



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

# Human Rights and the Environment

## Reference Paper<sup>1</sup>

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### **APF 12**

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<sup>1</sup> This Reference Paper was originally provided to the Advisory Council of Jurists (ACJ) as background for its consideration of the reference on human rights and the environment. The current paper has been supplemented by comments from the Jurists. The paper was prepared by the Asia Pacific Forum of National Human Rights Institutions (APF) Secretariat, in particular, staff and interns: Stephen Clark, Kieren Fitzpatrick, Greg Heesom, Sorcha O'Carroll and Christina Trahanas.

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## List of Abbreviations

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Aarhus Convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
ACJ	Advisory Council of Jurists
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
African Charter	African (Banjul) Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
American Convention	American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
AP I	Additional Protocol I to the Geneva Conventions of 1977
APF	Asia Pacific Forum of National Human Rights Institutions
ASEAN	Association of South East Asian Nations
ATCA	Alien Tort Claims Act (USA)
AU	African Union
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
Biosphere Conference	Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation
Brundtland Commission	See World Commission
C169	Convention Concerning Indigenous and Tribal Peoples in Independent Countries
CEDAW	(UN) Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	(UN) Committee on Economic, Social and Cultural Rights
CRC	(UN) Convention on the Rights of the Child
Draft Principles	Draft Principles on Human Rights and the Environment
Earth Summit	See UNCED
ECHR	European Court of Human Rights
ECOSOC	(UN) Economic and Social Council
EIA Convention	Convention on Environmental Impact Assessment in a Transboundary Context
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EU	European Union
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
FAO	Food and Agriculture Organisation
HRC	UN Human Rights Committee
HRW	Human Rights Watch
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
ILC Draft Articles	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
ILO	International Labour Organization
IUCN	International Union for the Conservation of Nature
Johannesburg Declaration	Johannesburg Declaration on Sustainable Development
MDGs	Millennium Development Goals
MNEs	Multinational enterprises
NGOs	Non-governmental organisations
NHRI	National Human Rights Institution
OAU	Organization of African Unity

OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
Optional Protocol	Optional Protocol to the International Covenant on Civil and Political Rights
PIC	Prior Informed Consent
POPs	Persistent organic pollutants
Protocol of San Salvador	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
Refugee Convention	Convention Relating to the Status of Refugees
Rio Conference	See UNCED
Rio Declaration	Rio Declaration on Environment and Development
Rotterdam Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
Stockholm Conference	UN Conference on the Human Environment
Stockholm Convention	Stockholm Convention on Persistent Organic Pollutants
Stockholm Declaration	Declaration of Principles for the Preservation and Enhancement of the Human Environment
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCCUR	UN Conference on the Conservation and Utilisation of Resources
UNCED	UN Conference on Environment and Development
UNCHR	UN Commission on Human Rights
UNCLOS	UN Convention on the Law of the Sea
UNECE	UN Economic Commission for Europe
UNEP Draft Principles	UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States
UNEP	UN Environmental Program
UNESCO	UN Economic, Social and Cultural Organisation
UNGA	UN General Assembly
UNSR	UN Special Rapporteur on Human Rights and the Environment
US	United States of America
Waigani Convention	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
Water Convention	Convention on the Protection and Use of Transboundary Watercourses and International Lakes
World Commission	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development

## Preface

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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 member-based organisation that supports, through cooperation, the establishment and development of national human rights institutions (NHRIs), which protect and promote the human rights of the peoples of the region.

The APF is comprised of independent NHRIs. Full members of the APF are those NHRIs that have been established in compliance with the minimum standards of the United Nations General Assembly (UNGA) endorsed 'Principles relating to the Status of National Institutions' (Paris Principles). A complete list of APF full members, candidate and associate members is at Annex 1. Representatives from each of the full member NHRIs constitute the APF Forum Council (Forum Council), which is the decision-making body of the APF.

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

### The Advisory Council of Jurists

At the Third Annual Meeting of the APF held in Indonesia in September 1998, APF members established an Advisory Council of Jurists (ACJ) to provide NHRIs with jurisprudential guidance on contemporary human rights issues.

The ACJ advises the Forum Council 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. A list of the current members of the ACJ is at Annex 2.

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 the need for development of 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); the death penalty (2000); and the regulation of child pornography on the internet (2000).

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

### Terms of 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 for the consideration and approval of the APF. In February 2007, these terms of reference were distributed to APF members for comment and approval. The terms of reference subsequently adopted by APF are:

*The Asia Pacific Forum of National Human Rights Institutions refers to the Advisory Council of Jurists to advise and make recommendations as to international law,*

*instruments and standards relevant to environment and the right to life. In particular the Advisory Council of Jurists is asked to consider:*

- 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 that 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.*

On the basis of the terms of reference a questionnaire was distributed to the APF's member NHRIs in April 2007, asking them to outline in as much detail as possible the laws and practices relating to human rights and the environment in their state and/or relevant to their mandate. 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; and
- reports by local, national or international non-governmental organisations (NGOs).

This reference paper incorporates information provided by member NHRIs in response to the questionnaire, as well as independent research carried out by the APF Secretariat.

This paper does not intend to answer each question posed in the terms of reference, but rather it aims to facilitate consideration of the terms of reference by the ACJ at its sixth session, to be held in conjunction with the 12<sup>th</sup> annual meeting of the APF in Sydney, Australia, from 24 to 27 September 2007.

## Structure of the Paper

There are four parts to this paper.

Part 1 addresses the issues raised in the terms of reference, providing background information for the ACJ in considering the current reference. It is divided into sections:

- section 1 provides an introduction to the development of international environmental law generally, and, in particular, as it relates to human rights;
- section 2 outlines the sources of international law; and
- sections 3 to 9 address the terms of reference.

Parts 2 and 3 incorporate information provided by member NHRIs in response to the questionnaire, as well as independent research carried out by the APF Secretariat.

Part 4 contains annexures, including a chronology of the key environmental instruments at Annex 3.

## PART 1 - CONSIDERATION OF ISSUES IN THE TERMS OF REFERENCE

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# Section 1 – The Development of International Environmental Law

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While the connection between the protection of human rights and the condition of the environment has been widely recognised in the international system, the precise nature of that relationship remains a subject of dispute. This section outlines the development of international environmental law and the relationship between international environmental law and human rights, in order to facilitate the ACJ's consideration of this reference. A table outlining major treaties, conferences and other developments is provided at Annex 3.

## International Environmental Law ~ From 1800 to 1972

International interest in the environment can be traced back to the 19<sup>th</sup> century and the development of early bilateral treaties dealing with conservation of wildlife, notably fisheries, birds and seals.<sup>2</sup>

With increased industrialisation and greater demand for natural resources, states developed an increasing awareness of, and concern for, the equitable and appropriate use of common natural resources, such as rivers and watercourses. This, in turn, led to the first use of international arbitration to settle environment related disputes. The first case, the *Bering Sea Fur Seals Fisheries Arbitration (Great Britain v United States of America)*,<sup>3</sup> dealt with a dispute between the United States (US) and Great Britain over Great Britain's alleged over-exploitation of fur seals beyond its territorial jurisdiction. While recognising the right of a state to exploit its resources, this case affirms the obligation to act in good faith and a related prohibition on the exercise of one's rights solely to cause injury to another. The second case, the *Trail Smelter Case (United States of America v Canada)*,<sup>4</sup> dealt with a dispute between the US and Canada over the latter's emission of noxious fumes which subsequently had a detrimental impact on the bordering American State of Washington. The Tribunal stated: '*no State has the right to use or to permit the use of its territory in such a manner as to cause injury ... to the territory of another or the properties or persons therein*'.<sup>5</sup>

With the creation of the United Nations (UN) following World War II, international awareness of and concern for the environment was evident in the mandates provided to UN organisations such as the Food and Agriculture Organisation (FAO) and the Economic, Social and Cultural Organisation (UNESCO). This awareness and concern was not, however, limited to states, as was apparent in the establishment in 1948 of the International Union for the Protection of Nature (now the International Union for the Conservation of Nature and Natural Resources (IUCN)). A unique organisation of government and non-government agencies, it has since been at the forefront in the development of international rules protecting the environment.

The first international conference on the issue of the environment, the UN Conference on the Conservation and Utilisation of Resources (UNCCUR) was convened by the UN Economic and Social Council (ECOSOC) and held in 1949. Focusing on resources, potential critical shortages and conservation, the Conference was notable for its clear recognition of the inter-relationship between conservation and development. This is perhaps one of the first indications of an expansion of the international community's concern from the protection of the natural environment, such as flora and fauna, to a broader concern for the environment in all its aspects.

There followed a number of conferences and international resolutions dealing with issues such as conservation of the maritime environment, nuclear energy, atomic radiation, the dumping of

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<sup>2</sup> Philippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> ed, 2003) 26.

<sup>3</sup> *Moore's International Arbitration* (1893) 755 in Sands, above n 2, 29.

<sup>4</sup> (1941) 3 RIAA 1905.

<sup>5</sup> *Ibid.*

radioactive waste, and maritime and atmospheric pollution, some of which subsequently led to the adoption of international instruments in these areas.<sup>6</sup>

In 1949, the decision of the International Court of Justice (ICJ) in *Corfu Channel (United Kingdom v Albania) (Merits)*<sup>7</sup> provided another significant development in terms of state responsibility, reaffirming every state's obligation not to: '*allow knowingly its territory to be used for acts contrary to the rights of other States*'.<sup>8</sup> This decision was subsequently affirmed and developed in the *Lac Lanoux Arbitration (France v Spain)*,<sup>9</sup> where the principle was applied to riparian rights in the context of shared rivers.<sup>10</sup>

By the late 1960s, the international community's concern about human impact on the environment, including the effects of air and water pollution, deforestation and overgrazing, led UNESCO to convene the Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation (Biosphere Conference). The final report of the Biosphere Conference recognised that significant environmental changes had been taking place: '*man now has the capability and responsibility to determine and guide the future of his environment, and ... [there is a need for] national and international corrective action*'.<sup>11</sup>

It was this conference and its subsequent report which led the UN to convene the 1972 United Nations Conference on the Human Environment.

## International Environmental Law ~ From 1972 to 2007

The 1972 UN Conference on the Human Environment (Stockholm Conference) and the subsequent establishment of the UN Environmental Program (UNEP) are considered to be the beginning of contemporary international environmental law.<sup>12</sup>

The Stockholm Conference was convened to focus the international community's attention on, and provide a basis for detailed consideration of, the human environment.<sup>13</sup> Prior to the Conference, the UN Secretary-General recommended that the Conference Preparatory Committee draft a declaration on the human environment addressing the '*rights and obligations of citizens and Governments with regard to the preservation and improvement of the human environment*'.<sup>14</sup> The declaration subsequently endorsed by the Conference, the *Declaration of Principles for the Preservation and Enhancement of the Human Environment (Stockholm Declaration)*, contained 26 principles, the first of which states:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*

The Declaration expressed concern about the preservation and enhancement of the human environment, recognised that both natural and man-made environments were essential to the enjoyment of basic human rights, and noted that the protection and improvement of the environment was a major issue affecting all peoples.

The Declaration contains further principles dealing with:

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<sup>6</sup> See for example, the 1993 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water and the 1954 International Convention for the Preservation of Pollution of the Sea by Oil.

<sup>7</sup> [1949] ICJ Rep 4.

<sup>8</sup> Ibid 22.

<sup>9</sup> (1957) 12 RIAA 281.

<sup>10</sup> See also Sands, above n 2, 34.

<sup>11</sup> Ibid 35.

<sup>12</sup> William Beardslee, 'International Law and the Environment: The Need for an Aggregate Organization' (1996) 5 *Journal of International Law and Practice* 379, 380.

<sup>13</sup> 45 UN ECOSOC, Annexes, Agenda Item 12 (Doc E/4466/Add.1) 2 (1968).

<sup>14</sup> UN Doc A/CONF.48/PC/2, [16] (1970).

- cooperation in addressing adverse environmental effects;
- inter-generational equity in the exploitation of natural resources;
- the inclusion of environmental considerations in economic development;
- the need to reduce environmental pollution;
- the correlation between environmental pollution and threats to health;
- state responsibility for activities within their jurisdiction or control; and
- the obligation to compensate victims of pollution and other environmental damage.

The Stockholm Conference can be credited with facilitating greater international awareness of environmental issues and concerns, and promoting greater international cooperation and action in addressing those concerns. The results can be seen in the continued development of international laws relating to the environment, the creation of new international institutions, and greater coordination on environmental issues between existing institutions and states.

One of the most significant achievements arising from the Conference recommendations was the creation of the UNEP. This UN agency was made responsible for addressing environmental issues at the global and regional level with a mandate to coordinate the development of environmental policy consensus amongst states. Since its creation, in 1972, it has been instrumental in the development of over 30 international and regional treaties.

The Stockholm Conference also precipitated the development of regional bodies (such as the Organisation for Economic Co-operation and Development (OECD) Environment Committee), as well as regional multilateral agreements on migratory species, mining and pollution. It is also credited with the gradual acceptance by international organisations, such as the World and Regional Development Banks, of the need to include environmental considerations in their planning and operational activities.

In the 10 years that followed the Stockholm Conference, several significant developments occurred:

- the *UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States (UNEP Draft Principles)* in 1978;
- the *World Conservation Strategy* in 1980;
- the *Montevideo Programme* in 1981; and
- the *World Charter for Nature* in 1982.

The *UNEP Draft Principles* contain 15 principles dealing with the use of shared national resources (excluding global common (resources) such as the atmosphere). Though expressly non-binding, the principles are important in that they bear close resemblance to those subsequently adopted in 1992 at the UN Conference on the Environment and Development (UNCED). In this way, the *UNEP Draft Principles* foreshadowed significant developments in international environmental law and policy dealing with, amongst other things:

- cooperation to control, prevent, reduce and eliminate adverse environmental effects;
- environmental impact assessments;
- the provision of information to, and consultation with, states and the public;
- emergency response; and
- access to administrative and judicial remedies (in a non-discriminatory manner).

The 1980 *World Conservation Strategy* was developed by a number of international and NGOs.<sup>15</sup> Highlighting the connection between conservation and development, the Strategy utilised the term 'sustainable development' to argue for the maintenance of ecosystems, genetic diversity and sustainable use of all natural resources. In so doing, it prompted the creation of national conservation strategies that were soon to develop in many states around the world.

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<sup>15</sup> FAO, IUCN, UNESCO, UNEP and WWF.

The 1981 *Montevideo Programme* was a plan of action for the UNEP over a 10 year period from 1982 to 1992. It led to the development of international and regional treaties and subordinate instruments addressing key environmental concerns, such as maritime and atmospheric pollution, ozone depletion, and toxic and dangerous wastes.

The adoption by the UNGA of the 1982 *World Charter for Nature* was significant because the text affirmed the fundamental value of nature and the environment.<sup>16</sup> Leaving anthropocentric concerns to one side, the Charter focuses on environmental protection, stating that '*every form of life is unique, warranting respect regardless of its worth to man*', and that the utilisation of natural resources should only occur in a manner that maintains the '*stability and quality of nature*'. The Charter recognised the relationship between the natural environment and human survival in the following preambular paragraph: '*Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems...*'.

Like the *UNEP Draft Principles* and the *World Conservation Strategy*, the provisions in the *World Charter for Nature* include concepts such as sustainable development, environmental impact assessment, and the obligation to provide information. These concepts also foreshadow later developments in international environmental law.

Ten years after the Stockholm Conference, the UN convened the World Commission on Environment and Development (World Commission or Brundtland Commission).<sup>17</sup> This independent body was established outside the UN system with a mandate to address growing concern '*about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development*'.<sup>18</sup>

In establishing the World Commission, the UNGA recognised that environmental problems were clearly global in nature and that it was in the common interest of all nations to establish policies for sustainable development. The World Commission was, therefore, asked to:

- examine and formulate realistic proposals for dealing with environmental and development issues;
- propose new forms of international cooperation that would lead to necessary change; and
- raise the level of understanding of environmental problems.

The subsequent report, *Our Common Future*,<sup>19</sup> was published in 1987. It recognised the connection between the environment and human rights in Principle 1 of the *Stockholm Declaration*; noted that several states had included a right to an adequate environment; and stated that states had a responsibility to protect the environment in their Constitutions or laws.<sup>20</sup>

Notwithstanding these developments the Report lamented the state of international environmental law: 'international law is being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the ecological basis of development'.<sup>21</sup> It called for greater action at the national and international level to fill gaps in the law; the adoption of a universal declaration on environmental protection and sustainable development; and additional instruments for dealing with disputes on environment and resources management. The Report further recommended that states take steps to recognise reciprocal rights and responsibilities relating to the environment, such as the responsibility to establish adequate environmental

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<sup>16</sup> GA Res 37/7, UN GAOR, 37<sup>th</sup> sess, 48<sup>th</sup> plen mtg UN Doc A/Res/37/7 (1982).

<sup>17</sup> Process of Preparation of the *Environmental Perspective to the Year 2000 and Beyond*, GA Res 161, UN GAOR, 38<sup>th</sup> sess, 102<sup>nd</sup> plen mtg, UN Doc A/Res/38/161 (1983).

