion' before a project, which could affect that person's environment, health and quality of life, is approved and implemented. These procedural rights are expressed as individual and community rights.<sup>132</sup>
- Article 48A of the *Indian Constitution* provides that '[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'.<sup>133</sup> Article 51A imposes a similar obligation on citizens – '[i]t shall be the duty of every citizen of India ... to protect and improve [t]he natural environment'. In addition to these constitutional environmental protections, art 21 of the *Constitution* contains an expansive right to life and personal liberty. The Indian Supreme Court has decided that the right to life includes 'a right to [a] healthy and pollution free environment'.
- The *Malaysian Constitution* recognises a person's right to liberty. The Malaysian NHRI notes this right operates in such a way that it is 'the responsibility of the government to provide for quality and clean air, [and a] healthy environment'.<sup>134</sup>
- The *Afghan Constitution* recognises the right to life and liberty. The *Afghan Constitution* imposes an obligation on the State 'to adopt necessary measures for safeguarding forests and the environment'.<sup>135</sup>

As mentioned, neither the *Australian Constitution* nor the documentary sources of New Zealand's Constitution<sup>136</sup> guarantee a general right to environment or related right.<sup>137</sup>

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<sup>130</sup> Ibid 156.

<sup>131</sup> *Thai Constitution 2007* (informal English translation) art 50.

<sup>132</sup> Asia Pacific Forum, above n 4, p. 176-8. See also *Thai Constitution 2007* (informal English translation) arts 55–9, 61, 65–6.

<sup>133</sup> Ibid 106.

<sup>134</sup> Ibid 122.

<sup>135</sup> Ibid 93. See Constitution of Afghanistan 1382 arts 23, 24.

<sup>136</sup> Ibid 137. Note: New Zealand's Constitutional provisions are found in a range of documents.

<sup>137</sup> Ibid 94, 137, 141.

### How does this information link with the recommendations?

- This information highlights the different approaches adopted in member's States. In encouraging governments to afford human rights appropriate legal recognition and protection, including a right to an environment of particular quality, NHRIs should consider:
  - the appropriate form for protecting human rights;
  - the language they will use to describe human rights, especially the right to an environment of a particular quality;
  - whether they will advocate for a broad right to an environment of a particular quality or specific elements of the right;
  - whether specific human rights should attach to individuals and/or communities; and
  - whether they will advocate for human rights that impose obligations on both the state and citizens: recommendations 1.1, 1.2.
- Lobbying governments to afford legal recognition and protection to procedural rights may be another option open to NHRIs. Of particular note is the *Thai Constitution*, which enunciates rights relating to community participation and access to information in environmental matters, and 'judicial rights' more generally. In lobbying for legal recognition and protection enshrining procedural rights, NHRIs should consider whether they wish to lobby for individual and/or community procedural rights: recommendations 2.3, 3.1 and 3.2.
- Legal recognition of environmental human rights, while important, is insufficient if those rights are not fully implemented. NHRIs should take note of the experiences of certain Member States where actual implementation of constitutional provisions relating to the environment has been problematic: recommendations 3.1 – 3.4.

## Does legislation in APF Member States guarantee a right to environment or related rights?

### A. Substantive environmental rights

Some states guarantee a substantive right to environment in legislation; however, the language used to describe such a right varies from country to country. Examples include:

- a 'right to environment';<sup>138</sup>
- a 'right of the people to a healthful environment';<sup>139</sup>
- a right to live in an 'environment and surroundings which are conducive to health';<sup>140</sup> and
- a right to 'use natural resources in accordance with customary traditions and practices which encourage community-based sustainable natural resource management'.<sup>141</sup>

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<sup>138</sup> Environmental Quality Act 1974 (Malaysia) Ibid 121.

<sup>139</sup> Asia Pacific Forum, above n.4. p. 156.

<sup>140</sup> *National Health Act 2007* (Thailand). Ibid 167, 168.

<sup>141</sup> *Environment Law 2007* (Afghanistan) art 7(1).

## B. Environmental protection

Most Member States have comprehensive legislation regulating the management and protection of the environment. Regulation occurring through the imposition of pollution or quality standards can be found in Afghanistan, Australia, India, Malaysia, New Zealand, the Republic of Korea and Thailand.<sup>142</sup> New Zealand reported that sustainability is the guiding principle in legislation about the 'management of natural and physical resources, Indigenous forests, and fisheries'.<sup>143</sup>

Many states also promote environmental protection through placing distinct restrictions on the practices of particular industries. This serves to address the unique forms of pollution and environmental degradation associated with certain industry, particular those involved in extraction and processing of minerals.

## C. Procedural environmental rights

General procedural rights guaranteed by legislation are quite common in APF Member States. In addition, a number also have specific environmental procedural rights.<sup>144</sup> Where procedural rights are not covered by legislation, they may be legally guaranteed through other means (for example: the Constitution in Thailand (see above question three)). Issues of standing may impact significantly on the effectiveness of procedural rights and broad provisions, such as those found in certain Australian States, may ensure greater protection and/or redress.<sup>145</sup>

## D. The right to life

Where the right to life is not otherwise protected in the Constitution, the domestic legislation establishing or administered by NHRIs invariably recognises the right to life.<sup>146</sup> More information on how the right to life is interpreted in different countries is provided below in question five and in the accompanying Reference Paper.