<sup>18</sup> *Report of the World Commission on Environment and Development*, GA Res 187, UN GAOR, 42<sup>nd</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/Res/42/187 (1987). A copy of this resolution is electronically available at <<http://www.un.org/documents/ga/res/42/ares42-187.htm>> (at 3 April 2008).

<sup>19</sup> Annex to *Report of the World Commission on Environment and Development*, GA Res 187, UN GAOR, 42<sup>nd</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/Res/42/187 (1987). For an electronic version of this report see <<http://www.un-documents.net/wced-ocf.htm>> (at 3 April 2008).

<sup>20</sup> *Ibid* [81].

<sup>21</sup> *Ibid* [97].

protection standards and to make relevant information available to the public.<sup>22</sup> It suggested the desirability of a right to environment, but did not claim that such a right already existed in customary international law.

Operating alongside the World Commission, an Expert Group on Environmental Law proposed 22 legal principles that were intended to reflect existing and nascent legal obligations under existing international instruments (that is, customary law, treaty law, declarations and resolutions). Annexed to the World Commission Report, the principles refer to:

- sustainable development and intergenerational equity;
- positive state obligations regarding the development of standards, assessments, monitoring, notification, access to information and due process;
- equitable use of shared resources;
- responsibility for transboundary harm;
- non-discrimination in relation to remedies;
- contingencies for emergency response; and
- the peaceful settlement of disputes.

Of particular interest to discussion about a human right to the environment is Principle 1, which states that: '*All human beings have the fundamental right to an environment adequate for their health and well-being*'.

While the World Commission considered environmental issues at the macro level, the international community continued to respond to specific environmental threats. The international response to the Chernobyl, Ukraine, for example, led to the adoption of a number of international instruments designed to address the transborder impact of nuclear accidents. While these instruments do not specifically refer to human rights, the clear intent of the instruments is to protect both the state and its citizens from the immediate and potential transborder impact of nuclear and radiological accidents.<sup>23</sup> Incidents like those at Chernobyl and Bhopal, India also led to the adoption of a number of international instruments dealing with environmental hazards including: dangerous chemicals and pesticides, persistent organic pollutants, hazardous waste, and their transfer and disposal.

In addition, a more diverse group of international organisations were becoming increasingly aware of the interaction between their mandates and the environment. The International Labour Organization's (ILO) *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (C169)<sup>24</sup> is a particularly relevant example of this. In recognising the link between Indigenous Peoples and their environment, C169 called for special measures to be adopted for safeguarding the environment (art 4) and for participation in formulating national and regional decision-making and development plans that may affect Indigenous Peoples (arts 2 and 7). In particular, art 7(3) provides: '*Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit*'.

Further resolutions and declarations were also drafted, including the *Hague Declaration on the Environment*,<sup>25</sup> done on 11 March 1989. Signed by representatives of 24 States<sup>26</sup> attending the International Summit on the Protection of the Global Atmosphere, the Declaration clearly recognised the connection between human rights and the environment in its first paragraph:

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<sup>22</sup> Ibid [83].

<sup>23</sup> *Convention on Early Notification of a Nuclear Accident* (entered into force 27 October 1986) <<http://www.iaea.org/Publications/Documents/Conventions/cenna.html>> at 3 April 2008; *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency* (entered into force 26 February 1987) <<http://www.iaea.org/Publications/Documents/Conventions/cacnare.html>> at 3 April 2008.

<sup>24</sup> Adopted 27 June 1989.

<sup>25</sup> (1989) 28 ILM 1308.

<sup>26</sup> Participants included: Brazil, Canada, Côte d'Ivoire, Egypt, France, Federal Republic of Germany, Hungary, Italy, Japan, Kenya, Malta, the Netherlands, Norway, Senegal, Spain, Sweden, Tunisia, Venezuela, and Zimbabwe. The States from the APF region, which attended, were: Australia, India, Indonesia, Jordan, and New Zealand.

'The right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world'.

In the same year, recognition of the impact of the environment on human rights was more clearly established in the *Convention on the Rights of the Child*<sup>27</sup> (CRC). While the Convention does not include a specific human right to the environment, the link is made in art 24(2)(c), which calls for appropriate measures to combat disease and malnutrition '*through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution*' (emphasis added). The Article goes on to require the provision of information and education to all segments of society on hygiene and environmental sanitation (art 24(2)(e)).

By 1992, the environment was becoming an integral issue in broader concerns for economic, social and cultural development. The international community had also accepted the new and discrete area of international environmental law and its legitimate role in facilitating regional and international action in relation to the environment; however, the initial emphasis on the environment and 'human rights' found in *Stockholm Declaration* had now been replaced by a focus on the environment and 'sustainable development'. This change in focus came into stark focus in the UN Conference on the Environment and Development (UNCED).

Called following consideration of the World Commission Report, UNCED (Rio Conference or Earth Summit) met in Rio de Janeiro, Brazil, in 1992. Attended by 176 States, and over 1000 international organisations, NGOs and corporations, discussion at the Conference was heavily influenced by the competing concerns of developing and developed countries. China and the G77 objected to an eco-centric approach, arguing that this would give priority to the natural environment at the expense of their development goals.<sup>28</sup> They also objected to proposals for the inclusion of an environmental right or a clear statement of state responsibility in regard to environmental protection, for fear that such a provision could create an avenue for international interference in domestic development projects.<sup>29</sup> In addition, they sought to ensure that developed countries took greater responsibility for addressing the environmental damage that their development had contributed and for which they had the technological and economic capacity to respond. This conflict is evident in the drafting of the Conference's *Rio Declaration on Environment and Development (Rio Declaration)*.

While the *Stockholm Declaration* clearly connected human rights to the environment, Principle 1 of the Rio Declaration is devoid of any such reference, stating more broadly: '*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*'. The concept of sustainable development is developed further in Principle 3, which refers to the need to *equitably* address the developmental and environmental needs of present and future generations. The centrality of the environment is then more clearly expressed in Principle 4, which states that environmental protection is an integral part of the development process.

Notwithstanding these statements, the declaration fails to develop the notion of a human right to an environment as first established in the *Stockholm Declaration* 20 years before. That said, the Rio Declaration affirms and extends many of the principles contained in the Stockholm Declaration, particularly those dealing with:

- cooperation in addressing adverse environmental effects;
- the need to reduce environmental pollution;
- the correlation between environmental pollution and threats to health;
- the development of national legislation and standards;

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<sup>27</sup> Entered into force 2 September 1990.

<sup>28</sup> Jeffrey D Kovar, 'A Short Guide to the Rio Declaration' (1993) 4 *Colorado Journal of International Environmental Law and Policy* 119, 124.

<sup>29</sup> Ilena Porras, 'The Rio Declaration: A New Basis for International Cooperation' in Philippe Sands (ed), *Greening International Law* (1993) 24.

- state responsibility for activities within their jurisdiction or control; and
- the obligation to compensate victims of pollution and other environmental damage.

The *Rio Declaration*, at Principles 13 and 14, also reinforces what had become known as the Precautionary Principle and the Polluter Pays Principle. These respectively provide:

- if an action or policy might cause severe or irreversible environmental harm, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who would advocate taking the action (Precautionary Principle and
- the polluting party pays for the damage done to the natural environment (Polluter Pays Principle).

In addition, Principle 10 of the Declaration affirmed and sought to extend procedural rights regarding the provision of information, public participation in decision-making and access to administrative and judicial proceedings. This principle was later to be included in a range of environmental conventions and, in 2001, the seminal convention in this regard, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, in 2001.

A more practical action plan for global cooperation and national action in the pursuit of sustainable development was also adopted at UNCED, *Agenda 21*. *Agenda 21* covered an extensive range of issues including: protection of the atmosphere and maritime environment; deforestation; desertification; biodiversity; biotechnology; and toxic and hazardous materials. It also set out the objectives, activities and the means for implementing actions relating to these issues in support of sustainable development.

A number of international instruments were also opened for signature at UNCED, notably:

- the *United Nations Framework Convention on Climate Change*;<sup>30</sup> and
- the *Convention on Biological Diversity*.<sup>31</sup>

The period following UNCED continued to see the development of new international environmental law instruments, including a number foreshadowed at UNCED. The growing problem of, and increasing international concern about, hazardous waste, toxic chemicals and pollution, led to the development of four chemical conventions:

- 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*<sup>32</sup> (*Waigani Convention*);
- the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*<sup>33</sup> (*Basel Convention*);
- the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*<sup>34</sup> (*Rotterdam Convention*); and

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<sup>30</sup> Entered into force 21 March 1994.

<sup>31</sup> Entered into force 29 December 1993.

<sup>32</sup> Entered into force 21 October 2001.

<sup>33</sup> Entered into force 4 May 1992. The *Basel Convention* is a global treaty, the purpose of which is to reduce and possibly eliminate the generation and transboundary movement of hazardous waste (including toxic, poisonous, explosive, corrosive, flammable, ecotoxic and infectious wastes). The Convention also aims at preventing illegal trafficking in waste. Subsequent amendments have included a prohibition on the export of hazardous waste, for any reason, from a member state of the OECD to non-OECD countries, and the *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal* (opened for signature 10 December 1999).

<sup>34</sup> Entered into force 24 February 2004. The *Rotterdam Convention* is a global treaty, the aim of which is to reduce the risk to human health and the environment from the international trade in hazardous chemicals (including 27 pesticides (including five severely hazardous formulations) and five industrial chemicals). Under the Convention, countries nominate chemicals which have been severely restricted or banned in their country. Once approved for inclusion in the Prior Informed Consent (PIC) procedure, these chemicals are subject to controls in international trade.

- the *Stockholm Convention on Persistent Organic Pollutants*<sup>35</sup> (*Stockholm Convention*).

These Conventions aim to support the environmentally sound management of toxic chemicals and hazardous waste, and to respond directly to the practice of shipping hazardous waste from developed to developing countries. Broader environmental concerns also led to conventions, protocols and/or agreements on:

- highly migratory fish stocks;<sup>36</sup>
- desertification;<sup>37</sup>
- civil liability;<sup>38</sup> and
- climate change.<sup>39</sup>

While not strictly environmental in focus, at the UN Millennium Summit in September 2000, world leaders agreed to a set of time bound and measurable goals/targets to, amongst other things, combat environmental degradation and ensure sustainable development. The *United Nations Millennium Declaration*<sup>40</sup> addresses the issue of sustainable development and intergenerational equity at paragraph 21, providing that the international community must:

*spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.*

The relevant *Millennium Development Goals* (MDGs) provide that states should:

- integrate the principles of sustainable development into country policies and programmes;
- reverse the loss of environmental resources;
- reduce by half the proportion of people without sustainable access to safe drinking water; and
- achieve significant improvement in lives of at least 100 million slum dwellers, by 2020.

The MDGs are intended to provide a framework for the international community and the UN system to work coherently together towards these common objectives.

Following the Millennium Summit and a full 10 years after UNCED, the international community again came together in Johannesburg in 2002 at the World Summit on Sustainable Development (WSSD). The WSSD was not intended to break new ground in terms of the adoption of new international environmental instruments, but rather was focussed on the eradication of poverty and the review of achievements post UNCED. While actionable outcomes were limited, it is notable that the *Johannesburg Declaration on Sustainable Development* (*Johannesburg Declaration*) reiterates the need for sustainable development in a manner that promotes environmental protection and intergenerational equity.

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<sup>35</sup> Entered into force 17 May 2004. The *Stockholm Convention* is a global treaty, the objective of which is to protect human health and the environment from persistent organic pollutants (POPs). POPs include organochlorine pesticides and industrial chemicals, and their by-products. They are toxic to humans and wildlife, resist degradation in the environment, bioaccumulate in fatty tissue, are semi-volatile, and are capable of travelling vast distances via water and air. The Convention aims to eliminate the production, use and emissions of POPs by setting out the actions to be taken by States Parties to reduce and eliminate releases of by-product POP chemicals.

<sup>36</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (entered into force 11 December 2001); *United Nations Convention on the Law of the Sea* (entered into force 16 December 1994).

<sup>37</sup> *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (entered into force 26 December 1996).

<sup>38</sup> *Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969* (entered into force 30 May 1996).

<sup>39</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (entered into force 16 February 2005).

<sup>40</sup> GA Res 2, UN GAOR, 55<sup>th</sup> sess, 8<sup>th</sup> plen mtg, UN Doc A/55/L.2 (2000).

## Regional Environmental Developments ~ Asia-Pacific Region

In addition to these international developments, there have also been a number of regional developments. The most important of these, from an international environmental law standpoint is the *Waigani Convention*. The objective of the *Waigani Convention* is to stop the import of hazardous and radioactive waste into the South Pacific region; to minimise production within the region of this type of waste; and to ensure the environmentally sound management and disposal of already existing waste.<sup>41</sup> Once a state becomes a party to the *Waigani Convention*, the country is eligible for technical and financial assistance to facilitate the management and cleanup of hazardous and radioactive material.

A number of Declarations and Ministerial statements have also been made.

In 1990, the *Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific* was adopted in Bangkok, Thailand.<sup>42</sup> It affirms the right of individuals and 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 decisions likely to affect their environment.<sup>43</sup>

In 1991, a similar Declaration, the *Arab Declaration on Environment and Development and Future Perspectives*, was issued by the Arab States and referred to the right of individuals and NGOs to obtain information about environmental issues. A decade later, in preparation for the WSSD in 2002, the Arab Ministers Responsible for Development, Planning and Environment issued the *Arab Ministerial Declaration on Sustainable Development*:

*[2] Achieving Sustainable development requires: ...*

*6. Development of economic and environmental policies that take into account the conservation and development of non renewable energy, rationalize energy use, and mitigate the negative impacts on the environment and human health. ...*

*Exerting greater effort towards the integration between the strategies of health and environment, specially regarding the provision of safe drinking water and food, treatment of municipal waters and solid waste, controlling and reducing the risk associated with chemicals and pollution in all its forms, as well as genetically modified materials, and the establishment of nuclear safety in the Arab Region.<sup>44</sup>*

## Regional Environmental Developments ~ Europe

In Europe, significant regional developments came about through an expansion of the work of the UN Economic Commission for Europe (UNECE), which, in the decade preceding 2000, negotiated a number of environmental treaties, all of which are now in force.

The precursor to these was the *Convention on Long-range Transboundary Air Pollution*, which entered into force on 16 March 1983, and sought to limit and prevent air pollution including long-

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<sup>41</sup> The Convention covers toxic, poisonous, explosive, corrosive, flammable, ecotoxic, infectious and radioactive wastes.

<sup>42</sup> A/CONF.151/PC/38 (16 October 1990).

<sup>43</sup> Ibid [27]. Paragraph 27 states: *'the right of individuals and non-governmental organizations 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 decisions likely to affect their environment'*.

<sup>44</sup> Arab Declaration on Environment and Development and Future Perspectives, (Cairo, September 1991) A/46/632 cited in UN Doc E/CN.4/Sub.2/1992/7, 20. Text available at: <http://www.escwa.org.lb/divisions/sdpd/wssd/arab.html>. [I wanted to access this site to check the quote above because the formatting seems strange; however, HREOC blocks my access.]

range transboundary air pollution. Parties would develop policies and strategies to combat the discharge of air pollutants through exchanges of information, consultation, research and monitoring.

The *European Charter on Environment and Health*, adopted by Environment and Health Ministers from the European region on 8 December 1989, links health and wellbeing with a clean and harmonious environment. It states that every individual is entitled to:

- an environment conducive to the highest attainable level of health and wellbeing;
- information and consultation on the state of the environment, and on plans, decisions and activities likely to affect both the environment and health; and
- participate in the decision-making process.

The 1992 *Convention on the Transboundary Effects of Industrial Accidents* is aimed at protecting human beings and the environment against industrial accidents. It promotes active international cooperation between the contracting parties, before, during and after an industrial accident. The Convention was adopted in Helsinki on 17 March 1992 and entered into force on 19 April 2000. A subsequent Protocol deals with civil liability in this regard.<sup>45</sup>

Also adopted in 1992, the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*<sup>46</sup> (*Water Convention*) is intended to strengthen national measures for the protection and ecologically sound management of transboundary surface waters and groundwaters. The Convention obliges Parties to prevent, control and reduce water pollution from point and non-point sources, and includes provisions for monitoring, research and development, consultations, warning and alarm systems, mutual assistance, institutional arrangements, and the exchange and protection of information, as well as public access to information. A subsequent Protocol also deals with the issues of civil liability in this regard.<sup>47</sup>

In 1997, the region adopted the *Convention on Environmental Impact Assessment in a Transboundary Context*<sup>48</sup> (*EIA Convention*). The *EIA Convention* sets out the obligations of parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of states to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.

Finally, in 1998, the *Aarhus Convention* was adopted. The *Aarhus Convention* clearly links environmental rights and human rights in its preambular paragraphs, which refer to the right of every person 'to live in an environment adequate to his or her health and well-being'. While such a right is not included among its operative provisions, the Convention establishes a number of procedural rights with regard to the environment. These include:

- the right of everyone to receive environmental information that is held by public authorities ('access to environmental information');
- the right to participate in environmental decision-making;
- access to justice, that is, the right to review procedures and to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

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<sup>45</sup> *Protocol on Civil Liability for Damage and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents* (opened for signature 21 May 2003). Note, this is a joint instrument to the *Convention on the Transboundary Effects of Industrial Accidents* and to the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*.

<sup>46</sup> Entered into force 6 October 1996.

<sup>47</sup> Protocol on Civil Liability, adopted in Kiev on 21 May 2003.

<sup>48</sup> Entered into force 10 September 1997.

The Convention thus seeks to promote greater government accountability for environmental protection by facilitating public oversight. The then UN Secretary-General, Kofi Annan, stated that the Convention is:

*by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities ... it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.*<sup>49</sup>

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<sup>49</sup> United Nations Economic Commission for Europe, *Aarhus Clearing House for Environmental Democracy* <<http://aarhusclearinghouse.unece.org/about.cfm>> at 3 April 2008.

## Section 2 – Sources of International Law

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It is generally recognised that art 38 of the *Statute of the International Court of Justice* provides a clear statement of the sources of international law. Article 38(1) provides:

*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

*a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;*

*b) international custom, as evidence of a general practice accepted as law;*

*c) the general principles of law recognised by civilized nations;*

*d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

International conventions are defined in art 2(1)(a) of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*<sup>50</sup> as international agreements concluded between states in written form and governed by international law. They are considered to incorporate definitive legal commitments on behalf of the parties.<sup>51</sup>

Customary international law has been considered by the ICJ on a number of occasions. In *Continental Shelf (Libyan Arab Jamahiriya/Malta)*,<sup>52</sup> the ICJ set out the requirements of customary international law:

*the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.*<sup>53</sup>

Customary international law, therefore, is founded in actual practice based on a belief that such practice is required under international law. Uniform state practice is not, however, always necessary and contrary practice may be viewed as supporting a particular rule in certain circumstances. As the ICJ stated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*,<sup>54</sup>

*[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.*<sup>55</sup>

Evidence that state actions have been treated as a breach of a rule of customary international law may take the form of claims or protests against the breaching state, or statements by the

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<sup>50</sup> (opened for signature 21 March 1986).

<sup>51</sup> Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed, 1990) 605.

<sup>52</sup> [1985] ICJ Rep 13.

<sup>53</sup> *Ibid* 29–30.

<sup>54</sup> [1986] ICJ Rep 14.

<sup>55</sup> *Ibid* 88.

breaching state seeking to justify their action in explicit or implicit acknowledgment that the action was contrary to a particular rule.

The issue of contrary state practice is perhaps a more difficult issue for international human rights law, with some commentators suggesting the need for greater consistency in actual state practice if one is to establish a rule of customary international law. In discussing the view that the norms articulated in the *Universal Declaration of Human Rights (UDHR)* constitute principles of customary international law, Schachter states:

*General statements by international bodies ... that the 'Universal Declaration constitutes an obligation for members of the international community' are not without significance, but their weight as evidence of custom cannot be assessed without considering actual State practice. National constitutions and legislation similarly require a measure of confirmation in actual behaviour. One can readily think of numerous constitutions that have incorporated many of the provisions of the Universal Declaration of Human Rights norms, but these provisions are far from realization in practice. Constitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice or 'general principles' of law.<sup>56</sup>*

If Schachter is right, any inconsistent practices (or 'window dressing') would need to be countered by strong and uniform condemnation by other states. This, however, is not a common feature of international human rights law, in part because many states prefer human rights to be considered matters internal to the state. States often refrain from criticising others for all but the most egregious human rights violations because they do not want their own 'domestic' actions placed in front of the international spotlight.

In the absence of international treaties or consistent state practice, some commentators have argued that the inclusion of human rights principles in 'soft law' instruments, such as international declarations and resolutions of the UNGA, other UN and international bodies, and provisions in national constitutions can evidence rules of customary international law.

Traditionally, international legal scholars have not considered these 'soft law' instruments to be legitimate sources of international law; however, Rodriguez-Rivera argues that the international system has changed substantially since the creation of the UN over half a century ago. He suggests that the expansion in the number of countries, the emergence of different groups and voting allegiances, has meant that it is increasingly difficult to reach consensus in the development of binding international legal instruments. He indicates that States are increasingly looking to soft law instruments as a way of advancing international relations and law. Rodriguez-Rivera goes on to argue that perhaps the proliferation of soft law instruments on a particular subject matter may be indicative of the crystallisation of particular rules at international law.<sup>57</sup>

While it is true that these instruments proliferate in the international system, the majority of international legal scholars have taken the view that while they may be evidence of emerging principles of international law and of *opinio juris*, they are not considered to independently establish norms. Shelton provides a useful analysis:

*From the perspective of state practice, resolutions, codes of conduct, conference declarations, and similar instruments are apparently not viewed as law, soft or hard, albeit they may be related to or lead to law in one manner or another. States and other actors generally draft and agree to legally nonbinding instruments advertently, knowingly. They make a conscious decision to have a text that is legally binding or not. In other words, for practitioners, governments and intergovernmental organizations, there is not a continuum of instruments from soft to hard, but a binary system in which an instrument is entered into as law or not-*

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<sup>56</sup> Oliver Schachter, *International Law in Theory and Practice* (1991) ch XV.

<sup>57</sup> Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 1.

*law. The non-law can be politically binding or morally binding, and expectations of compliance with the norms contained in the instrument can be extremely strong, but the difference between a legally binding instrument and one that is not appears well understood and acted upon by government negotiators. Although a vast amount of resolutions and other nonbinding texts include normative declarations, so-called soft-law is not law or a formal source of norms. Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not come with a sliding scale of bindingness, nor does desired law become law by stating its desirability, even repeatedly.<sup>58</sup>*

Thus, Shelton argues that States intentionally choose to enter into non-binding rather than binding instruments, and the willingness of States to promote norms in non-binding instruments does not necessarily reflect their consent to be bound by those norms and cannot be seen as definitive evidence of the emergence of new rules.

Finally, the ICJ Statute refers to general principles of law, judicial decision and academic writings.

General principles of law are distinguished from customary international law, the former being principles of law that are common to the major legal systems of the world, while the latter, as outlined above, arise from State practice and *opinio juris*. As State-based environmental actions increasingly proliferate, the uniformity of any such practice may permit identification of some common principles and rules.

Judicial decisions, considered to include judgments and advisory opinions of the ICJ and arbitral or other international tribunals, and the writings of 'the most highly qualified' jurists are considered as 'subsidiary sources'. These are important in affirming the development of general principles and customary international law.

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<sup>58</sup> Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 320–1.

## Section 3 - Whether a Right to an Environment of a Particular Quality Exists

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The terms of reference ask the ACJ to consider whether a right to an environment of a particular quality exists either in international human rights instruments, or in customary international law

This section will outline the development of relevant international conventions, state practice and judicial decisions in this area in order to assist jurists in determining whether a right to an environment of a particular quality exists, and, if so, how it has been defined in international law.

### A Right to Environment in International Human Rights Conventions

A specific right to environment has not been clearly articulated in international human rights treaties. Neither the *UDHR*, nor the International Bill of Rights, comprised of the *International Covenant on Civil and Political Rights*<sup>59</sup> and *International Covenant on Economic, Social and Cultural Rights*,<sup>60</sup> contain a right to environment, notwithstanding that a number of rights in these instruments arguably rely, for their fulfilment, on an environment of a certain quality.

### A Right to Environment in Regional Human Rights Conventions

At the regional level, there are a number of instruments dealing with human rights:

- the *Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>61</sup> (*European Convention*);
- the *African (Banjul) Charter on Human and Peoples' Rights*<sup>62</sup> (*African Charter*); and
- the *American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*<sup>63</sup> (*American Convention*).

The latter two, the African Charter and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights<sup>64</sup> (Protocol of San Salvador), contain a specific environmental right though they are characterised in different ways.

#### The African Charter

In 1981, the African member States of the Organization of African Unity (OAU), now the African Union (AU), adopted the *African Charter* to promote and protect *human and peoples'* rights. The *African Charter* relevantly provides, at art 24: '*All peoples shall have the right to a general satisfactory environment favourable to their development*' (emphasis added). It should be noted that, notwithstanding the preambular paragraph's reference to both human and peoples' rights, art 24 specifically refers to the right of peoples.

While jurisprudence on the right to environment in the African system has been limited, the African Commission on Human and Peoples' Rights (African Commission) found, in the case of

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<sup>59</sup> Entered into force 23 March 1976.

<sup>60</sup> Entered into force 3 January 1976.

<sup>61</sup> Entered into force 21 September 1970.

<sup>62</sup> Entered into force 21 October 1986.

<sup>63</sup> Entered into force 18 July 1978.

<sup>64</sup> Entered into force 16 November 1999.

*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*,<sup>65</sup> that art 24 obliges states to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.<sup>66</sup> In concluding its findings, the African Commission recommended:

- *adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;*
- *ensuring that appropriate environmental and social impact assessments are prepared for any future oil development ... ; and*
- *providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.*

## The Protocol of San Salvador

The *Protocol of San Salvador* was adopted in 1988. Article 11 states:

*Everyone shall have the right to live in a healthy environment and to have access to basic public services.*

*The States Parties shall promote the protection, preservation, and improvement of the environment.*

Unlike the *African Charter*, the right to environment in the *Protocol of San Salvador* creates an individual right rather than a right of peoples. There are also some additional limits to the protections afforded by art 11. While some rights are subject to individual petitions to the Inter-American Commission on Human Rights (IACHR), and possible adjudication before the Inter-American Court of Human Rights (IACtHR), violations of art 11 can only be addressed through observations and recommendations of the Commission on its own initiative.<sup>67</sup>

## Other Regional Instruments

The *European Convention* does not contain a specific right though a number of its provisions; however, art 8 dealing with the right to privacy in the *European Convention* and art 11 of the *European Social Charter*<sup>68</sup> dealing with the right to protection of health have been utilised to address concerns arising out of environmental factors. These provisions are discussed in the relevant section below.

There are no regional instruments applicable in the Asia Pacific Region that contain a human right to environment.

## Environmental Protection in International Humanitarian Law

Aside from international human rights law, perhaps the only other closely related area of international law to address environmental protection is international humanitarian law (IHL). A

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<sup>65</sup> (2001) No 155/96 <<http://www1.umn.edu/humanrts/africa/comcases/155-96.html>> at 2 April 2008.

<sup>66</sup> Ibid [54].

<sup>67</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (entered into force 16 November 1999) art 19(6).

<sup>68</sup> Entered into force 26 February 1965.

set of rules designed to protect civilians and limit the effects of armed conflict, IHL is predominantly found in the 1949 Geneva Conventions<sup>69</sup> and 1977 Additional Protocols.<sup>70</sup>

*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*<sup>71</sup> (*Additional Protocol I*) contains a number of provisions that deal with the protection of the civilian population and the environment from harm. Article 35(3) provides:

*It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.*

The position is reinforced in art 55, which provides:

*1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.*

*2. Attacks against the natural environment by way of reprisals are prohibited.*

In explicitly recognising that environmental degradation can have a 'harmful effect on the physical or mental health of the people',<sup>72</sup> the *travaux préparatoires* to *Additional Protocol I* indicate that the provision seeks to protect both the natural environment against the immediate use of weapons or techniques deliberately directed against it, as well as the civilian population and long-term natural environmental processes within and beyond the zone of conflict.<sup>73</sup>

In addition to *Additional Protocol 1*, the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*<sup>74</sup> (ENMOD) seeks to provide further protection for the natural environment. Whereas *Additional Protocol I* is aimed at protecting the natural environment against damage which could be inflicted on it by any weapon, the goal of ENMOD is to prevent the use of environmental modification techniques as weapons of war. Also, the prohibition in *Additional Protocol I* applies only to armed conflict, while the prohibition contained in ENMOD applies to the use of these techniques for hostile purposes.

There are a number of fundamental differences between international human rights law and IHL. The two bodies of law apply in different situations and do not share common core documents. Moreover, the latter does not seek to create individual rights, but rather obligations on the state in times of conflict. For these reasons, commentators have suggested that there are significant difficulties in importing principles of IHL directly into human rights law.<sup>75</sup> While IHL provisions regarding the environment reflect a growing concern about the human impact of environmental degradation in times of war, it is unlikely that they could be used to establish, in their own right, the existence of a human right to environment.

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<sup>69</sup> The Geneva Conventions are comprised of: *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (entered into force 21 October 1950); *Convention (III) Relative to the Treatment of Prisoners of War* (entered into force 21 October 1950); and *Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (entered into force 21 October 1950).

<sup>70</sup> The 1977 Additional Protocols are: *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (entered into force 7 December 1978); and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (entered into force 7 December 1978).

<sup>71</sup> Entered into force 7 December 1978.

<sup>72</sup> International Committee of the Red Cross, *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977) [1442] <<http://www.icrc.org/ihl.nsf/COM/470-750044?OpenDocument>> at 5 April 2008.

<sup>73</sup> *Ibid* [1440]–[1443].

<sup>74</sup> Entered into force 5 September 1978.

<sup>75</sup> René Provost, *International Human Rights and Humanitarian Law* (2002) 8.

## A Right to Environment Derived from Custom

Over the past 35 years, the relationship between the condition of the environment and the enjoyment of human rights has been the subject of considerable discussion. There are a significant number of international conventions and decisions of international and regional courts as well as a plethora of UN, international and regional declarations, resolutions and statements of principle dealing with the relationship between the environment and the realisation of human rights.

As previously stated, the 1972 Stockholm Conference and *Stockholm Declaration* were perhaps the first clear articulation of the relationship between human rights and the environment. As noted in section 1, the first principle of the *Stockholm Declaration* states:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.*

This principle is somewhat unwieldy. Some commentators suggest the right contained in the first sentence should have been more clearly stated;<sup>76</sup> however, the lack of clarity resulted from a lack of consensus amongst states. It is notable that, on the one hand, the Working Group charged with drafting the Declaration received a number of proposals from states to include a right to a 'healthful and safe environment', or a 'safe, healthy and wholesome environment'. On the other hand, various states opposed the articulation of such a right altogether.<sup>77</sup> The principle, thus, represents the base level of agreement between states at the time.

Ten years after the Stockholm Conference, *Our Common Future*, the report arising from the UN convened World Commission, recognised the connection between the environment and human rights in Principle 1 of the *Stockholm Declaration*. The Report noted developments in national constitutions and laws, and recommended that all states take steps to recognise reciprocal rights and responsibilities relating to the environment, such as the responsibility to establish adequate environmental protection standards.<sup>78</sup>

In an annex to the Report, the World Commission proposed a number of legal principles, the first being: '*[a]ll human beings have the fundamental right to an environment adequate for their health and well-being*'.<sup>79</sup> While suggesting the desirability of a right to environment, the Report did not argue that such a right already existed in customary international law.

Almost a decade later, in 1989, 24 States from around the globe attended the International Summit on the Protection of the Global Atmosphere where they adopted the *Hague Declaration on the Environment*, with its first paragraph stating: '*[t]he right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge to all States throughout the World*'. The Declaration goes on to state that as a consequence of the right to live in dignity in a viable global environment, there is a duty on the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.<sup>80</sup>

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<sup>76</sup> Louis B Sohn, 'The *Stockholm Declaration* on the Human Environment' (1973) 14 *Harvard International Law Journal* 423, 455.

<sup>77</sup> *Ibid* 452-3.

<sup>78</sup> Annex to *Report of the World Commission on Environment and Development*, GA Res 187, UN GAOR, 42<sup>nd</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/Res/42/187 (1987) 323. For an electronic version of this report see <<http://www.un-documents.net/wced-ocf.htm>> (at 3 April 2008).

<sup>79</sup> *Ibid* 339.

<sup>80</sup> *Hague Declaration on the Environment* (1989) 28 ILM 1309, [4].

In 1992, UNCED failed to expand further the connection between the environment and human rights. As mentioned in the preceding section, the language in the *Rio Declaration* is weaker than the language in the *Stockholm Declaration*. While a number of states supported the inclusion of a right to environment in the *Rio Declaration*, there was no unanimity; therefore, the final document does not contain a clear statement on a right to environment. Instead, Principle 1 of the *Rio Declaration* states: '*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature*'.

UNCED represented a second occasion where the international community had an opportunity (and was provided with draft provisions) to proclaim a right to environment, but failed to reach consensus on how such a right should be articulated. This occurred in the context of negotiations on a 'non-binding' conference declaration, rather than a 'binding' international legal instrument. Instead of reflecting an emerging consensus on a right to environment, the result suggests a refusal on the part of the international community to accept such a right indicating such a right did not exist at the time.

Notwithstanding this limitation, provisions in the *Rio Declaration* support the application of certain human rights, such as the right to participate in public affairs, in association with environmental protection. For example, Principle 10 of the *Rio Declaration* provides:

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

Principle 10 is considered to have been the impetus for the subsequent inclusion of such 'procedural rights' in international environmental law, perhaps best exemplified in the *Aarhus Convention* (described below).

The failure of UNCED to articulate a human right to environment in 1992 did not deter the UN Special Rapporteur on Human Rights and the Environment (UNSR) from proclaiming such a right existed in international law in her final report to the UN Commission on Human Rights (UNCHR) in 1994.<sup>81</sup> The UNSR's report argued that developments such as the *Stockholm Declaration*, the *African Charter*, the *Protocol of San Salvador*, and the various international instruments and national constitutions 'revealed universal acceptance of the environmental rights recognised at the national, regional and international levels'.<sup>82</sup> The UNSR appended to her report a document entitled *Draft Principles on Human Rights and the Environment*<sup>83</sup> (*Draft Principles*), and recommended that comments on these principles be sought.