## E. Obligations on state and non-state actors

### i. Obligation to uphold a right to environment

On the basis of the information received, only some jurisdictions create express 'obligations' to protect the environment. These obligations may appear in constitutional or legislative texts, and generally apply to the state. In some cases, constitutional provisions also place an obligation on individual citizens.<sup>147</sup> In at least one state, non-state actors are specifically mentioned. In the Philippines, the government has responsibility to protect individuals and the environment against violations by non-state actors, and may issue ordinances and create legislation protecting the environment and regulating the projects of non-state actors.<sup>148</sup>

In other countries, there are no apparent obligations on states or non-state actors in relation to the environment, or that information has not been provided in the questionnaire responses.

### ii. Obligations relating to human rights

In Australia and New Zealand, legislation does not impose any positive obligations on the state to prevent human rights violations by non-state actors.<sup>149</sup> The *New Zealand Bill of Rights Act 1990* binds the executive and legislature (as well as the judiciary) and therefore the state owes

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<sup>142</sup> Asia Pacific Forum, above n.4. p. 98,131, 177. See also *Environment Law 2007* (Afghanistan) arts 27–63

<sup>143</sup> Ibid 137-9.

<sup>144</sup> Ibid. 99, 145, 156-62

<sup>145</sup> Ibid 104.

<sup>146</sup> Ibid 100, 128.

<sup>147</sup> Ibid 106. See also *Environment Law 2007* (Afghanistan) arts 13, 16, 68, 69.

<sup>148</sup> Ibid 156.

<sup>149</sup> Ibid 104, 141.

a positive obligation to prevent breaches of rights contained in the Bill of Rights including the right to life.<sup>150</sup>

## F. Use of legislation to override environmental goals and human rights

At times Parliaments legislate or Ministers exercise discretion to override environmental protection measures. Australia and Malaysia reported instances where their respective federal or state governments had passed special legislation or utilised Ministerial discretions to override environmental laws for a particular project, by, for example, decreasing pollution checks and standards for a project, or exempting a region from environmental restrictions.<sup>151</sup>

### How does this information link with the recommendations?

- Most APF Member States have legislation setting pollution standards and pollution controls. These lay important foundations for recognising the environment is important and affects people's quality of life. NHRIs may use this broader protection of the environment to create opportunities for lobbying and creating a 'culture' supportive of a right to an environment of a particular quality: recommendations 1.3, 3.1, 3.2, 3.3.
- Robust administrative law regimes provide significant advances in the recognition and implementation of environmental rights. Several members' states have strong administrative law regimes which establish the three basic procedural rights – access to information, participation, and access to justice/remedies. NHRIs should look to the experiences of their neighbours in considering advocacy on such measures: recommendations 3.2, 3.3.
- Mechanisms that permit the overriding of environmental protection laws should be appropriately restricted to ensure that the exercise of such powers occurs in a transparent manner and within established and acceptable boundaries: recommendations 3.3, 3.4.

## Have courts in APF Member States recognised a right to environment or related rights?

### A. Substantive environmental rights

Some countries have comprehensive and expansive case law on the interpretation and application of international environmental law principles and environmental rights (the Philippines and India). In other countries, the courts have used cases relating to environmental issues to comment on how environmental harms may affect other rights (Malaysia, Republic of Korea, and Thailand). In other countries, courts are yet to recognise a right to environment or the link with existing human rights, or this information was not provided in NHRIs responses.

The Indian Supreme Court has recognised that sustainable development, the precautionary principle, the polluter pays principle, and the principle of intergenerational equity, are part of Indian environmental law. At times, the Supreme Court has also ordered state courts to constitute special 'Green Benches' to decide environmental matters.

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<sup>150</sup> New Zealand Bill of Rights Act 1990 ss 3 and 8.

<sup>151</sup> Ibid 103, 140.

The Philippines too has comprehensive case law on substantive environmental rights.<sup>152</sup> The Supreme Court of the Philippines has recognised the right to environment, holding that it is an issue of “inter-generational responsibility” and “inter-generational justice”. Importantly, the Supreme Court placed the right to a balanced and healthful ecology on the same footing as civil and political rights, such as the right to life. The Supreme Court has also linked environmental rights with the right to public safety and welfare.<sup>153</sup>

The Constitutional Court of the Republic of Korea has commented on the nature of the environment. It has defined the environment broadly as encompassing cultural and social environment. In addition, the Court has held that environmental harms may violate other rights, such as property rights through noise, vibration and fumes.

The Supreme Court of Thailand has recognised that ‘[a] person [has] the right to clean air for good health and quality of life, the right to enjoy nature, and the right to be free from the affects of environmental damages’.<sup>154</sup>

Neither Australian, New Zealand, nor Malaysian courts have recognised a right to environment,<sup>155</sup> though the latter has recognised that environmental harms can violate the right to life and the right to health.<sup>156</sup>

## B. Right to life

In most countries, courts recognise the right to life, though only three NHRIs reported recognition of a link between the right to an environment of a particular quality and the right to life (Philippines, Republic of Korea and Malaysia).

## C. Problems of standing

Commentators writing in the field of environmental law have indicated that limitations imposed on standing are often a major obstacle to participation in environmental matters. There was limited information provided by member NHRIs in their responses to the questionnaire; however the Malaysian, Australian and Indian NHRIs elaborated on some of the obstacles and benefits to standing provisions in their respective countries.

In Malaysia, environmental proceedings can only be instituted by the Attorney-General, and the rate of environmental prosecutions is low.<sup>157</sup> Individuals and NGOs have limited standing to take action against projects affecting the environment.<sup>158</sup>

Under Australian law, earlier difficulties associated with compelling a government authority to carry out its public statutory duties have been partly overcome by allowing the public ‘open standing’ to enforce environmental laws in some jurisdictions’.<sup>159</sup>

In India, standing is not an obstacle to bringing actions before Indian courts. The Indian NHRI reports that ‘matters involving the degradation of the environment have often come to the [Supreme] Court in the form of petitions filed in the public interest ... due to the lenient view ... [of] the Court towards ... *locus standi* and ... “proof of injury”’. Public interest litigation is an

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<sup>152</sup> Ibid 158-9.