Principle 2 of the *Draft Principles* states: '*[a]ll persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible*'. This principle reflects the UNSR's assertion that a right to a satisfactory environment existed in international

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<sup>81</sup> Fatma Zohra Ksentini, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment Final Report*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> sess, [31], UN Doc E/CN.4/Sub.2/1994/9 (1994).

<sup>82</sup> *Ibid* [240]. One piece of evidence relied upon by the UNSR was the *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), GAOR, 29<sup>th</sup> sess, 2315<sup>th</sup> plen mtg. She noted the comment of Andrzej Makarewicz who argued that: '*[b]y stating that economic, political and other relations must be governed in particular by the principle of respect for human rights and fundamental freedoms, this instrument asserts the need to work towards establishing the essential conditions for protecting and improving the environment*': Ksentini, above n 81, [32]. While it may be possible to argue that including discussions of state responsibility for environmental protection in a document that also asserts the importance of respect for human rights strengthens arguments for a right to environment, it should be noted that the Charter itself does not assert a right relating to the environment. The environment is addressed in art 30, in a section addressing the common responsibility of states towards the international community.

<sup>83</sup> Ksentini, above n 81, Annex I.

human rights law, and coincided with her recommendation to the UN that a UNSR be mandated to receive communications about environmental problems affecting human rights. These recommendations were not immediately pursued. Rather, the UNCHR requested a report on the views of governments, specialised agencies and NGOs.<sup>84</sup> While the UNCHR eventually appointed a Special Rapporteur with a more limited mandate,<sup>85</sup> the *Draft Principles* were never adopted nor were many of the Report's recommendations implemented.

These developments, and the failure of the international community to articulate such a right only two years earlier in a non-binding conference declaration in Rio de Janeiro, provide strong evidence that, by 1992, a right to environment had not yet crystallised at international law.

This reluctance to recognise a specific right to environment did not, however, stop the continued development of international law on human rights and the environment. A significant regional development around this time came with the expansion of the work of the UNECE, which had, during the 1990s, negotiated a number of environmental treaties and/or protocols on: transboundary air pollution; environmental impact assessment; transboundary watercourses and international lakes; and the transboundary effects of industrial accidents and civil liability (see section 1). In 1999, members of the UNECE adopted the *Aarhus Convention*. Hailed as a new kind of environmental agreement, linking environmental rights and human rights, its preambular paragraphs referred to the right of every person 'to live in an environment adequate to his or her health and well-being'. While the subsequent operative provisions do not address an overarching right to environment, its provisions impose on states and public authorities, obligations regarding access to information, public participation in decision-making and access to justice. As indicated in section 1, the UN Secretary-General, Kofi Annan, indicated that these Convention obligations clearly articulate the obligation imposed on states in Principle 10 of the Rio Declaration and reinforce the importance of the participation of citizens in environmental decision-making. That said, a specific right to environment has not otherwise been proclaimed in European regional instruments, and cases dealing with such issues have utilised existing human rights.

In the same year as the *Aarhus Convention* was adopted, 1999, UNESCO and the UNCHR convened an International Seminar on the Right to the Environment. The meeting, attended by experts from Europe, Africa and Latin America, and representatives of the UN, UNESCO, international organisations and NGOs, adopted the *Declaration of Bizkaia on the Right to the Environment*,<sup>86</sup> art 1 of which states: 'Everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment'. It should be noted that while art 1 emphasises that the right to environment is inherent in the dignity of all persons, the preambular paragraphs emphasise the need for this right to be recognised in legal instruments of universal scope, and requests that the UN and other organisations adopt suitable measures for the recognition of this right.<sup>87</sup>

In 2002, to mark the 10<sup>th</sup> anniversary of UNCED, the UN convened the WSSD in Johannesburg. The WSSD, which provided an opportunity to review UNCED progress, did not adopt any conventions or principles but reiterated the participants' commitment to the principles contained in the *Stockholm Declaration* and the *Rio Declaration*. As with the environmental issues considered at the Millennium Summit two years before, the WSSD focussed on the environment in the context of sustainable development, highlighting the importance of advancing and

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<sup>84</sup> *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/1994/56.

<sup>85</sup> The Special Rapporteur's mandate was limited to investigating 'the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, recognising the importance of these issues for life and health': *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, HRC Res 1995/81, United Nations Commission on Human Rights, 51<sup>st</sup> sess UN Doc E/CN.4/RES/1995/81 (1995).

<sup>86</sup> Information document, United Nations Economic, Social and Cultural Organisation General Conference, 30<sup>th</sup> sess, UN Doc 30 C/INF.11 (1994).

<sup>87</sup> *Ibid* [14].

strengthening the 'interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection'.<sup>88</sup>

## General Principles of Law

In its 2005 report to the UNCHR, Earthjustice<sup>89</sup> commented on a study it had conducted on national Constitutions, stating: '[of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources]'.<sup>90</sup> Earthjustice noted

- '109 [Constitutions] ... recognize the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm'.<sup>91</sup>
  - Of these 109 Constitutions, '56 constitutions explicitly recognize the right to a clean and healthy environment, and 97 constitutions make it the duty of the national government to prevent harm to the environment'.<sup>92</sup>
- '[56] constitutions recognize a responsibility of citizens or residents to protect the environment'.<sup>93</sup>
- '14 [Constitutions] prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm'.<sup>94</sup>
- '[20] constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury'.<sup>95</sup>
- '[16] constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment'.<sup>96</sup>

It is notable that the 56 countries who have Constitutions recognising a right to a clean and healthy environment come from all regions of the globe, with 12 from the Americas, 24 from Europe, 16 from Africa and four from Asia.<sup>97</sup> The proliferation of constitutional protections relating to a right to environment provides some guidance as to the growing recognition of a right to environment.

## A Right to Environment Derived from Judicial Decisions

International tribunals have addressed the status of the environment in a number of significant decisions.

In 1941, the arbitral judgment in the *Trail Smelter Case (United States of America v Canada)*, discussed in section 1, stated: 'no State has the right to use or to permit the use of its territory in such a manner as to cause injury ... to the territory of another or the properties or persons

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<sup>88</sup> World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development* (2002) [5] <[http://www.un.org/esa/sustdev/documents/docs\\_key\\_conferences.htm](http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm)> at 5 April 2008.

<sup>89</sup> Earthjustice is a non-profit public interest law firm, founded in 1971, with consultative status with the ECOSOC.

<sup>90</sup> Earthjustice, *Environmental Rights Report: Human Rights and the Environment* (2005) 37 <[http://www.earthjustice.org/library/references/2005\\_ENVIRONMENTAL\\_RIGHTS\\_REPORTrev.pdf](http://www.earthjustice.org/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf)> at 5 April 2008.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 38.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Democratic Republic of Congo, Ecuador, El Salvador, Ethiopia, Finland, France, Georgia, Honduras, Hungary, Kyrgyzstan, Latvia, Macedonia, Mali, Moldova, Mongolia, Mozambique, Nicaragua, Niger, Norway, Paraguay, Philippines, Portugal, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Tajikistan, Timor l'Este, Togo, Turkey, Ukraine, Yugoslavia. In addition to these, the Constitutions of Comoros and Guatemala recognise a right to health that is not explicitly tied to the state of the environment.

therein'.<sup>98</sup> This case is generally considered to have set the precedent for state obligations in regard to transborder pollution. This prohibition was confirmed in *Corfu Channel (United Kingdom v Albania) (Merits)* and the *Lac Lanoux Arbitration (France v Spain)* in the context of transborder water pollution.

The ICJ has also addressed the issue of the environment in its *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*.<sup>99</sup> In this Advisory Opinion, the ICJ noted the importance of respect for the environment:

*The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*<sup>100</sup>

It should be noted that while the ICJ invokes the importance of the environment for human survival, it only articulates the responsibility of states, not of individuals. Specifically, it enunciates the transborder obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states.

The ICJ subsequently endorsed this approach when considering a dispute between Hungary and Slovakia in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>101</sup> In that case, Weeramantry J, in a Separate Opinion, drew a strong connection between the enjoyment of human rights and the quality of the environment:

*the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.*<sup>102</sup>

## A Right to Environment in the Writing of Publicists

Finally, it is necessary to consider scholarship on the right to environment. While a number of scholars have concluded that a right to environment exists in international law, the majority conclude that while there has been growing recognition of the connection between human rights and the environment, a human right to environment is yet to be defined and recognised.

Ramcharan argues that implicit in the right to life is a right to environment and a concomitant obligation on states 'to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings'.<sup>103</sup> As discussed above, the UNSR would support such an approach because she argued that a right to a 'secure, healthy and ecologically sound environment' existed in international law.<sup>104</sup>

Lee takes a different approach, suggesting that there is substantial evidence that a right to environment has emerged in Latin America, and possibly in Africa, but that such a right does not yet exist at international law or in other regional systems.<sup>105</sup>

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<sup>98</sup> *Trail Smelter Case (United States of America v Canada)* (1941) 3 RIAA 1905, 1965.

<sup>99</sup> [1996] ICJ Rep 226.

<sup>100</sup> *Ibid* 241–2.

<sup>101</sup> [1997] ICJ Rep 7.

<sup>102</sup> *Ibid* 92.

<sup>103</sup> Bertrand G Ramcharan (ed), *The Right to Life in International Law* (1983) 13.

<sup>104</sup> See Ksentini, above n 81.

<sup>105</sup> John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283, 339.

Following Rodriguez-Rivera's approach, outlined in section 2, the answer to the question of whether a right to environment exists in international law is dependent on our approach to the law. If we rely on the traditional sources of international law, such as binding instruments, then such a right has not yet emerged. If, however, we look at the accumulation of soft law instruments, which he argues reflect the will of the people, then a right to environment definitely exists.<sup>106</sup>

The more traditional approach is adopted by scholars such as Shelton and Palmer, who state that while the connection between human rights and the environment is being increasingly recognised in international law, an actual right to environment has yet to emerge. Shelton argues that there has been movement towards the recognition of such a right, but acknowledges that it has not yet been widely accepted as part of the human rights catalogue.<sup>107</sup> Palmer suggests that variations in national and international practice in relation to human rights and the environment, and evidence of unwillingness on the part of states to accept a right to environment make it difficult to claim that a right to environment exists in customary international law.<sup>108</sup>

An even stronger and more negative approach to the existence of a right to environment is taken by Alston. He argues that while there has been significant debate on the existence of a right to environment, there is very limited support in international law for the existence of a freestanding human right to environment, attaching either to individuals or indeed to peoples.<sup>109</sup> He suggests that the focus has been, and should be, on the 'synergies' that can be achieved by linking human rights and environmental protection, rather than on the recognition of a right to environment.<sup>110</sup>

## Summary

The international community has as yet been unable to reach consensus on the proclamation of a right to environment in a binding international convention. While presented with numerous opportunities to articulate, adopt and reinforce a uniform right to environment in non-binding instruments, for example: the *Stockholm Declaration*, the World Commission Report and principles, the *Rio Declaration*, and the UNSR's *Draft Principles*, it has failed to do so. Indeed, the approach of the international community to the connection between human rights and the environment has varied considerably. While some nations and the AU have been willing to articulate a justiciable right to an environment of some particular quality, other nations and regions have articulated a non-justiciable right. Others still have refrained from, or refused to, articulate any rights in this area.

The activity and inactivity in this area has occurred against the backdrop of the international community clearly recognising the effect of environmental harms on human populations, and seeking to address certain elements of this problem by focussing on obligations between states. This can be seen in the various international instruments dealing with pollution, toxic and hazardous waste, industrial accidents and so forth.

In 2002, the Office of the High Commissioner for Human Rights (OHCHR) and the UNEP organised a seminar to review and assess progress achieved since UNCED on promoting a human right to environment. The international legal experts present noted the growing connection of human rights and environmental concerns, particularly in the context of sustainable development. They also noted the growing body of case law in many national jurisdictions on the links between human rights and the environment, either recognising the right to a healthy environment or acknowledging that other human rights could be violated as a result

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<sup>106</sup> Rodriguez-Rivera, above n 57.

<sup>107</sup> Dinah Shelton, 'Environmental Rights' in Philip Alston (ed), *Peoples' Rights* (2001) 189, 257.

<sup>108</sup> Alice Palmer, 'An International Right to Environment: A New Generation?' (2006) 15 *Interights Bulletin* 142.

<sup>109</sup> Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston (ed), *Peoples' Rights* (2001) 259, 281.

<sup>110</sup> *Ibid* 282-3.

of environmental degradation.<sup>111</sup> However, they agreed that such a right had not yet been clearly articulated and defined in international law. Among their recommendations was the suggestion that further steps be taken *'to support the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law'*.<sup>112</sup>

It is clear that the importance of environmental protection for the enjoyment of human rights has been widely recognised, and it may indeed be possible to argue, as Shelton does, that a specific right to environment is emerging in international law. At present, however, the evidence does not appear to support the argument that such a right already exists.

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<sup>111</sup> Meeting of Experts on Human Rights and the Environment, *Conclusions: Final Text* (2002) <<http://www.unhcr.ch/environment/conclusions.html>> at 5 April 2008. Six background papers on human rights and the environment were prepared prior to this meeting, these papers remain a useful resource, and may be found online at <<http://www.unhcr.ch/environment/>> at 5 April 2008.

<sup>112</sup> Meeting of Experts on Human Rights and the Environment, above n 111, 15.

## Section 4 – Use of Existing Rights to Address Environmental Harms

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Environmental damage takes many forms and affects individuals, communities, states and regions in different ways. Approaches to addressing the human rights consequences of environmental damage depend on: the type of damage; the rights affected; the individuals who have been harmed; and the legal regime applicable in the country where the damage has occurred. There has not been a uniform approach to the human rights consequences of environmental harms, similar situations having been addressed differently in different jurisdictions. The following section describes the various human rights that have been utilised to address the effect of environmental degradation.

### The Right to Life

The connection between the environment and the right to life is the subject of a specific term of reference, discussed in detail in section 5 of this paper.

### The Right to Health

The right to health is established under both the *UDHR*<sup>113</sup> and the *ICESCR*, as well as in other conventions such as *CRC*.

*ICESCR* relevantly provides, at art 12:

1. *The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ...*
  - (b) *the improvement of all aspects of environmental and industrial hygiene;*
  - (c) *the prevention, treatment and control of epidemic, endemic, occupational and other diseases; ...*

*CRC* provides, at art 24:

1. *States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health ... [and]*
2. *States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: ...*
  - (c) *To combat disease and malnutrition ... taking into consideration the dangers and risks of environmental pollution.*<sup>114</sup>

At the regional level, the *European Social Charter* includes the 'right to enjoy the highest standard of health attainable'.<sup>115</sup> The *Protocol of San Salvador* refers to the right to health as

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<sup>113</sup> *Universal Declaration of Human Rights*, art 25.

<sup>114</sup> The full text of art 24(2)(c) of *CRC* provides that States Parties, shall take appropriate measures 'to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution'.

<sup>115</sup> Article 11 provides:

'the highest level of physical, mental and social well-being', and imposes an obligation on states to adopt measures to prevent endemic, occupational and other diseases.<sup>116</sup> Article 11 provides: 'everyone shall have the right to live in a healthy environment', and imposes an obligation on states to promote the 'protection, preservation and improvement of the environment'. The *African Charter* provides for the right 'to the best attainable standard of health'. It imposes an obligation on states to take measures to promote this standard of health.<sup>117</sup>

Additionally, and as mentioned earlier, the *Stockholm Declaration*, *Rio Declaration* and *Johannesburg Declaration* contain clear statements about the adverse effects of environmental degradation on human health.

International commentary and case law on the environment and health has been somewhat limited in comparison to other rights. This has occurred, in part, because the right to health is protected in *ICESCR*, rather than *ICCPR*. For the same reason, it has not been the subject of any significant consideration pursuant to the *European Convention*.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has expressly considered environmental degradation in its country reports (for example: erosion and food contamination (Tunisia 1986),<sup>118</sup> pollution (Poland 1989)<sup>119</sup> and nuclear radiation (Ukraine 1995)).<sup>120</sup> CESCR has also raised this issue in its General Comments. General Comment 14, on issues of implementation relating to the right to the highest attainable standard of health, expressly refers to the underlying determinants of health as including a 'healthy environment'.<sup>121</sup> Furthermore, the environment is raised in General Comments on the right to adequate food, (ie, freedom from adverse substances and contamination)<sup>122</sup> and adequate housing (ie, the location of housing on or near contaminated sites threatens the right to health).<sup>123</sup> UN treaty bodies under the *Convention on the Elimination of All Forms of Discrimination against Women*<sup>124</sup> (*CEDAW*) and *CRC* have also drawn similar links in relation to the impact of environmental degradation on women and children in the context of air pollution and water contamination.<sup>125</sup>

In the inter-American system, the connection between environmental harms and the right to health has been recognised on a number of occasions. The IACHR found a violation of the right to health in *Yanomami Community v Brazil*.<sup>126</sup> Amongst other things, the Commission held the

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*With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:*

- (1) to remove as far as possible the causes of ill-health;*
- (2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;*
- (3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.*

<sup>116</sup> Article 10(1) provides: '[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being'.

<sup>117</sup> Article 16 provides:

- 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.*
- 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*

<sup>118</sup> Citation

<sup>119</sup> Citation

<sup>120</sup> Citation

<sup>121</sup> *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, Committee on Economic, Social and Cultural Rights, 22<sup>nd</sup> sess, [4], UN Doc E/C.12/2000/4 (2000).

<sup>122</sup> *General Comment No 12: The Right to Adequate Food (Art 11)*, Committee on Economic, Social and Cultural Rights, 20<sup>th</sup> sess, [10], UN Doc E/C.12/1999/5 (1999).

<sup>123</sup> *General Comment No 4: The Right to Adequate Housing (Art 4)*, Committee on Economic, Social and Cultural Rights, 6<sup>th</sup> sess, [8], UN Doc E/1992/23 (1991).

<sup>124</sup> Entered into force 3 September 1981.

<sup>125</sup> *Combined Fourth and Fifth Periodic Reports of Romania under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, Committee on the Elimination of Discrimination against Women, 23<sup>rd</sup> sess, [38], UN Doc CEDAW/C/ROM/4-5 (2000); *Concluding Observations of the Committee on the Rights of the Child, Jordan*, Committee on the Rights of the Child, 24<sup>th</sup> sess, [50], UN Doc CRC/C/15/Add.125 (2000); *Concluding Observations of the Committee on the Rights of the Child, South Africa*, Committee on the Rights of the Child, 23<sup>rd</sup> sess, [30], UN Doc CRC/C/15/Add.122 (2000).

<sup>126</sup> Inter-American Commission on Human Rights, Case 7615, Decision of 5 March 1985, Res 12/85, Annual Report 1984–1985, OEA/Ser.L/V/II.66, doc 10 rev 1 <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/interamericancommission/nr/789>> at 7 April 2008.

State had taken inadequate steps to protect the Yanomami people from the threat to their health posed by development and migration, which resulted from the granting of licenses to exploit natural resources in their tribal lands.

In its consideration of country reports, the IACHR has also recognised the threat to health from:

- the contamination of water, air and soil resulting from oil exploration in Ecuador: the Commission stated:

*[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated;*<sup>127</sup>

- environmental pollution in Brazil;<sup>128</sup>
- water pollution, deforestation, flooding of tribal lands and general environmental degradation in Paraguay.

Within the African system, the impact of environment degradation on human health has already been mentioned in section 3. As noted, in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, the African Commission held that art 24 obliges states to: 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.<sup>129</sup> A number of communications have also considered that the failure of the state to provide safe drinking water constitutes a violation of art 16 of the *African Charter* dealing with the right to the best attainable standard of health.<sup>130</sup>

Within the European system, environmental factors impacting on the right to health have been considered under other rights (such as the right to privacy and family life), since the right to health is only protected in the *European Social Charter*. Nevertheless, the right contained therein has been interpreted through state communications, which indicate it encompasses threats to health caused by pollution. These communications have imposed positive obligations on states to address various forms of environmental pollution including air, water and noise pollution, and nuclear radiation.<sup>131</sup>

Some countries have begun to take preventive measures to address the health consequences of environmental harms: India, Thailand and Indonesia, for instance, have all introduced health assessments into environmental impact assessments.

## Privacy and Family Life

Article 17 of the *ICCPR* protects people from 'arbitrary or unlawful interference' with privacy, the family or the home. It provides:

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<sup>127</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev 1 (1997) ch VIII <<http://www1.umn.edu/humanrts/iachr/country-reports/ecuador1997.html>> at 7 April 2008.

<sup>128</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, Doc. 29 rev.1 (1997) ch VI <<http://www1.umn.edu/humanrts/iachr/country-reports/brazil1997.html>> at 7 April 2008.

<sup>129</sup> *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2001) No 155/96, [54] <<http://www1.umn.edu/humanrts/africa/comcases/155-96.html>> at 2 April 2008.

<sup>130</sup> See, eg, African Commission on Human and Peoples' Rights, *Free Legal Assistance Group v Zaire*, Communication Numbers 25/89, 47/90, 56/91, 100/93 (1995).

<sup>131</sup> European Committee of Social Rights, *Digest of the Case Law* (December 2006).  
[http://www.coe.int/T/E/Human\\_Rights/Enc/](http://www.coe.int/T/E/Human_Rights/Enc/)

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*Everyone has the right to the protection of the law against such interference or attacks.*

Article 8 of the *European Convention* provides similar protections:

*Everyone has the right to respect for his private and family life, his home and his correspondence.*

*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The provision in the *European Convention* dealing with privacy and family life have been used on numerous occasions to seek redress for environmental contamination or deterioration that makes homes and/or communities uninhabitable, where extremes of noise or noxious fumes encroach on the home, or when people are displaced by development projects.

## Noise Pollution

A series of cases have dealt with the issue of noise pollution, generally associated with airports and industrial sites. In *Arrondelle v United Kingdom*,<sup>132</sup> *Powell and Rayner v United Kingdom*<sup>133</sup> and *Hatton v United Kingdom*,<sup>134</sup> the European Court of Human Rights (ECHR) accepted that excessive noise could constitute a violation of art 8. The Court also held that the state had an obligation to weigh the detriment to the individual against the benefit to the community. In so doing, it recognised a margin of appreciation in favour of the state in its assessment of the relative weight of these two competing concerns. In more recent decisions, the Court has indicated that, while a 'margin of appreciation' exists, the state must attempt to minimise interference and attempt to find alternative solutions that have a more limited effect on the human rights.<sup>135</sup>

## Industrial Pollution

Two significant decisions of the ECHR also addressed industrial pollution. The 1994 case, *López Ostra v Spain*,<sup>136</sup> involved industrial plants polluting the air in residential areas. The ECHR held that the level of pollution prevented the applicant from enjoying their home and violated their right to respect for their private, family life and home. As with the noise cases discussed above, the Court held that in determining whether a violation had occurred, it was necessary to strike a fair balance between the town's economic well-being and the applicant's enjoyment of her right to respect for privacy, family life and home. The ECHR suggested that the threshold for interference with privacy and family life is lower than the threshold for interference with the right to health: '*[n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health*'.<sup>137</sup>

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<sup>132</sup> (1982) 26 DR 5.

<sup>133</sup> (1990) 172 Eur Court HR (ser A).

<sup>134</sup> (2002) 34 EHRR 1. See also *Baggs v United Kingdom* (1987) 52 DR 29.

<sup>135</sup> See *Hatton v United Kingdom* (2002) 34 EHRR 1.

<sup>136</sup> (1995) 303-C Eur Court HR (ser A).

<sup>137</sup> *Ibid* [51].

In *Fadeyeva v Russia*,<sup>138</sup> in 2005, the Court also articulated the connection between contamination of a home with toxic pollutants and violations of the right to respect for the home. While the ECHR suggested that, based on indirect evidence and presumptions, it was possible to conclude that the applicant's health had deteriorated due to prolonged exposure to the pollutants, it also stated that even if the pollution had not caused any quantifiable harm to her health, it had made her more vulnerable to various diseases. Notwithstanding this, the ECHR found that these harms to her health violated her right to respect for her home, not her right to health:

*[T]here can be not doubt that it adversely affected the quality of life at her home. Therefore, the Court accepts that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.*<sup>139</sup>

Limits to the scope of the right to privacy, family life, and the home have also been established by the ECHR. For instance, in *Kyrtos v Greece*,<sup>140</sup> the Court held that the destruction of the scenic beauty around a home did not amount to a human rights violation, and would be more appropriately considered in a forum dealing with general environmental concerns.

Differences in the wording of the provisions establishing the right to privacy, family and the home may affect the persuasiveness of the European case law in other jurisdictions. For example, the *European Convention* protects the right to 'respect for' private and family life, the home and correspondence, whereas the *ICCPR* protects against 'arbitrary or unlawful interference with privacy, family, home or correspondence'. Nevertheless, the suggestion that there may be a different threshold for violations of this type of right, as opposed to violations of the right to health, may be useful in other systems where claims based on the right to health have been unsuccessful.

Interference with privacy and family life will also be a significant part of the allegations in a forthcoming case on behalf of the Inuit at the IACHR. While still in its early stages, the case bears consideration since the applicants, who represent the Inuit Circumpolar Conference, have brought a case against the US for harms caused by global warming. The petition claims that global warming is melting polar ice, sea ice and the permafrost, each of which drastically and adversely affects the environment upon which the family and cultural life of the Inuit is inherently based. The destruction of the natural and man-made environment (including houses, roads and other vital structures) allegedly violates the Inuit's rights to private and family life, and the inviolability of the home.<sup>141</sup>

## Property

Property rights lack a clear articulation in binding international law. Article 17 of the *UDHR* provides the following protections:

*(1) Everyone has the right to own property alone as well as in association with others.*

*(2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*

It is worth noting that the word 'private' does not appear in this provision. Neither the *ICCPR*, nor the *ICESCR* provide an individual or private property right.

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<sup>138</sup> [2005] ECHR 376 (9 June 2005).

<sup>139</sup> *Ibid* [88].

<sup>140</sup> [2003] ECHR 242 (22 May 2003).

<sup>141</sup> Centre for International Environmental Law, *The Inuit Case* (2008) <[http://www.ciel.org/Climate/Climate\\_Inuit.html](http://www.ciel.org/Climate/Climate_Inuit.html)> at 10 April 2008.

Rights to ownership or enjoyment of property are enshrined in the *European Convention*,<sup>142</sup> the *African Charter*,<sup>143</sup> and the *American Convention*. Article 21 of the *American Convention* provides:

*(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.*

*(2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*

*(3) Usury and any other form of exploitation of man by man shall be prohibited by law.*

In the case of *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*,<sup>144</sup> the IACtHR found that government grants of logging concessions on the traditional lands of Indigenous people violated the right to property under the *American Convention*. The Indigenous lands in question had yet to be clearly delimited, but the Court held that the State was obliged to refrain from acting in a way that could harm or destroy property on those lands. Two particular considerations in this case were the recognition of the communal property rights of Indigenous people in the *Nicaraguan Constitution*, and the provision of the *American Convention* requiring that it not be interpreted in a way that would limit rights protected under national laws. The Court concluded:

*Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention – which precludes a restrictive interpretation of rights, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the Indigenous communities within the framework of communal property, which is also recognised by the Constitution of Nicaragua.<sup>145</sup>*

The *Mayagna (Sumo) Awas Tingni Community v Nicaragua* decision may be a relevant authority in other situations where communal property rights are recognised, and where the right to property is protected under a national Constitution or rights instrument.

## Cultural Rights

The right to culture is protected under art 27 of the *ICCPR*:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

The UN Human Rights Committee (HRC) has recognised that social and economic activities may be protected as a part of culture, and, therefore, environmental harms that undermine such activities may violate this right. The IACHR has also recognised that environmental destruction can threaten the integrity of a minority culture.

The HRC recognises the importance of social and economic activities to culture in General Comment 23 on the rights of minorities:

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<sup>142</sup> *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (entered into force 18 May 1954) art 1.

<sup>143</sup> *African (Banjul) Charter on Human and Peoples' Rights* (entered into force 21 October 1986) arts 14, 21.

<sup>144</sup> (2001) 79 Inter-Am Ct HR (ser C).

<sup>145</sup> *Ibid* [148].

*With regard to the exercise of the cultural rights protected under article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.*<sup>146</sup>

The connection between land usage and culture is further articulated in the HRC decisions of *Bernard Ominayak and the Lubicon Lake Band v Canada*,<sup>147</sup> and *Lansman v Finland*.<sup>148</sup>

In *Bernard Ominayak and the Lubicon Lake Band v Canada*, the Lubicon Lake Band, an Aboriginal band, alleged that their territory had been expropriated for private oil and gas exploration, and that this had destroyed the environment, undermined their economic base and threatened their survival as a people. The Committee recognised that art 27 protects the right of persons, in community with others, 'to engage in economic and social activities which are part of the culture of the community to which they belong'.<sup>149</sup>

In *Lansman v Finland*, an Indigenous group in Finland, the Sami, brought a complaint alleging that a government contract allowing a private company to engage in stone quarrying in their traditional lands would disrupt their traditional reindeer herding activities. Once again, the HRC acknowledged that social and economic activities may be a part of culture. Significantly, the HRC also stated that art 27 does not only protect traditional means of livelihood: while the authors had adapted their methods of reindeer herding over the years, and now practiced with the help of modern technology, reindeer herding remained a part of their protected culture.

In this decision, the HRC also placed limits on the protections of the right to culture:

*Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.*<sup>150</sup>

The Committee concluded that the quarrying activities that had taken place prior to the hearing had not adversely affected the applicant's reindeer herding activities; therefore, the activities did not violate the Sami's right to culture. The Committee did, however, warn that any future quarrying activities would have to be carried out in a manner that allowed the Sami to 'continue to benefit from reindeer husbandry',<sup>151</sup> and that expanded quarrying activities might violate their rights under art 27.

Finally, the IACHR, in a case involving incursions on the traditional lands of an Indigenous people, found that these incursions and the resulting environmental damage threatened the group's 'integrity as a people' and violated their human rights. The Commission stated:

*Their integrity as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they*

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<sup>146</sup> *General Comment No 23: The Rights of Minorities (Art 27)*, Human Rights Committee, 50<sup>th</sup> sess, [7], UN Doc CCPR/C/21/Rev1/Add.5 (1994).

<sup>147</sup> Human Rights Committee, Communication No 167/1984, UN Doc CCPR/C/38/D/167 (1984).

<sup>148</sup> Human Rights Committee, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994).

<sup>149</sup> *Bernard Ominayak and the Lubicon Lake Band v Canada* Human Rights Committee, Communication No 167/1984, [32.2], UN Doc CCPR/C/38/D/167 (1984).

<sup>150</sup> *Lansman v Finland*, Human Rights Committee, Communication No 511/1992, [9.4], UN Doc CCPR/C/52/D/511/1992 (1994).

<sup>151</sup> *Ibid* [9.8].

*are constantly in danger and their environment is suffering constant deterioration.*<sup>152</sup>

Where environmental contamination or environmentally destructive activities substantially interfere with the traditional activities of an Indigenous group, the statements of the HRC, and the jurisprudence of both the HRC and the IACHR provide a strong basis for an argument that the cultural rights of the Indigenous people have been violated. These precedents are particularly valuable because the right to culture is protected in the *ICCPR*, which means that there is the possibility of bringing a complaint about violations to the HRC.

## Discrimination

Environmental concerns have been connected to the right to freedom from discrimination in the jurisprudence of both the IACHR and domestic American Courts. This recognition is significant because non-discrimination is a well-established principle in international law; thus, it may provide an avenue for addressing violations before tribunals that are reluctant to recognise the connection between environmental harms and other human rights.

In a case before the IACHR, the *Danns*, members of the Western Shoshone Indigenous group in the US claimed that the US had been discriminatory in its treatment of their lands. There were multiple issues before the Commission relating to the right of the *Danns* to use the land, but one of the concerns was that the State had permitted gold prospecting in the traditional Western Shoshone territory, and mining companies involved in the prospecting were digging the earth, pumping scarce water, and were likely to take over the land.<sup>153</sup> The US claimed that an earlier court case, in which the *Danns* had not participated, had determined that Aboriginal title to the lands in question had been extinguished, and compensation in the amount of a few cents per acre had been paid. The Commission found the actions of the State to be discriminatory, holding that, in the US, *'the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review'*.<sup>154</sup> The Commission concluded that the *Danns* had not been afforded equal treatment in the determination of their property interests in the traditional territory of the Western Shoshone people.<sup>155</sup>

Recent decisions by an American District Court and the Ninth Circuit Court of Appeal have also canvassed the possibility of claims based on racial discrimination in connection with environmental harms. A group of current and former residents of Bougainville, Papua New Guinea, brought an action in the American courts against Rio Tinto under the *Alien Tort Claims Act*, 28 USC §1350 (*ATCA*). Multiple claims were made for actions connected to Rio Tinto's mining operations in Bougainville, and its connection with the blockade and government actions during the 10 year civil war in the 1990s. While the existing decisions deal with the justiciability of the issues, they make a significant statement on the possibility of addressing harms on the basis of discrimination.

The plaintiffs' application stated, among other things:

*Rio viewed the people of Bougainville as inferior due to their color [sic] and culture and, therefore, intentionally violated their rights. This is a policy and intent that Rio has manifested and directed towards Indigenous people in many areas of the world where they have located mines. In this instance, this policy was, in part, the reason*

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<sup>152</sup> *Yanomami Community v Brazil*, Inter-American Commission on Human Rights, Case 7615, Decision of 5 March 1985, Res 12/85, Annual Report 1984–1985, OEA/Ser.LV/II.66, doc 10 rev 1, [82(f)] <<http://www.humanrights.is/the-human-rights-rproject/humanrightscasesandmaterials/cases/regionalcases/interamericancommission/nr/789>> at 7 April 2008.

<sup>153</sup> *Dann v United States*, Inter-American Commission on Human Rights, Case 11.140, Decision of 27 December 2002, Report No. 75/02, [40].