<sup>153</sup> Ibid 157-9.

<sup>154</sup> Ibid 180-1.

<sup>155</sup> Ibid 96, 124, 140.

<sup>156</sup> Ibid 125.

<sup>157</sup> Ibid 131.

<sup>158</sup> Ibid 131-2.

<sup>159</sup> Ibid 104.

'important [tool] of legal aid and has served to bring justice in many cases involving social and environmental concerns'.<sup>160</sup>

## D. Obligations on state and non-state actors

The practice of the courts in member countries is diverse. In India, the courts have imposed obligations on state and non-state actors alike, recognising that non-state actors are equally subject to environmental principles, like the polluter pays principle. Awards to compensate for harm are common.

In other countries, courts have tended to act only on the basis of established legislative obligations. In Australia, New Zealand, the Philippines and Thailand, where there is no legislation to support the imposition of a duty on the state or a non-state actor to take or refrain from taking action relating to environmental harm, courts have been reluctant to hold that such duties exist, deferring to the legislature to impose the appropriate duty and/or remedy.<sup>161</sup>

In Australia and Malaysia, applicants have successfully used common law actions, such as the tort of nuisance, to seek redress from state and non-state actors who have caused environmental harm.<sup>162</sup>

### How does this information link with the recommendations?

- Judicial interpretation of the relationship between human rights and the environment may provide support for NHRIs in their advocacy for recognition of a right to an environment of a particular quality, and in their education campaigns. NHRIs may also draw on the jurisprudence from other countries to compare the status of a right to an environment of a particular quality in their country with others: recommendations 1.1 – 1.4, 2.2, 3.1, 4.1 and 4.2.
- NHRIs should compare standing rules to ensure that those within their own states ensure appropriate access for interested parties: for example, India has very broad standing rules and a culture of public interest litigation: rec 2.4. See also the guidelines on participatory rights at Part 4.

## Initiatives to address environmental problems

### A. Government environmental departments

Afghanistan, Australia, India, Malaysia, New Zealand, the Philippines and Thailand have government environment agencies. For example, the National Environmental Protection Agency in Afghanistan and the Department of Environment in Malaysia administer environmental matters and conduct research, education and training.

Responses highlighted concerns about the transparency of operations and highlighted the need for objective decision making, free from political or other interference.<sup>163</sup>

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<sup>160</sup> See also the decision in *Minors Oposa v Secretary of the Department of Environment and Rural Resources*, where the plaintiff minors, purporting to represent themselves and generations unborn successfully challenged the granting of timber concessions which, if exploited, would allegedly breach the constitution right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. *OPOSA, et al. vs. FULGENCIO S. FACTORAN, JR. et al.* (G.R. No. 101083, July 30, 1993).

<sup>161</sup> Ibid 97, 146, 172..

<sup>162</sup> Ibid 97, 124, 131.

<sup>163</sup> Ibid 103-4.

## B. Transboundary harm

Some environmental problems cross borders. For example haze in South East Asia is a longstanding problem for many ASEAN States. ASEAN has developed a *Cooperation Plan on Transboundary Pollution* to attempt to address this issue.<sup>164</sup>

## C. Other initiatives

A variety of initiatives have been undertaken to address environmental and related human rights issues at the domestic level. The Philippines' government established fund pools to help citizens who have been affected by environmental and natural disasters.<sup>165</sup> In Malaysia, civil society adopted a Malaysian Charter of Human Rights, which expressly recognises the right to a healthy environment.<sup>166</sup>

Though not specifically attributed to the environment, a further interesting initiative is New Zealand's Pacific Access Category for immigrants, which permits relocation of Pacific Islanders to New Zealand and could accommodate environmental refugees.<sup>167</sup>

### How does this information link with the recommendations?

- Several NHRIs report working with environmental agencies to advocate for and educate about the impact of the environment on human rights. Members should consider the possibility of cooperating with environmental and other stakeholder groups in mobilising support for human rights and environmental issues: recommendations 3.2, 3.3, 4.1, 4.2, 6.1, 6.2, 7.1

## The role of NHRIs

### A. Investigation and complaints

All NHRIs have certain basic functions including monitoring and complaint handling, advocacy and education. However, the manner in which they undertake these tasks may differ, particularly with regard to complaint handling.<sup>168</sup>

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<sup>164</sup> Ibid 133-5.

<sup>165</sup> See 157-8.

<sup>166</sup> Ibid 125

<sup>167</sup> Ibid 143. See Immigration New Zealand, *Pacific Access Category* (2007)

<<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>> at 7 March 2008; Immigration New Zealand, *Samoan Quota Scheme* (2007) <<http://www.immigration.govt.nz/migrant/stream/live/samoanquota/>> at 7 March 2008.