<sup>154</sup> *Ibid* [144].

<sup>155</sup> *Ibid* [145].

*Rio destroyed villages, the environment, sacred sites and local culture, and is one of the reasons behind Rio's support of the blockade.*<sup>156</sup>

The District Court dismissed the claims on the basis that they were non-justiciable political questions, while acknowledging that the substance of the claims was cognisable under ATCA.<sup>157</sup> The Court of Appeal overturned the District Court. It ruled that these claims were properly the subject of litigation under ATCA, and that they were justiciable in American courts because racial discrimination violates *jus cogens*, and international law does not recognise an act that violates *jus cogens* as a sovereign act.<sup>158</sup>

## Indigenous Peoples' Rights

As previously indicated, Indigenous peoples have brought claims in several international systems arguing that their rights, such as the right to culture, the right to property, and the right to be free from discrimination, have been violated by environmental harms.

The particular situation of Indigenous peoples, and the special relationship of some Indigenous peoples with their land and resources, has been recognised in several international fora, and some national Constitutions and legislation. This recognition may provide support for arguments that environmental harms have affected the rights of an Indigenous people.

C169, the ILO's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, contains a number of provisions that protect Indigenous groups from environmental harms. Nineteen States have ratified this treaty, but Fiji and Nepal are the only states in the Asia Pacific region to have done so.

Article 4 of C169 requires specific protection for the property, culture and environment of Indigenous peoples: '[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned'. Article 7(4) also requires specific protection of the environment in the territories of Indigenous peoples: '*[g]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit*'. There are further provisions in C169 requiring governments to respect the relationship of Indigenous peoples with their lands and territories,<sup>159</sup> to safeguard the right of Indigenous peoples to the natural resources on their lands,<sup>160</sup> and to protect the right of Indigenous peoples not to be removed from the lands that they occupy (with certain limited exceptions).<sup>161</sup>

The recently adopted *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>162</sup> represents a significant development in the protection of Indigenous peoples from environmental harms in international law. The Declaration contains specific protections against environmental harms that threaten the traditional way of life of Indigenous people. It also recognises the right to self-determination of Indigenous peoples, including their right to pursue economic, social and cultural development. The Declaration protects Indigenous people from dispossession of their land or resources, or forced removal from their lands. Article 29 specifically requires that States take steps to protect Indigenous lands from contamination or destruction:

*(1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.*

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<sup>156</sup> Hagens Berman Sobol Shapiro LLP, *Rio Tinto Complaint* (2000) [234] <<http://www.hbsslaw.com/files/Final%20Rio%20Tinto%20Complaint1037668347503.pdf>> at 10 April 2008.

<sup>157</sup> *Sarei v Rio Tinto, PLC*, 221 F Supp 2d 1116 (CD Cal, 2002).

<sup>158</sup> *Sarei v Rio Tinto, PLC*, 487 F 3d 1193 (9<sup>th</sup> Cir, 2007).

<sup>159</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989) art 13.

<sup>160</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989) art 15.

<sup>161</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 June 1989) art 16.

<sup>162</sup> GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/Res/61/295 (2007).

*States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.*

*(2) States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent.*

In addition to requiring that States protect Indigenous lands and resources, the Declaration requires that Indigenous people be included in decision-making that affects their rights.<sup>163</sup> The *Rio Declaration* articulated a similar concern in its recognition of the special role of Indigenous communities in environmental management, in principle 22:

*Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.*

The relationship that many Indigenous peoples have with their land, resources, and environment was also recognised in *Agenda 21* (the plan of action adopted at UNCED), which called on governments to include Indigenous people in decisions that may affect that relationship.<sup>164</sup>

Unfortunately, (with the exception of C169 in Fiji and Nepal) none of these documents is binding at international or domestic law, though there appears to be an emerging recognition of the special relationship between many Indigenous peoples and their environment in international law. In particular, the *United Nations Declaration on the Rights of Indigenous Peoples*, as a General Assembly Resolution, represents evidence of the opinions of many governments on the link between Indigenous peoples and their environment. This recognition may bolster future claims brought by or on behalf of Indigenous groups.

## Self-Determination and State Sovereignty

States are the primary actors in international law, and state sovereignty is the most substantial protection or articulation of the right to self-determination for many peoples. The right to self-determination of peoples is enshrined in art 1(1) of both the *ICCPR* and the *ICESCR*, which provide: '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

The traditional criteria for statehood, as set out in the *Montevideo Convention on the Rights and Duties of States*<sup>165</sup> are: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.<sup>166</sup> A defined territory is not only a criterion for statehood, but is also essential to a state's ability to exercise many of its rights and obligations under international law.<sup>167</sup>

One of the key issues facing Pacific Island States, in particular, is the threat that climate change and rising sea levels may pose to their sovereignty. In its most severe form, this threat poses the possibility that some islands, such as the Carteret Islands, may entirely disappear below sea level. Rising sea levels also pose other threats to the survival of these States within their current

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<sup>163</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Annex (art 18) UN Doc A/Res/61/295 (2007).

<sup>164</sup> Division for Sustainable Development, United Nations Department of Economic and Social Affairs, *Agenda 21* (2002) [26.3] <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>> at 10 April 2008.

<sup>165</sup> Entered into force 26 December 1934.

<sup>166</sup> *Montevideo Convention on the Rights and Duties of States* (entered into force 26 December 1934) art 1.

<sup>167</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, 2003) 105.

territories. As ocean levels and temperatures rise, the coral reefs that provide protection from the open ocean are likely to deteriorate, leaving the islands and their populations exposed. In addition, rising sea levels threaten freshwater resources on many islands.

It is unclear what the status a state or its citizens would be in international law, if it suffered the permanent loss of its territory, or what the scope of the right to self-determination would be in that context. There is no precedent for a state failing to meet the criteria for statehood because of the disappearance of its territory. There are, however, precedents for states who, for a period of time, fail to meet other Montevideo criteria, such as 'effective government'. Such states continue to exist as states, although some of their rights, such as the rights to non-interference and sovereignty, may be suspended until such time as they again meet the Montevideo criteria; although, unlike a failed state, a submerged island state will have permanently lost one of its primary physical manifestations of sovereignty.

## Refugee Protections

Environmental degradation, particularly deforestation, water depletion, resource pollution, desertification, and coastal flooding is leading to the displacement of people in a number of countries. Recent examples of environmental displacement include natural disasters such as the tsunami in December 2004, and human-made disasters such as the Chernobyl nuclear accident. In the future, rising sea levels may lead to significant displacement of people both from Pacific Island States and from low-lying areas in South East Asia and South Asia.

While the term 'environmental refugees' has become popular, persons displaced by environmental harms do not enjoy any protection under international refugee law. Art 1A(2) of the *Convention Relating to the Status of Refugees*<sup>168</sup> (*Refugee Convention*) defines a refugee as

*any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.*<sup>169</sup>

Those displaced by environmental degradation do not meet the definition of refugee set out in the Convention. In most cases, they will not have 'a well-founded fear of being persecuted on the basis of one of the enumerated grounds', and they will not be outside their country of origin. Indeed, they are perhaps better characterised as internally displaced persons because environmental degradation has not contributed to large population movements beyond state borders (except with the notable exception of African droughts).

Environmental refugees may have refugee status under international law in exceptional circumstances where states use environmental damage as a form of persecution. An example of this occurring would be the destruction of the marshes in southern Iraq in the early 1990s, which is often viewed as a deliberate campaign against the Marsh Arabs who opposed the rule of Saddam Hussein.

Some regional instruments have expanded the definition of refugees. In the AU's *Convention Governing the Specific Aspects of Refugee Problems in Africa*,<sup>170</sup> the term 'refugee' applies to both persons falling within the definition found in the *Refugee Convention*, and

*to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country*

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<sup>168</sup> Entered into force 22 April 1954.

<sup>169</sup> UN Convention relating to the Status of Refugees. 22 April 1954). Amended by the Protocol Relating to the Status of Refugees, 4 Oct. 1967. Ref. Art. 1, 2,

<sup>170</sup> Entered into force 20 June 1974.

*of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*<sup>171</sup>

The *Cartagena Declaration on Refugees*, which was adopted in Colombia in 1984 by a group of governmental experts and eminent jurists from the Americas in response to the increasing numbers of Latin Americans who were being driven from their homes by violence at the time, also proposed the expansion of the definition of a refugee to include:

*persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*<sup>172</sup>

While both the *AU Convention Governing the Specific Aspects of Refugee Problems in Africa* and the *Cartagena Declaration on Refugees* expand the definition of a refugee, neither recognises environmental degradation as a single cause for migration, and neither would appear to provide specific protection for environmental refugees.

Within the APF region, New Zealand has established the Pacific Access Category for immigrants from Tuvalu, Fiji, Kiribati and Tonga. Each country is allocated a set annual quota of citizens who can be granted residency in New Zealand. Principal applicants, must, meet certain requirements (which are unrelated to the environment from which they come), and they are not classified as 'environmental refugees'.<sup>173</sup>

## Procedural Rights

The importance of participatory rights to the ability of people to protect themselves from environmental harms has been widely recognised. As stated by Dinah Shelton: '*[t]he direct involvement of those likely to be affected by environmental harm will help prevent the establishment of secret toxic dumpsites or other acts of deliberate pollution*'.<sup>174</sup>

There are three components to participatory rights:

- public awareness and access to information held by public authorities;
- participation in decision-making; and
- access to justice.

## Access to Information

Access to information has been recognised by a number of international bodies as a component of the rights to freedom of opinion and expression. The importance of access to information in an environmental context has been articulated in a significant number of international declarations and agreements.

In 1946, in a resolution calling for an international conference on freedom of information, the UNGA recognised a right to freedom of information: '*[f]reedom of information is a fundamental*

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<sup>171</sup> 1001 U.N.T.S. 45, entered into force June 20, 1974, Art. 1(2).

<sup>172</sup> Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3 (art 3(3)) (1984–85).

<sup>173</sup> See generally Immigration New Zealand, *Pacific Access Category* (2008)

<<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>> at 10 April 2008.

<sup>174</sup> Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 103, 117.

human right and is the touchstone of all the freedoms to which the United Nations is consecrated'.<sup>175</sup>

The rights to freedom of opinion and expression were articulated in art 19 of the UDHR: '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

These were subsequently codified in greater detail in art 19 of the ICCPR:

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

In a joint declaration in 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression stated:

*Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.*<sup>176</sup>

The UN Special Rapporteur's 1999 report also stated:

*everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by the Government in all types of storage and retrieval systems ... subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.*<sup>177</sup>

## Access to Information in International Environmental Law

On a global level, the importance of access to information in an environmental context was recognised in Principle 10 of the Rio Declaration:

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<sup>175</sup> *Calling of an International Conference on Freedom of Information*, GA Res 59(I), UN GAOR, 1<sup>st</sup> sess, 65<sup>th</sup> plen mtg (1949).

<sup>176</sup> *Joint Declaration of the United Nations Special Rapporteur on Freedom of Expression, the Organization of American States Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe Representative on Freedom of the Media* (26 November 1999) in Sandra Coliver, 'The Importance of the Right of Access to Information Held by Public Authorities, and the Need for the United Nations to Take Steps to Further Elaborate, Codify, Protect and Promote this Right' (Talk presented to the United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 8–9 November 2006) <<http://www2.ohchr.org/english/issues/development/governance/docs/Coliver.pdf>> at 10 April 2008.

<sup>177</sup> Abid Hussain, *Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression*, Commission on Human Rights, 55<sup>th</sup> sess, [12], UN Doc E/CN.4/1999/64 (1999).

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

In 2002, the *Plan of Implementation of the World Summit on Sustainable Development*<sup>178</sup> further developed this connection by calling on states to:

*Ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration.*<sup>179</sup>

The UNCHR encouraged the implementation of the principles of the *Rio Declaration*, particularly, Principle 10, in its resolution entitled *Human Rights and the Environment as a Part of Sustainable Development in 2003*.<sup>180</sup>

The *Aarhus Convention* is perhaps the most detailed treaty on the right to information in an environmental context. In contrast with the *Rio Declaration*, the *Aarhus Convention* is a binding regional and international instrument, and it articulates specific rights to information. Drafted in 1998, by the UNECE, art 19(3) opens it to accession by states who are not Members of the UNECE upon approval by the Meeting of the Parties. To date, no states outside the UNECE have taken advantage of this provision.

The significance of this treaty has already been mentioned in previous sections. Secretary-General Kofi Annan recognised the Convention as containing the most significant and detailed articulation of the right to information in an environmental context.

A great number of international environmental agreements now contain provisions requiring the provision of specific information by a state to its citizens. These include the *Rotterdam Convention*, the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*,<sup>181</sup> and the *Stockholm Convention*; however, there are many others that either implicitly or explicitly confirm this right.<sup>182</sup> While many states have entered into commitments to provide information to the public under these Conventions, the corresponding obligation to do so is an obligation vis-à-vis the other States Parties, not vis-à-vis the state's own citizens. These provisions create duties, but do not directly create individual rights.

Beyond determining the scope of a right to information, or the extent to which such a right exists, a question arises as to the value of defining such a right specifically within the context of environmental issues. On the one hand, the right to information, along with other participatory

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<sup>178</sup> (2002) <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf)> at 10 April 2008.

<sup>179</sup> *Ibid* [128].

<sup>180</sup> Resolution 2003/71, Commission on Human Rights, 59<sup>th</sup> sess, 62<sup>nd</sup> mtg, [6], UN Doc E/CN.4/RES/2003/71 (2003).

<sup>181</sup> (Entered into force 18 June 2001) arts 6(iii), 13(iii).

<sup>182</sup> *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes* (entered into force 29 September 1997); *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (entered into force 6 October 1996); the Regional Seas Conventions and Protocols: see <<http://www.unep.ch/regionalseas/legal/conlist.htm>> at 10 April 2008; *Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment* (opened for signature 21 June 1993); *United Nations Framework Convention on Climate Change* (entered into force 21 March 1994). Non-binding texts include the *European Charter on the Environment and Health* (adopted 8 December 1989); *Arab Declaration on Environment and Development and Future Perspectives* (Cairo, September 1991) A/46/632 in UN Doc E/CN.4/Sub.2/1992/7, 20

rights, could be viewed as simply a component of basic democratic rights and the rule of law.<sup>183</sup> On the other hand, there may be some utility in defining these rights, specifically in relation to environmental contamination because of the frequency with which people have been exposed to environmental contaminants without their knowledge or consent. Specific rights would facilitate complaints about such exposure, and may open the possibility of complaining about such exposure without actually having to establish a violation of another, less well-defined right, such as the right to life or health.

If there was a specific right to information within the environmental context, it would be necessary to consider whether a state may have legitimate bases, such as security concerns, for abrogating it. It would also be necessary to consider what would be required to discharge a state's obligations: for example, whether general legislation on access to information is sufficient, or whether it would be necessary to establish specific regulatory structures to ensure that adequate information is actually made available.

### Access to Information in Regional Environmental Instruments

At the regional level, the right to access to information in the right to freedom of expression is included in the preamble to the *Inter-American Declaration of Principles on Freedom of Expression*:

*Reaffirming Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication.*<sup>184</sup>

In a 2006 decision, the IACtHR for Human Rights found that the rights of freedom of thought and expression in the *American Convention* include a right:

*to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.*<sup>185</sup>

It has also been the subject of consideration by the IACHR in country reports, with the Commission concluding:

*severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, [is] inconsistent with the*

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<sup>183</sup> Pallemmaerts suggests that the traditional boundaries of participatory democracy are being pushed by citizen activism on environmental issues. On the basis of that argument, rights that are specifically tied to environmental objectives may at times be broader than basic participatory rights: Marc Pallemmaerts, 'Proceduralizing Environmental Rights: the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context' in *Human Rights and the Environment Proceedings of a Geneva Environment Network Roundtable* (2004) 14.

<sup>184</sup> See <<http://www.iachr.org/declaration.htm>> at 10 April 2008.

<sup>185</sup> *Case of Claude-Reyes v Chile* (2006) 151 Inter-Am Ct HR (ser C) [77].

*right to be respected as a human being ... The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.*<sup>186</sup>

In 1991, the *Arab Declaration on Environment and Development and Future Perspectives* articulated a right to information about environmental issues. The Declaration stated that individuals and organisations shall have the '*right to acquire information about environmental issues ... access to data ... and to participate in the formulation and implementation of decisions that may affect their environment*'.

The importance of access to information in an environmental context was also recognised in the Asia Pacific Region with the 1990 *Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific*. The Declaration affirmed a right of individuals to be informed about environmental problems that affect them, and to have access to the information that would allow them to participate in decision-making that affects their environment.<sup>187</sup>

## Participation in Decision-Making

The right to participate in governance is articulated in art 21(1) of the *UDHR*. Furthermore, art 25 of the *ICCPR* provides for the right to take direct part in public affairs. The ability to participate in governmental decision-making gives individuals and communities the opportunity to voice their concerns about existing or potential environmental problems.

Principle 23 of the *World Charter for Nature*, which approaches environmental problems from an ecological, rather than a human rights, perspective, articulates an obligation on governments to allow public participation in decision-making:

*All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.*

This principle reflects general principles now also recognised in other international instruments.<sup>188</sup>

The *Rio Declaration* noted that environmental issues are best addressed with the participation of concerned citizens, and that individuals should have the opportunity to participate in the decision-making process. This recommendation was adopted in the *Aarhus Convention*, which provides for:

- arrangements to be made by public authorities to enable the public affected and environmental NGOs to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment;
- these comments to be taken into due account in decision-making; and
- information to be provided on the final decisions and the reasons for it.

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<sup>186</sup> Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, Doc. 10 rev 1 (1997).

<sup>187</sup> '[T]he right of individuals and nongovernmental organizations to be informed of environmental problems relevant to them, to have necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment': *Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific*, (16 October 1990) A/Conf.151/PC/38, [27].

<sup>188</sup> These include, but are not limited to: *United Nations Convention to Combat Desertification in Those Countries Experiences Serious Drought and/or Desertification* (entered into force 26 December 1996) art 3; *Rotterdam Convention*, art 15(2); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (11 September 2003) art 23.

Public participation in the context of decisions impacting on the environment has been considered by the HRC in the case of *Apirana Mahuika v New Zealand*.<sup>189</sup> The petition claimed, amongst other things, a violation of the right to self-determination, right to a remedy and minority rights. The alleged violations arose from national regulations on commercial and non-commercial fishing. The Committee emphasised

*that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.*<sup>190</sup>

The HRC held that the substantial process adopted by the Government complied with this requirement because the Government paid special attention to the cultural and religious significance of fishing for the Maori Indigenous people.

## Access to Justice

Article 10 of the *UDHR* establishes the right to access to justice: '*[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*'.<sup>191</sup>

Article 14 of the *ICCPR* also establishes this right of access to justice in both civil and criminal contexts. The HRC has noted that states have tended to focus on criminal justice issues, but that states need to recall that these provisions also apply in procedures to determine the rights and obligations of individuals.<sup>191</sup>

While art 2(3) of the *ICCPR* requires that states ensure that individuals, whose rights have been violated, have access to an effective remedy, the *ICESCR* does not have an equivalent provision. The *CESCR* has exhorted states to provide access to justice for rights that are justiciable under their laws, but there is no precise requirement of access to justice in connection with particular rights.<sup>192</sup> To the extent that environmental harms affect economic, social and cultural rights, rather than civil and political rights, it may be more difficult to establish a right of access to justice.

In international environmental law, concerns about access to justice in an environmental context were clearly addressed in the *Rio Declaration*, which called for the development of national laws on liability and compensation for victims of pollution and other environmental damage. Principle 13 provides:

*States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.*

This is reiterated in Principle 10 which, in dealing with access to information, provides that States shall provide '*[e]ffective access to judicial and administrative proceedings, including redress and remedy*'.

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<sup>189</sup> Human Rights Committee, Communication No 547/1992, Un Doc CCPR/C/70/D/547/1993 (2000).

<sup>190</sup> *Ibid* [9.5].

<sup>191</sup> *General Comment No 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art 14)*, Human Rights Committee, 21<sup>st</sup> sess, [14], UN Doc HRI/GEN/1/Rev1 at 14 (1984).

<sup>192</sup> *General Comment No 3: The Nature of States Parties' Obligations (Art 2, par 1)*, Committee on Economic, Social and Cultural Rights, 5<sup>th</sup> sess, UN Doc E/1991/23, annex III at 86 (1990).

Access to justice in an environmental context was further developed in the *Aarhus Convention*. In that Convention, art 9 provides:

*(1) Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. ...*

*(3) ... each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

## Section 5 – Use of the Right to Life to Address Environmental Harms

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Environmental harms can, and often do, have a direct impact on human life. These effects may be immediate – for example, the aftermath of the Chernobyl and Bhopal disasters – or may appear gradually – for example, the extended exposure to toxic pollutants in the air, water or soil leads to deterioration in health and an increased susceptibility to disease.

Global environmental degradation may also have a slower, but equally insidious impact on human life. Rising global temperatures, changing weather patterns and rising sea levels are projected to have a significant effect on the habitability of the planet, impacting disproportionately on those least able to respond.

### The Right to Life in Human Rights Treaties

The right to life is protected in both the *UDHR* and the *ICCPR*. Article 3 of the *UDHR* provides: ‘[e]veryone has the right to life, liberty and security of the person’. Article 6(1) of the *ICCPR* provides: ‘[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.

The right to life of children receives specific protection in art 6 of the *CRC*:

- (1) *States Parties recognise that every child has the inherent right to life.*
- (2) *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

The right to life is a fundamental right from which no derogation is allowed, even in times of emergency.<sup>193</sup> In addition to being protected in global human rights instruments, it is protected in all regional instruments: art 2 of the *European Convention*; art 1 of the *American Declaration of the Rights and Duties of Man*; art 4 of the *American Convention*; and art 4 of the *African Charter*.

### Interpretation of the Right to Life

Historically, the right to life has been interpreted to apply to situations where states use lethal force against their citizens. In this context, the right protects an individual from a range of acts such as forced disappearances, extrajudicial executions, and other such threats. States are obliged both to refrain from using lethal force themselves, and to address criminal activities involving lethal force.<sup>194</sup> The obligation has been interpreted to also cover situations where the state assumes a special degree of control over individuals: for example, in cases involving detention and imprisonment.<sup>195</sup>

Environmental threats to life differ from the more widely recognised violations of the right to life because, in general, they do not involve the use of lethal force, are frequently caused by non-state actors engaged in legitimate activities, and the victims are neither specifically targeted, nor under a special degree of state control. While the connection between the condition of the environment and human life has clearly been recognised in a variety of international

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<sup>193</sup> *International Covenant on Civil and Political Rights* (entered into force 23 March 1976) art 4(2).

<sup>194</sup> See, eg, *Basilio Laureano Atachahua v Peru*, Human Rights Committee, Communication No 540/1993, [8.3], UN Doc CCPR/C/53/540/1993 (1996); *Osman v United Kingdom* (2000) 29 EHRR 245, [115].

<sup>195</sup> See, eg, *Lantsova v The Russian Federation*, Human Rights Committee, Communication No 763/1997, [9.2], UN Doc CCPR/C/74/D/763/1997 (2002); *Keenan v United Kingdom* [2001] ECHR 242, [91] (3 April 2001).

instruments, jurisprudence on violations of the right to life resulting from environmental harm is still in an early stage of development.

In General Comment 6, the HRC makes several statements that are particularly relevant in considering the impact of environmental harms on the right to life. First, it warns against interpreting the right to life in a narrow or restrictive manner.<sup>196</sup> Second, it states that protection of the right to life requires the state to take positive measures and that *'it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'*.<sup>197</sup> This statement is important because it extends protection beyond acute threats to life, such as homicide or forced disappearances, to more diffuse threats, such as malnutrition and disease. Nevertheless, the statement is relatively weak because it does not impose a clear obligation on states to address these problems. As Nowak points out in his discussion of the general comments:

*By using the word 'desirable', the Committee has made it known that while assuming that the scope of the right to life is broad, it would not necessarily hold Art 6(1) to be violated when legislation does not achieve a sufficient reduction in the infant mortality rate.*<sup>198</sup>

In General Comment 14, the HRC addresses the effects of nuclear weapons on the right to life. The Committee notes the general duty of states to avoid use of force and to protect life, particularly from the severe threat to life posed by weapons of mass destruction. The Committee states:

*It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure. ... The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognised as crimes against humanity.*<sup>199</sup>

The suggestion that the existence of nuclear weapons could be a threat to the right to life, even without the immediate threat of their use in hostilities, is significant for the application of the right to life to environmental harms. Nuclear testing, for instance, does not involve directing lethal force against human populations, but may threaten human life by potentially contaminating the environment with radiation. If such contamination violates the right to life, the principle may be extended to the contamination of the environment with pollutants that have a comparable effect.

The ICJ has also considered this issue in the context of its *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*. As discussed in the previous section, in noting the importance of respect for the environment, the ICJ stated:

*The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*<sup>200</sup>

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<sup>196</sup> General Comment No 6: *The Right to Life (Art 6)*, Human Rights Committee, 16<sup>th</sup> sess, [1], [5], UN Doc HR/GEN/1/Rev1 at 6 (1994).

<sup>197</sup> Ibid [5].

<sup>198</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 107 (fn 17).

<sup>199</sup> General Comment No 14: *Nuclear Weapons and the Right to Life (Art 6)*, 23<sup>rd</sup> sess, [4], [6] UN Doc HRI/GEN/1/Rev1 at 18 (1984).

<sup>200</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 241–2.

Also mentioned in the previous section, in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judge Weeramantry drew a strong connection between the enjoyment of the right to life and the quality of the environment:

*the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.*<sup>201</sup>

Regional systems have also considered the connection between environmental harms and the right to life. The IACtHR has taken a particularly broad approach to the right to life, which has not as yet been endorsed in other jurisdictions:

*The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.*<sup>202</sup>

This statement extends the right to life beyond a right to physical survival, to include a right to a dignified existence, and, in subsequent decisions, the Court has connected the rights to health, to food, and access to clean water with the right to a life of dignity.<sup>203</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. It has held that a state has an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>204</sup> In a case specifically dealing with environmentally harmful activities, *Öneryıldız v Turkey*,<sup>205</sup> the Court found an obligation on the State to protect life against any dangerous activity, public or private.

## Positive Obligations to Protect the Right to Life

Article 2(1) 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'*. The obligation to 'respect' rights is interpreted as requiring states not to violate human rights

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<sup>201</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 92.

<sup>202</sup> *Case of the 'Street Children' (Villagrán-Morales et al) v Guatemala* (1999) 63 Inter-Am Ct HR (ser C) [144].

<sup>203</sup> *Ibid.* See also *Case of the Yakye Axa Indigenous Community v Paraguay* (2006) 142 Inter-Am Ct HR (ser C) [160]–[167]. Note, 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 art 2 of the Convention safeguarding the rights of man means only 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>204</sup> See *LCB v United Kingdom* [1998] ECHR 49 (9 June 1998) [40]; *Calvelli and Ciglio v Italy* [2002] ECHR 3 (17 January 2002) [49]. *LCB v United Kingdom* 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.

<sup>205</sup> [2004] ECHR 657 (30 November 2004).

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

In General Comment 31, on the general legal obligations of States Parties, the HRC stated:

*the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities ... There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.*<sup>206</sup>

In General Comment 6, discussing the positive obligations imposed on states to protect the right to life, the HRC refers to:

- the obligation to prevent and punish deprivations of life through criminal acts;
- the obligation to establish effective facilities and procedures to investigate disappearances that might involve loss of life; and
- the desirability of state actions to address harms associated with high infant mortality, low life expectancy, malnutrition and epidemics.<sup>207</sup>

The ECHR has articulated similar obligations: first, a general obligation to put measures in place to safeguard life; second, a specific obligation to address known criminal threats to identified individuals.<sup>208</sup> With regard to the former, and as discussed above, the Court has placed a general obligation on the state to introduce protections where dangerous activities threaten life.<sup>209</sup> This obligation has been construed as including regulation: for example, regulation in connection with the treatment of patients in both public and private hospitals in order to protect their lives.<sup>210</sup> It has also been extended to an obligation to provide information about possible threats to life.<sup>211</sup>

## Obligation to Introduce Legislation or Other Measures

Article 2(2) of the *ICCPR* requires that States Parties take steps to adopt domestic legislation or other measures to give effect to the rights protected in the Covenant:

*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and within the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*

In addition to this general obligation, art 6 of the *ICCPR* requires that the right to life 'be protected by law'. The jurisprudence and statements of human rights bodies have repeatedly called on states to adopt legislation and to take other measures to prevent violations of the right

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<sup>206</sup> *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, [8], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>207</sup> *General Comment No 6: The Right to Life (Art 6)*, Human Rights Committee, 16<sup>th</sup> sess, [3], [4], UN Doc HR/GEN/1/Rev1 at 6 (1994).

<sup>208</sup> See *Akkok v Turkey* [2000] ECHR 458 (10 October 2000) [77].

<sup>209</sup> *Önveryıldız v Turkey* [2004] ECHR 657 (30 November 2004).

<sup>210</sup> *Calvelli and Ciglio v Italy* [2002] ECHR 3 (17 January 2002).

<sup>211</sup> *LCB v United Kingdom* [1998] ECHR 49 (9 June 1998).

to life. In *Basilio Laureano Atachahua v Peru*,<sup>212</sup> the HRC reiterated its statement in General Comment 6 that a state is obliged to take measures to prevent criminal deprivations of life.<sup>213</sup>

The HRC has also addressed the need for legislation and other measures to protect life, in its country reports. In its observations on Hong Kong, in 1995, the HRC articulated a general obligation to provide legislative protections:

*under the Convention a State Party does not only have an obligation to protect individuals against violation by Government officials but also by private parties. It thus notes with deep concern the absence of legislation providing effective protection against violations of Convention rights by non-governmental actors.*<sup>214</sup>

In other country reports, the HRC has specifically addressed the need for criminal legislation and for active prosecution of offenders to address certain activities or situations which, though not always directly leading to death, result in an increased threat to the right to life: for example, female genital mutilation<sup>215</sup> and inadequate gun control measures.<sup>216</sup> Such comments are interesting in the context of environmental harms because they involve calls by the HRC to legislate and to act to prevent an activity, or address a situation, that may not have, or are not intended to have, an immediate and adverse impact on life.

## Obligations to Investigate and Provide Remedies

Article 2(3) of the *ICCPR* requires States Parties to provide remedies for violations of *ICCPR* rights:

*Each State party to the present Covenant undertakes:*

*(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

*(c) To ensure that the competent authorities shall enforce such remedies when granted.*

In General Comment 31, the HRC refers to an obligation on states to investigate and redress human rights violations by private actors, and to provide remedies for such violations:

*There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the*

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<sup>212</sup> Human Rights Committee, Communication No 540/1993, UN Doc CCPR/C/53/540/1993 (1996).

<sup>213</sup> *Ibid* [8.3].

<sup>214</sup> *Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, Human Rights Committee, [10], UN Doc CCPR/C/79/Add.57 (1995).

<sup>215</sup> See *Concluding Observations of the Human Rights Committee, Lesotho*, Human Rights Committee, [12], UN Doc CCPR/C/79/Add.106 (1999); *Concluding Observations of the Human Rights Committee, Senegal*, Human Rights Committee, [12], UN Doc CCPR/C/79/Add.82 (1997).

<sup>216</sup> *Concluding Observations of the UN Human Rights Committee, United States of America*, Human Rights Committee, [282], UN Doc CCPR/C/79/Add.50 (1995).

*need to provide effective remedies in the event of breach under article 2, paragraph 3.*<sup>217</sup>

Similar obligations appear in regional jurisdictions. In the *Case of Velásquez-Rodríguez v Honduras*,<sup>218</sup> for instance, the IACtHR noted that state responsibility may arise because the state has failed to respond to a violation as required by the *American Convention*:

*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*<sup>219</sup>

The ECHR too has held on numerous occasions that the state must provide some recourse, either administrative or criminal, for violations of human rights.<sup>220</sup>

## Consideration of the Right to Life and the Environment

### The UN Human Rights Committee

The jurisprudence of the HRC on the connection between environmental harms and the right to life is limited. While a number of cases addressing environmental harms have been presented to the Committee, most have been declared inadmissible because the authors were not ‘victims’ within the meaning of art 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights*<sup>221</sup> (*Optional Protocol*). However, the HRC has affirmed the connection between the condition of the environment and the right to life in a number of cases.

In the 1982 case of *EHP v Canada*,<sup>222</sup> which was declared inadmissible due to the failure to exhaust domestic remedies, the Committee considered the threat to the right to life posed by the storage of radioactive waste in close proximity to residences in the town of Port Hope. Nuclear waste had been stored in dumpsites since 1945, apparently without the knowledge of the residents. In 1974, large scale pollution of residences and other buildings was discovered. A cleaning operation stalled and 200 000 tons of radioactive waste remained in eight temporary disposal sites near, or directly beside, residences. The applicant claimed that this constituted a threat to the life of present and future generations in Port Hope because exposure to radioactive materials is known to cause cancer and genetic defects. In a preliminary proceeding on admissibility, the Committee stated ‘*the present communication raises serious issues, with regard to the obligation of States parties to protect human life* (article 6(1))’.<sup>223</sup> While the case was not subsequently examined on its merits, this statement suggests that such a situation could, in the appropriate circumstances, lead to a finding that the right to life had been violated.

Between 1993 and 2006, the HRC released three significant decisions on the effect of the deployment, threat and possible use of nuclear weapons on the right to life. Each of these decisions declared the communication (or application) inadmissible under art 1 of the *Optional Protocol* because the authors were not ‘victims’ of a violation. The HRC has repeatedly stated:

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<sup>217</sup> *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, [8], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>218</sup> (1988) 4 Inter-Am Ct HR (ser C).

<sup>219</sup> *Ibid* [172].

<sup>220</sup> See *Kiliç v Turkey* (28 March 2000) Application No 22492/93, [62]; *Mahmut Kaya v Turkey* (28 March 2003) Application No 22535/93, [85]; *Calvelli and Ciglio v Italy* [2002] ECHR 3 (17 January 2002) [51].