<sup>168</sup> These differences may arise from the nature of the complaint or type of respondent. The Australian NHRI's process depends on whether the complaint concerns discrimination or another breach of human rights. With regard to discrimination complaints, it has a wide jurisdiction to 'discuss options for resolution with the parties and if required convene a conciliation conference so the parties can discuss the issues raised in the complaint'. For other alleged human rights breaches, the Australian NHRI has a narrower mandate of inquiring into these breaches if they are 'committed by the Commonwealth or persons acting on behalf of the Commonwealth [ie, the state]',<sup>168</sup> which includes non-state actors acting on behalf of the Commonwealth (Asia Pacific Forum, above n 4, 98). The Korean NHRI is also limited in what it can investigate because it can only investigate violations of arts 10 and 22 of the *Constitution*, which relate to a human's worth and dignity and the right to pursue happiness, and the freedom of learning and the arts. Conversely, the Thai NHRI has broader powers relating to all human rights. It can examine any act violating human rights or an international Convention on human rights to which Thailand is a party. Also, it can propose remedial measures addressing the person/agency committing the acts (*Thai Constitution 2007* (informal English translation) art 248(1)). The Malaysian NHRI does not have jurisdiction over non-state actors (Asia Pacific Forum, above n 1, 147), whereas the New Zealand NHRI has 'a limited jurisdiction in relation to the activities of non-state actors ... [where there is] a complaint of unlawful discrimination ... in one of the areas of public life covered by the [*Human Rights Act 1993* (NZ)]' (Ibid 147). The Thai NHRI has authority to examine violations of human rights by state and non-state actors (*Thai Constitution 2007* (informal English translation) art 248(1)).

Some NHRIs, such as Thailand and India, have a broad remit. For others, their capacity to undertake, complaint handling and investigatory processes differ on the basis of the type of complaint and on who allegedly committed the human rights violation (e.g., whether the entity responsible for the violation is a state or non-state actor).

While the New Zealand, Palestinian, Philippines, and Thai NHRIs reported that they received complaints directly relating to the environment,<sup>169</sup> the Australian, Malaysian and Philippines' NHRIs reported receiving complaints indirectly concerning environmental issues, an example being discrimination complaints involving the use of chemicals that exacerbate the effects of a complainant's disability.

## **B. Research, reports and projects on the connection between environmental harms and the right to life**

All NHRIs have, to some degree, undertaken projects relating to human rights and the environment.<sup>170</sup>

The Australian NHRI has conducted research on environmental harms and the right to life, especially in relation to Indigenous people. Some of these projects have involved the participation of aid organisations, such as Oxfam other government organisations, and the private sector, such as the mining industry.<sup>171</sup>

The Indian NHRI has worked with state governments and various government departments on campaigns and action plans to end manual scavenging, and to address the health dimensions of fluorosis. It also conducted research on the dependency of citizens on forests for their livelihood and the impact of this dependence for the environment.

The Malaysian NHRI has worked in partnership with the United Nations Development Program on a High Level Policy Dialogue that focuses on the Millennium Development Goals, some of which are related to health and the environment'.<sup>172</sup>

The Thai NHRI reports having formed a number of sub-committees that deal with land and forest management, and water and mineral resources. The sub-committees conduct research and monitoring into activities impacting on human rights and the environment, and report to government at both local and policy levels.<sup>173</sup>

## **C. Awareness and education campaigns relating to environmental harms affecting the rights to life or health**

All NHRIs advocate, and promote observance and protection of human rights through education and publicity.

Some NHRIs have directly addressed environmental harms affecting the rights to life or health. For example, the Palestinian NHRI visits places affected by environmental harm and conducts open meetings on the right to life and health.<sup>174</sup> The Thai NHRI is also active in conducting seminars 'to raise awareness [of] people's right to environment and to build a stronger network among parties concerned, particularly local communities'.<sup>175</sup>

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<sup>169</sup> Asia Pacific Forum, above n 4, p. 147, 152, 167, 182.

<sup>170</sup> Ibid 118, 167, 183. See also: Law on Structure Duties and Mandate of the Afghanistan Independent Human Rights Commission 2005 (Afghanistan) arts 21(16), 21(20), 21(21), 21(23).

<sup>171</sup> Ibid 99.

<sup>172</sup> Ibid 136.

<sup>173</sup> Ibid 172–3.

<sup>174</sup> Ibid 153–4.

<sup>175</sup> Ibid 183.

Other institutions have conducted campaigns that indirectly relate to environmental harms affecting the right to health. For example, environmental issues are implicit in some campaigns and projects run by the Australian NHRI, particularly those relating to Indigenous people and sustainable development.<sup>176</sup> The Malaysian NHRI has organised programmes on the 'right to basic needs, adequate housing ... and right to health which touches on environmental related issues'.<sup>177</sup>

#### **D. Intervention in court proceedings on the issue of the environment and the rights to life and health**

Many NHRIs may intervene in court proceeding, but few reported that they had done so on the issue of the environment and human rights.<sup>178</sup> India is one exception. Interestingly, the Indian NHRI also reported that, pursuant to orders of the Supreme Court, it has been required to prepare measures to address alleged human rights violations, and to monitor the implementation of these measures, in an action relating to land reform in the Orissa State.

#### **E. Introduction of Bills and participation in legislation-making**

All NHRIs indicated that they had capacity to scrutinise legislation and several indicated that they had done so in relation to the environment. The Thai NHRI has made recommendations about 'the problem of water shortage in the eastern part of Thailand'.<sup>179</sup> The South Korean NHRI reported making several recommendations to government, including in relation to the use of water resources, climate change and procedural rights.

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<sup>176</sup> Ibid 99.

<sup>177</sup> Ibid 135-6.

<sup>178</sup> Ibid 99, 120, 167.

<sup>179</sup> Ibid 184.

### How does this information link with the recommendations?

- NHRIs should consider whether and how issues associated with a right to an environment of a particular quality fall within their respective mandates. Information provided by their counterparts may provide useful examples of opportunities for future engagement in this area: recommendations 3.3, 4.1, 4.2, 6.1, 7.1
- Most NHRIs can petition governments on Bills and legislation. This is a particularly useful tool for advocacy in relation to human rights generally and a right to environmental quality in particular: recommendations 1.1, 2.1, 2.2.
- The type of complaints received by NHRIs may inform them of the types of environmental harms affecting human rights within their countries and region. In response, NHRIs may be able to engage with government and civil society to raise and address such issues. There are numerous examples of NHRIs responding to a domestic environmental issue and engaging different stakeholders in their response: recommendations 1.3, 3.1, 3.3, 4.1, 6.1, 6.2.
- NHRIs should disseminate information on the link between the environment and human rights, and on their role in addressing the environment and human rights so that all stakeholders are more aware of this role: rec 4.2.

### Should there be a specific right to the environment?

All NHRIs supported the development of a specific right to an environment, of a particular quality<sup>180</sup> though respondents noted the need to, and difficulties associated with, clearly and carefully defining such a right.<sup>181</sup>

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<sup>180</sup> Ibid 102, 121, 136, 151, 169, 186.

<sup>181</sup> Ibid 186.

## PART 4 – PROCEDURAL RIGHTS

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This section provides additional background information on procedural rights since the ACJ is of the view that this is a particularly important tool in protecting human rights and the environment. It provides background information, key principles for environmental procedural rights and examples that illustrate the application of the three key elements of participatory rights: access to information; participation in decision-making; and, access to justice. The section should be of assistance in considering the implementation of recommendations 2.3 and related recommendations

### Background

Governmental authority is based on '[t]he will of the people'.<sup>182</sup> To properly exercise their will and make informed decisions, people should have the opportunity to be informed of, and engaged in, public affairs.<sup>183</sup>

Procedural rights, which are comprised of the rights to:

- access information;
- participate in decision-making; and
- access to justice/remedies,

do just that. They enable people and communities to be informed of, monitor and participate in the actions of the State.

The justification for procedural rights stems from three intertwined human rights, enunciated in arts 19 and 21 of the *Universal Declaration of Human Rights* and arts 19 and 25 of the ICCPR:

- everyone has the right to freedom of opinion and expression;
- everyone has the right to take part in the government of their country; and
- everyone has the right to vote.

It is argued that procedural rights promote more accountable and transparent governance and business practices.<sup>184</sup> Decision makers, whether they be governments or businesses, will be concerned to comply with appropriate standards if, as a result of access to information, their decisions and actions are open to broad public scrutiny. Similarly, broader participation in decision-making ensures that all relevant voices and relevant considerations are taken into account.<sup>185</sup> Finally, access to justice increases transparency and promotes compliance with environmental laws encompassing as it does, the review of decisions as well as the award of appropriate remedies for breaches of both procedural rights and the subject laws.

In the international and regional arena, there have been statements supporting environmental procedural rights. Recognition of the importance of these rights began with principle 2 of the *Declaration of the United Nations Conference on the Human Environment*, arising from the 1972 Stockholm Conference on the Human Environment, which stated that careful planning and management were central to safeguarding natural resources. In 1992, principle 10 of the *Rio*

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<sup>182</sup> *Universal Declaration of Human Rights*, GA Res 217 A (III) (10 December 1948) art 21(3).

<sup>183</sup> Australian Law Reform Commission, *Open Government – A Review of the Federal Freedom of Information Act 1982*, Report No 77 (1996) [2.2], [2.3].

<sup>184</sup> Australian Law Reform Commission, above n 2, [2.2]; Stec and Casey-Lefkowitz, above n 3, 18; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (entered into force 30 October 2001) preamble [10], [11].

<sup>185</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (entered into force 30 October 2001) preamble [9]; Stec and Casey-Lefkowitz, above n 3, 18.

*Declaration on Environment and Development* made an even more direct link between the environment and procedural rights stating '[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level'. The United Nations Special Rapporteur on Human Rights and the Environment also included procedural rights in the *Draft Principles on Human Rights and the Environment* she annexed to her Final Report in 1994.<sup>186</sup>

Within the Asia Pacific Region, Ministerial Declarations have affirmed the right of individuals and NGOs to be informed about and participate in matters affecting the environment.<sup>187</sup>

The most recent development in environmental procedural rights is the *Aarhus Convention*, which enunciates legally binding rights – the right to access information, the right to public participation in decision-making and the right to access to justice – in environmental matters. Importantly, the Convention instructs States Parties 'to take steps to guarantee the basic right of present and future generations to live in an environment adequate to health and wellbeing',<sup>188</sup> rather than enunciating an aspirational right to a healthy environment. The Convention, therefore, links practical rights with 'the harder-to-grasp complex of rights included in the right to a healthy environment'.<sup>189</sup>

## Principles for Environmental Procedural Rights

The following principles guide the promotion, protection and implementation of environmental procedural rights, and appear throughout the *Aarhus Convention*. NHRIs should advocate that states adopt environmental procedural rights encapsulating the following principles:

- Environmental procedural rights should be available to all, taking into account the particular needs of indigenous peoples and particularly vulnerable groups. Such rights should be available, free from discrimination, including on the basis of sex, race and nationality. This principle of non-discrimination also means that people and communities who exercise these rights should be able to do so freely without facing discrimination, harassment, punishment or other forms of abuse.
- The subject matter and scope of procedural rights should be construed expansively, (see for example A1 (access to Information); B3 and B7 (public participation) and C4, C5 and C7).
- Environmental procedural rights should be enforced and implemented in a way which makes them effective, accessible and useful tools for people and communities to realise a right to an environment of a particular quality. To enable the effective realisation of environmental procedural rights, there should be consistency between any instruments and any entity applying and enforcing them.
- States should actively apply and enforce environmental procedural rights on their own initiative by disseminating and initiating information and activities implementing the right. States should also respond to requests for the application and enforcement of environmental procedural rights.
- If a state actor or non-state actor refuses to apply and enforce any environmental participatory right, they should provide reasons to the public.
- To the degree possible, states should invest the necessary resources to ensure that environmental procedural rights are implemented and enforced.
- The implementation and enforcement of procedural rights should be reviewed in accordance with environmental changes and developments in the specific right to an environment of a particular quality.

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<sup>186</sup> *Draft Principles on Human Rights and the Environment* in Fatma Zohra Ksentini, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> sess, Provisional Agenda Item 4, Annex I, 74, principles 11(b), 15–20, 22 UN Doc E/CN.4/Sub.2/1994/9 (1994).

<sup>187</sup> See, eg, *Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific 1990/1995* [27]; *Ministerial Declaration on Environment and Development in Asia and the Pacific 2000* [1], [14].

<sup>188</sup> Stec and Casey-Lefkowitz, above n 3, 29.

<sup>189</sup> *Ibid* 14, 29.

## Application of the principles to key rights

The following section provides examples of how each of the principle described above may be encapsulated in the procedural rights: access to information; public participation (in decision-making); and access to justice (remedies).

They are illustrative of the issues NHRIs may choose to raise in advocating for procedural rights. For more detailed examples and explanation about implementing and enforcing procedural rights see: Stephen Stec and Susan Casey-Lefkowitz in collaboration with Jerzy Jendroska for the Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2000) <<http://www.unece.org/env/pp/acig.pdf>> at 6 December 2007.

### Access to Information

A1. The concept of 'information' should be construed broadly. It should include:

- information on environmental elements (for example, air, water, land) and environmental issues (for example, desalination, air pollution etc);
- information on projects affecting the environment (for example, construction activities, laws involving the environment); and
- information about the impact of the environment or environmental degradation may have on the ecosystem generally, and on humans, flora, fauna etc.

A2. Anyone and any community should be able to request environmental information from any government agency, other entity conducting a public function, or non-state actor engaging in an activity or practice affecting the environment.

A3. Anyone and any community should be able to request information relating to environmental matters at any stage during a decision-making, or similar, process.

A4. The state should develop and disseminate information about how to exercise participatory rights: for example, policies and procedures on how to access information. This information and the processes for exercising participatory rights should be clear, and the state should facilitate public understanding of this information.

A5. The time frames within which people may request information should be reasonable.

A6. Information should be made available promptly.

A7. Information should be disseminated in widely available and easily accessible forms, which are appropriate for its audience: for example,

- information should be free of charge, or available at a minimal cost, and costs should not be used as financial constraints impeding access to information;
- where electronic access is available, electronic tools, such as interactive databases and registers, should be used;
- where electronic access is not available, information should be available in convenient locations, such as at an information reference centre.

A8. Information should be translated into official languages, or the language of the person or the community affected by the environmental issue, or requesting information, where reasonable.

A9. Information, which is provided to the public, should take the form of actual copies of documents containing the requested information, rather than excerpts or summaries.

A10. If people and communities request information from state and non-state actors, these actors should respond to the requests.

A11. The state should allow requests for information to take different forms: for example, an oral request, a written request.

A12. Dissemination of information should not just be in response to a request. The state should be proactive in disseminating information. Active dissemination may be undertaken through laws or regulations imposing:

- labelling, monitoring and reporting obligations on public authorities and private entities; and
- more rapid information dissemination obligations about imminent or immediate environmental threats and disasters.

A13. Grounds for refusing to provide information should be as restrictive as possible. If a request for information is refused, the state or non-state actor should notify the person or community requesting information about the refusal, and should provide reasons for the refusal and information about review procedures. Valid reasons for refusing information may include:

- the request for information is too general;<sup>190</sup>
- the environment would be adversely affected by disclosure;
- international relations would be adversely affected by disclosure;
- national defence would be adversely affected by disclosure;
- public security would be adversely affected by disclosure;
- the confidentiality of commercial or personal information would be adversely affected by disclosure.

## Public Participation

B1. Anyone and any community should be able to participate in a decision affecting the environment at any stage of the decision-making process.

B2. Participation in decision-making by individuals and communities, which are particularly concerned with a decision, should be especially encouraged, and the views which arise from this participation should be properly considered by decision-makers.

B3. The types of decisions in which people and communities can participate should be broad, including decisions relating to:

- environmental plans and policy;
- environmental law and regulations; and
- specific activities and projects with environmental effects, which are conducted by state as well as non-state actors.

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<sup>190</sup> See Stec and Casey-Lefkowitz, above n 3, 57.

B4. The state should develop and disperse information, policies and procedures about how to participate in decisions. This information should be clear, and the state should facilitate public understanding of this information.

B5. If there are selection processes about who can participate in a decision, these processes should be objective and open.

B6. The time frames within which people may participate in decisions should be reasonable. This means that the time frames should be such that the public can prepare and access information about a project being considered. In addition, public participation should occur at a time which would allow opinions, voiced during a decision-making process, to be considered. For example: the public concerned with a decision should be informed about a proposed activity early in the decision-making process, while options are still open and while they may still influence any final decisions.

B7. Participation in decision-making processes should take different forms, depending on the subject matter of a decision and the public involved. Public participation may involve

- conducting meetings between stakeholders at convenient locations;
- circulating and making available documents relevant to a decision;
- giving the public the opportunity to circulate written statements at meetings or around a community;
- giving the public the opportunity to speak, to ask questions, and to have their questions answered at meetings;
- establishing committees comprised of different stakeholders, which are involved in decision-making;
- calling for comments and submissions.

B8. If people or communities request a state or non-state actor to participate in a decision, the state or non-state actor should respond to these requests.

B9. The state should be proactive in organising opportunities for the public to participate in decisions affecting the environment, even without requests for participation.

B10. Grounds for restricting participation in decision-making should be as restrictive as possible. If a request to participate in a decision is refused, the state should notify the person or community requesting participation about the refusal, and should provide reasons for the refusal and information about review procedures. Valid reasons for refusing participation may include:

- the environment would be adversely affected by disclosure;
- international relations would be adversely affected by disclosure;
- national defence would be adversely affected by disclosure;
- public security would be adversely affected by disclosure;
- the confidentiality of commercial or personal information would be adversely affected by disclosure.

B11. Once a decision is made, the public should be informed of the decision. In informing the public, the state should be guided by the principles guiding the promotion, protection and implementation of participatory rights listed in this Annex.

## Access to Justice

C1. Anyone and any community should be able to have access to justice; that is, access to review procedures and remedies.

C2. Mechanisms facilitating access to justice and remedies should be fair, equitable, prompt, and free or inexpensive.

C3. People and communities should be able to challenge breaches of participatory rights, decisions affecting the environment, and any breaches of national and international law relating to the environment.

C4. Access to justice should include accessing courts, tribunals and other dispute resolution mechanisms. Where necessary, legal aid should be provided. This is particularly important in environmental and human rights cases, which necessarily have a public interest element.

C5. The types of remedies available should include: restitution; compensation; rehabilitation; injunctive relief; and satisfaction and guarantees of non-repetition.<sup>191</sup>

C6. The state should develop and disperse information, policies and procedures about how the public can access justice and the remedies available to them. This information should be clear, and the state should facilitate public understanding of this information.

C7. The concept of standing before tribunals, courts and other decision-making bodies should be broad. Individuals and communities should qualify as having standing before tribunals, courts and other decision-making bodies. Standing should also extend to those who have not been directly harmed by a breach of environmental participatory rights, or environmental laws and regulations.

C8. The time frames within which people and communities may seek access to justice or remedies should be reasonable. People and communities should be given enough time to lodge applications and required documents. Limitation periods on actions should be widely dispersed.

C9. The state should develop measures to assist people in accessing justice and remedies.

C10. Where appropriate, the state should be proactive in organising remedies for people and communities, which are adversely affected by an environmental decision or matter.

C11. If a request for review or a remedy fails/is refused, the relevant entity should notify the person or community requesting review or a remedy, and should provide reasons for the refusal and information about other review procedures.

C12. Decision-making bodies and their members, including the judiciary, should be independent and impartial.

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<sup>191</sup> See generally *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by UN General Assembly Resolution 60/147 on 16 December 2005; Stec and Casey-Lefkowitz, above n 3, 132–3.

## ANNEX 1: PARTIES TO INTERNATIONAL INSTRUMENTS IN THE APF REGION<sup>i</sup>

Name of Instrument	Entry to Force	States Parties <sup>i</sup>	APF States Parties <sup>iii</sup>	Afghanistan	Australia	India	Indonesia	Jordan	Malaysia	Maldives	Mongolia	Nepal	New Zealand	The Philippines	Qatar	Rep. of Korea	Sri Lanka	Thailand	Timor l'Este	Palestine
Bill of Rights																				
International Covenant on Civil and Political Rights	23/3/1976	160/194	14/16	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
International Covenant on Economic, Social and Cultural Rights	3/1/1976	157/194	14/16	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
International Convention on the Elimination of All Forms of Racial Discrimination	4/1/1969	173/194	15/16	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Convention on the Elimination of All Forms of Discrimination against Women	3/9/1981	185/194	15/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	-
Convention on the Rights of the Child	2/9/1990	193/194	16/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Convention Relating to the Status of Refugees	22/4/1954	144/194	6/16	✓	✓	x	x	x	x	x	x	x	✓	✓	x	✓	x	x	✓	-
Convention Governing the Specific Aspects of Refugee Problems in Africa	20/6/1974	49 <sup>iv</sup> /53 AU Members <sup>v</sup>	n/a	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Participatory Rights																				
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters <sup>vi</sup>	3010/2001	41 <sup>vii</sup> /56 UNECE Members <sup>viii</sup>	0/16	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Environment and Biodiversity																				
United Nations Framework Convention on Climate Change	21/3/1994	192/194	16/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Kyoto Protocol to the United Nations Framework Convention on Climate Change	16/2/2005	176/194	14/16	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Convention on Biological Diversity	2912/1993	190/194	16/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Cartagena Protocol on Biosafety to the Convention on Biological Diversity	11/9/2003	143/194	13/16	x	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-

United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa	26/12/1996	192/194	16/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
Hazardous Substances and Toxic Waste																					
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	5/5/1992	170/194	15/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	24/2/2004	116/194	14/16	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Stockholm Convention on Persistent Organic Pollutants	17/5/2004	150/194	14/16	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and Radio Active Waste and to Control the Transboundary Movement of Hazardous Waste within the South Pacific Region	21/10/2001	14/16 <sup>x</sup> (regional)	2/-	x	✓	x	x	x	x	x	x	x	x	✓	x	x	x	x	x	x	-
Joint Convention on the Safety Of Spent Fuel Management and on the Safety of Radioactive Waste Management	18/6/2001	49 <sup>x</sup> /194	2/14	x	✓	x	x	x	x	x	x	x	x	✓	x	x	x	x	x	x	-
Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage	4 //10/ 2003	15 <sup>x</sup> /194	1/16	x	x	x	x	x	x	x	x	x	x	✓	x	x	x	x	x	x	-
Marine																					
United Nations Convention on the Law of the Sea	16/11/1992	150/194	15/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto	2/10/1983	146/194	13/16	x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	x	-
Convention on the Law of the Non-navigational Uses of International Watercourses	-	16/194	2/16	x	x	x	x	✓	x	x	x	x	x	x	✓	x	x	x	x	x	-
International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea	-	10/194	0/16	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969	30/5/1996	120/194	10/16	x	✓	✓	✓	x	✓	✓	x	x	✓	✓	✓	✓	✓	✓	x	x	-

Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971	30/5/1996	102/194	9/16	x	✓	✓	x	x	✓	✓	x	x	✓	✓	✓	✓	✓	x	x	-
Atmospheric																				
Vienna Convention for the Protection of the Ozone Layer	22/9/1988	191/194	15/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Montreal Protocol on Substances that Deplete the Ozone Layer	1/1/1989	191/194	15/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	-
Occupational Health and Safety																				
Convention Concerning Occupational Health Services (C161) <sup>xii</sup>	17/2/1988	26/194	0/16	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Convention Concerning Prevention and Control of Occupational Hazards Caused by Carcinogenic Substances and Agents (C139)	10/6/1976	36/194	1/16	✓	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Convention Concerning Safety and Health in Construction (C167)	11/1/1991	20/194	0/16	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Convention Concerning Safety in the use of Chemicals at Work (C170)	4/11/1993	16/194	1/16	x	x	x	x	x	x	x	x	x	x	x	x	✓	x	x	x	-
Convention Concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration (C148)	11/7/1979	44/194	0/16	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	-
Other																				
Convention on International Liability for Damage Caused by Space Objects	1/9/1972	108 <sup>xiii</sup> /194	11/16	x	✓	✓	✓	✓	x	x	✓	✓	✓	✓	✓	✓	✓	x	✓	-
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques	5/10/1978	73/194	7/16	✓	✓	✓	x	x	x	✓	x	x	✓	x	x	✓	✓	x	x	-
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts	7/12/1978	167 <sup>xiv</sup> /194	8/16	x	✓	x	x	✓	x	✓	✓	x	✓	x	✓	✓	✓	x	x	✓
Convention Against Corruption	14/12/2005	104/194	16/16	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-

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<sup>i</sup> Information on the status of multilateral treaties has been taken from:

- United Nations Treaty Database, which had information current to 15 November 2007
- Database of International Labour Standards (<http://www.ilo.org/ilolex/english/newratframeE.htm>) on 10 January 2008 ;
- the International Maritime Organization's Summary of Status Conventions Table ([http://www.imo.org/Conventions/mainframe.asp?topic\\_id=247](http://www.imo.org/Conventions/mainframe.asp?topic_id=247)) current to 29 February 2008

<sup>ii</sup> Number of countries that can sign international instruments: 194. This excludes: Taiwan; Palestine; Western Sahara

<sup>iii</sup> Number of APF member states that can sign international instruments: 16/17. This excludes Palestine.

<sup>iv</sup> African Union, *List of Countries which Have Signed, Ratified/Accessed to the African Union Convention on OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* <<http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>> at 17 March 2008.

<sup>v</sup> African Union, *Member States* <<http://www.africa-union.org/root/au/memberstates/map.htm>> at 10 January 2008.

<sup>vi</sup> This is a United Nations Economic Commission for Europe ('UNECE') Convention, which non-UNECE Member States can sign.

<sup>vii</sup> *Parties and Signatories to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* <<http://www.unece.org/env/pp/ratification.htm>> at 10 January 2008.

<sup>viii</sup> *Dates of Membership of the Economic Commission for Europe* <[http://www.unece.org/oes/member\\_countries/member\\_countries.htm](http://www.unece.org/oes/member_countries/member_countries.htm)> at 10 January 2008.

<sup>ix</sup> Pacific Islands Forum Secretariat, *Convention to Ban the Importation into Forum Island Countries of Hazardous And Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region [Waigani Convention] – Status Report*

<[http://www.forumsec.org/UserFiles/File/Waigani\\_Convention\\_Status\\_Report.pdf?phpMyAdmin=a2498005399765db990bdeaeef994e9d1](http://www.forumsec.org/UserFiles/File/Waigani_Convention_Status_Report.pdf?phpMyAdmin=a2498005399765db990bdeaeef994e9d1)> at 17 March 2008.

<sup>x</sup> *Latest Status of the Joint Convention on the Safety Of Spent Fuel Management and on the Safety of Radioactive Waste Management*

<[http://www.iaea.org/Publications/Documents/Conventions/jointconv\\_status.pdf](http://www.iaea.org/Publications/Documents/Conventions/jointconv_status.pdf)> at 10 January 2008.

<sup>xi</sup> Latest Status of the *Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage* <[http://www.iaea.org/Publications/Documents/Conventions/protamend\\_status.pdf](http://www.iaea.org/Publications/Documents/Conventions/protamend_status.pdf)> at 10 January 2008.

<sup>xii</sup> The Conventions with (C[number]) after the title are International Labour Organization ('ILO') Conventions. This table only lists a few, more general, ILO Conventions. More specific ILO Conventions include: *Convention Concerning Protection against Hazards of Poisoning Arising from Benzene* (C136) (entered into force 27 July 1973); *Convention Concerning the Protection of Workers against Ionising Radiations* (C115) (entered into force 17 June 1962); *Convention Concerning Safety in the Use of Asbestos* (C162) (entered into force 6 June 1989). For more ILO Conventions see International Labour Organization, *ILOLEX – Database of International Labour Standards* <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>xiii</sup> *Convention on International Liability for Damage Caused by Space Objects* <<http://www.unoosa.org/oosa/SpaceLaw/liability.html>> at 10 January 2008.

<sup>xiv</sup> *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 5 December 2007*

<[http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)> 10 January 2008.