<sup>221</sup> Entered into force 23 March 1976.

<sup>222</sup> Human Rights Committee, Communication No 67/1980, UN Doc CCPR/C/17/D/67/1980 (1982).

<sup>223</sup> *Ibid* [8].

*For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.*<sup>224</sup>

This principle was most thoroughly set out in an early decision of the HRC, *Aumeeruddy-Cziffra v Mauritius*,<sup>225</sup> which was unrelated to either the right to life or the environment. The Committee held that an applicant could only claim to be a victim of something if they were actually affected by it. The law or practice in question must either have already been concretely applied to the detriment of the applicant, or it must be applicable in such a way that the victim's risk of being affected is more than a theoretical possibility.

Two of the nuclear weapons cases before the HRC, *EW v The Netherlands*<sup>226</sup> and *Aalbersberg v The Netherlands*,<sup>227</sup> dealt respectively with the deployment of nuclear weapons, and the government's recognition of the lawfulness of the potential use of nuclear weapons. In both cases, the Committee found the claims to be inadmissible because the authors were not facing an imminent threat to their lives.

In contrast to *EW v The Netherlands* and *Aalbersberg v The Netherlands*, the applicants in *Bordes and Temeharo v France*<sup>228</sup> complained about activities that had already occurred, that is, French nuclear tests in the South Pacific.<sup>229</sup> The authors referred to the direct effects of radiation on human health, the risk of radioactive contamination of the food chain, and suggested that testing may have affected the structure of the atolls, increasing the risk of radioactivity escaping into the surrounding environment. Despite finding that the Communication (application) was inadmissible, the HRC took the opportunity to reaffirm General Comment 14, stating:

*Although the authors have not shown that they are 'victims' within the meaning of article 1 of the Optional Protocol, the committee wishes to reiterate, as it observed in its General Comment 14, that 'it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today'.*<sup>230</sup>

Finally, in *Brun v France*,<sup>231</sup> an application to the HRC argued that the possible long-term health and environmental effects of open-field trials of genetically modified organisms violated the applicant's right to life. The Committee found the communication inadmissible, noting that, notwithstanding the precautionary principle, an applicant cannot argue that a law or practice violates the *ICCPR* in theoretical terms, and that the applicant was not a victim who faced an imminent or actual violation of his rights.

## The European Court of Human Rights

Jurisprudence on environmental harms affecting human rights in the European system has been dominated by a unique focus on the right to respect for privacy, family life and the home. There may be two reasons for this focus: a perceived reluctance within European human rights

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<sup>224</sup> This language is used in *Aalbersberg v The Netherlands*, Human Rights Committee, 87<sup>th</sup> sess, Communication No 1440/2005, [6.3], UN Doc CCPR/C/87/D/1440/2005 (2006); *EW v The Netherlands* Human Rights Committee, 47<sup>th</sup> sess, Communication No 429/1990, [6.4], UN Doc CCPR/C/47/D/429/1990 (1993). Similar language is used in *Bordes and Temeharo v France* Human Rights Committee, 57<sup>th</sup> sess, Communication No 645/1995, [5.4], UN Doc CCPR/C/47/D/645/1995 (1996).

<sup>225</sup> Human Rights Committee, Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978.

<sup>226</sup> Human Rights Committee, 47<sup>th</sup> sess, Communication No 429/1990, UN Doc CCPR/C/47/D/429/1990 (1993).

<sup>227</sup> Human Rights Committee, 87<sup>th</sup> sess, Communication No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (2006).

<sup>228</sup> Human Rights Committee, 57<sup>th</sup> sess, Communication No 645/1995, UN Doc CCPR/C/47/D/645/1995 (1996).

<sup>229</sup> *Ibid* [5.5].

<sup>230</sup> *Ibid*, para 5.9.

<sup>231</sup> Human Rights Committee, 88<sup>th</sup> sess, Communication No. 1453/2006, UN Doc CCPR/C/88/D/1453/2006 (2006).

bodies to recognise the connection between environmental harms and other rights, and the comparatively low threshold for finding violations of the right respect for privacy, family and home. That said, the ECHR has recently stated that environmental harms can violate the right to life and, as a result, jurisprudence in this area may be set to expand.

The right to life is protected in art 2(1) of the *European Convention*:

*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

In the 1976 decision of the ECHR, *X and Y v Federal Republic of Germany*,<sup>232</sup> members of an environmental group complained to the European Commission on Human Rights that military activities on marshlands adjacent to the group's property violated, among other rights, their right to life. In dismissing the application, the Court found no violation of the right to life and held that no right to 'nature preservation' was included among the Convention rights. This decision may have affected the strategy of subsequent applicants, and limited European jurisprudence on the right to life, since as mentioned above, subsequent environment related actions have claimed violations of other rights.

The right to respect for privacy, family life and the home is found in art 8 of the *European Convention*. It provides:

*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Two significant cases on human rights and the environment in the European system are *López Ostra v Spain* and *Fadeyeva v Russia*.

In *López Ostra v Spain*, the applicant alleged ongoing serious health problems from pollution emanating from a nearby tannery waste treatment plant. A malfunction at the plant led to the further release of gas fumes and contamination that affected people living in the area, and local residents were evacuated. The plant continued to operate and the applicant finally sold her house and moved. In this case, the Court held:

*Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.*<sup>233</sup>

In *Fadeyeva v Russia*, the applicant made a similar complaint. The Court stated that even if the pollution did not cause any quantifiable harm to the applicant's health, it affected the quality of life at her home, in violation of art 8. The Court also suggested that strong indirect evidence would be a sufficient basis for finding that pollution had affected human health.<sup>234</sup>

In 1998, in *Guerra and others v Italy*,<sup>235</sup> the applicants alleged a breach of various rights, including the right to life associated with pollution resulting from the operation of a chemical

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<sup>232</sup> (1976) European Commission of Human Rights, Application 7407/76.

<sup>233</sup> *López Ostra v Spain* (1995) 303-C Eur Court HR (ser A) [51].

<sup>234</sup> *Fadeyeva v Russia* [2005] ECHR 376, [88] (9 June 2005).

<sup>235</sup> (1998-1) ECHR (19 February 1998) <<http://cmiskp.echr.coe.int//tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=716&sessionId=7033547&skin=hudoc-en&attachment=true>> at 17 April 2008.

factory near their town. The Court found a violation of art 8, the right to family, home and private life, and, citing *López Ostra v Spain*, reiterated that '*severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life*'.<sup>236</sup> The Court declined to consider whether the right to life guaranteed by art 2 had been violated, considering it unnecessary in light of its decision on art 8.

The statements in *López Ostra v Spain*, *Fadeyeva v Russia* and *Guerra and others v Italy* make it clear that there is a lower threshold for a violation of art 8. Conversely, they indicate the greater evidence required to prove a violation of the right to life or health arising from industrial pollution.

In the more recent case of *Öneryıldız v Turkey*, the ECHR has suggested that its reluctance to accept claims for breaches of art 2 has been more perceived than actual. In *Öneryıldız v Turkey*, the Government had been informed of the risk of a methane gas explosion at a waste disposal site, but no steps were taken to address the problem. An explosion subsequently killed 39 people. The Court began by establishing that the protection of the right to life applies to any activity, public or private that may pose a risk to life.<sup>237</sup> The Court then addressed its perceived reluctance to find a connection between environmental harms and the right to life, noting that it had never denied that environmental harms could affect the right to life: '*[w]here the Convention institutions have had to examine allegations of an infringement of the right to the protection of life in such areas, they have never ruled that Article 2 was not applicable*'.<sup>238</sup> In making this comment, the Court specifically referred to cases involving toxic emissions and nuclear tests.<sup>239</sup>

This statement suggests that there is an opportunity to test further the scope of the right to life in relation to environmental contamination in the European system.

## The Inter-American Court and Commission

As mentioned above, the right to life in the Inter-American system has been interpreted broadly. In the *Case of the 'Street Children' (Villagrán-Morales et al) v Guatemala*,<sup>240</sup> the IACtHR stated:

*The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.*<sup>241</sup>

The extension of the right to life to include the right to a dignified existence is peculiar to the Inter-American system and may result in broader protections against environmental harms than those provided in other systems.

In the 1985 decision of the IACHR, *Yanomami Community v Brazil*, the Commission found that the Brazilian Government was responsible for violations of the right to life for failing to take steps to protect that safety and health of the Yanomami Indigenous communities. The complaint alleged that the construction of a highway and the grant of concessions to exploit resources brought an influx of newcomers to the lands of the Yanomami, and that these new arrivals

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<sup>236</sup> Ibid iii.

<sup>237</sup> *Öneryıldız v Turkey* [2004] ECHR 657, [71] (30 November 2004).

<sup>238</sup> Ibid [72].

<sup>239</sup> Ibid.

<sup>240</sup> (1999) 63 Inter-Am Ct HR (ser C).

<sup>241</sup> Ibid [144]. See also *Case of the Yakye Axa Indigenous Community v Paraguay* (2006) 142 Inter-Am Ct HR (ser C).

introduced influenza, tuberculosis and measles, which devastated the Yanomami population. The case is a significant precedent for addressing environmental harms because it addressed a violation of the right to life caused, not by a deliberate attack on the population, but by changes in their environment and surroundings that affected their survival.

In its 1997 report on the human rights situation in Ecuador, the IACHR addressed an allegation that oil exploitation activities had contaminated the environment of the Huaorani Indigenous communities, to the detriment of their life and health. The Commission noted the documented harm to human life and health caused by exposure to oil and oil-related chemicals. It recommended that the government implement the measures necessary to remedy the situation and to prevent future contamination that would further threaten the health and life of the people.

Like their European counterparts, the Inter-American human rights bodies have explicitly recognised that the responsibility of the state to protect life extends beyond traditional threats, such as homicide, to diffuse threats such as environmental contamination. Both systems have held states responsible for violating the right to life where they have failed to take steps to protect against such threats.

## Summary

Even though environmental harms have been widely recognised as threats to human life and health, international tribunals have been cautious in finding that such harms violate the right to life.

Statements from the HRC on nuclear weapons, and from the European and Inter-American Courts of Human Rights on the harms caused by various forms of environmental contamination support the proposition that the obligation of states to protect the right to life includes an obligation to protect against the threats posed by environmental harms.

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

## Section 6 – State Responsibility

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### Introduction

The section begins with a discussion of general principles of state responsibility, and their relevance to human rights violations. This is followed by a discussion of the principles for attributing responsibility to the state for harms caused by specific actors: state agents, non-state actors carrying out public functions, and non-state actors carrying out private functions. Much of the existing jurisprudence on these questions pertains to non-environmental violations of the right to life, but it reflects principles that would also be relevant to environmental harms affecting the right to life.

### Basic Statement of State Responsibility

The fundamental principle of state responsibility is enshrined in art 1 of the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (ILC Draft Articles): '[e]very internationally wrongful act of a State entails the responsibility of that State'.<sup>242</sup> This basic statement raises two questions: what is an internationally wrongful act? And, when is an act attributable to a State?

### What Is an Internationally Wrongful Act?

The ILC Draft Articles define an internationally wrongful act as an act or omission, attributable to the state, which constitutes a breach of an international obligation of the state.<sup>243</sup> There are several approaches to the inclusion of human rights within the international obligations of states. First, some human rights create obligations *erga omnes*, that is, obligations owed to the international community as a whole.<sup>244</sup> Violations of these human rights obligations are violations of an obligation of the state to the international community. The ILC also suggests that an internationally wrongful act may involve:

*legal consequences in relation ... [to] ... persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, State responsibility extends, for example, to human rights violations ...*<sup>245</sup>

Various international human rights bodies, including the HRC, have applied principles of state responsibility to human rights violations.<sup>246</sup>

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<sup>242</sup> The ILC Draft Articles are widely accepted as a codification of current customary international law. They have been cited in numerous decisions of international tribunals, and an earlier version of the ILC Draft Articles is cited in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 38–9. The ICJ did suggest caution in assuming that all the ILC Draft Articles reflect customary law in its recent decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007. The Court stated that it 'does not see itself required to decide at this stage whether the ILC's articles dealing with attribution, apart from Articles 4 and 8, express present customary international law' : at [47]. This statement suggests that the Court's earlier reliance on sections of the ILC Draft Articles should not be treated as an endorsement of the entire document.

<sup>243</sup> *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) art 2.

<sup>244</sup> See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32.

<sup>245</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 87.

<sup>246</sup> In *Jegatheeswara Sarma v Sri Lanka*, Human Rights Committee, Communication No 950/2000, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/950/2000 (2003), the HRC cited the ILC Draft Articles, and said that it was irrelevant to the responsibility of the State whether an officer involved in a disappearance had been acting *ultra vires*, or without the knowledge of his supervisors: at [9.2]. In *B d B v The Netherlands*, Human Rights Committee, Communication No 273/1988, 35<sup>th</sup> sess, UN Doc CCPR/C/35/D/273/1988 (1989), the HRC dismissed an argument that the actor in question was not a state

Additional bases for imposing responsibility on states for violations of the right to life are found in the text of the *ICCPR*. Article 2(1) states:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The obligation 'to respect and to ensure to all individuals' the rights recognised in the Convention imposes responsibility on the state for many harms that affect these rights.

Article 6, which protects the right to life, also imposes specific obligations on States Parties: '*[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*'. States Parties are required to protect the right to life by law, and, based on this Article and the requirement to 'ensure' rights in art 2, must ensure that no one is arbitrarily deprived of their life.

## When Is an Act Attributable to a State?

The clearest case for the attribution of wrongful acts to the State is where those acts are committed by a public actor. As the ICJ held in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)*,<sup>247</sup> it is a well-established rule of international law that the activities of State organs are imputable to the State: '*[a]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character*'.<sup>248</sup>

Similar statements can be found in other decisions, such as the IACtHR decision, the *Case of Velásquez-Rodríguez v Honduras*: '*[a]ny impairment of [rights protected by the Convention] which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility*'.<sup>249</sup>

Finally, art 4 of the ILC Draft Articles also establishes that actions of organs of the state will give rise to state responsibility:

*(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*

*(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Actions of organs of the state or public authorities, therefore, give rise to state responsibility.

## Organs of the State

Whether an actor is an organ of the state will depend on the internal laws of the state. In the Commentary on the ILC Draft Articles, the ILC states that:

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organ, and not controlled by the state. It held that a state is not relieved of its obligations when it delegates some of its functions to other autonomous organs: [6.5].

<sup>247</sup> [1999] ICJ Rep 62.

<sup>248</sup> *Ibid* 87.

<sup>249</sup> *Case of Velásquez-Rodríguez v Honduras* (1988) 4 Inter-Am Ct HR (ser C) [164].

*In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government.*<sup>250</sup>

Internal laws cannot, however, shield the state from responsibility for actors who are de facto public functionaries:

*the conduct of certain institutions performing public functions and exercising public powers (eg, the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.*<sup>251</sup>

It is also clear that in federal states, the state will be responsible for the activities of its individual states or provinces. In the *LaGrand Case (Germany v United States of America) (Request for the Indication of Provisional Measures)*,<sup>252</sup> the ICJ held that the US would be responsible for the activities of the competent authority of the State, which in this case, was the Governor of Arizona.

### Ultra Vires Activities

It is a well-established principle that the activities of public officials are generally attributable to the state even if they are outside the legitimate capacity of those officials. An early articulation of this principle is found in the arbitral decision of the *Estate of Jean-Baptiste Caire (France) v United Mexican States*.<sup>253</sup>

*The State also bears international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official or organ has acted within the limits of his competency or has exceeded those limits.*<sup>254</sup>

This principle was also articulated by the HRC in *Jegatheeswara Sarma v Sri Lanka*.<sup>255</sup>

*The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted ultra vires or that superior officers were unaware of the actions taken by that officer.*<sup>256</sup>

An additional invocation of this principle appears in the *Case of Velásquez-Rodríguez v Honduras*: ‘under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority, or violate international law.’<sup>257</sup>

Finally, this principle is enshrined in art 7 of the ILC Draft Articles:

*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State*

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<sup>250</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 32.

<sup>251</sup> *Ibid* 82.

<sup>252</sup> [1999] ICJ Rep 9, 28.

<sup>253</sup> (1926) V RIAA 516 in Brownlie, above n 51, 437–8.

<sup>254</sup> *Estate of Jean-Baptiste Caire (France) v United Mexican States* (1926) V RIAA 516, 529–30 in Brownlie, above n 51, 437–8.

<sup>255</sup> Human Rights Committee, Communication No 950/2000, 78th sess, UN Doc CCPR/C/78/D/950/2000 (2003).

<sup>256</sup> *Ibid* [9.2].

<sup>257</sup> *Case of Velásquez-Rodríguez v Honduras* (1988) 4 Inter-Am Ct HR (ser C) [170].

*under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.*

*Estate of Jean-Baptiste Caire (France) v United Mexican* also sets out the limits of state responsibility for ultra vires activities of public officials:

*in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that, in acting they should have used powers or measures appropriate to their official character.*<sup>258</sup>

While there is no precise definition of which ultra vires acts give rise to state responsibility, and which do not, states have generally been held responsible for wrongful acts of police or security forces where those groups have relied on the authority of their position in order to violate human rights. A frequently cited example of a situation where state responsibility will not arise is a policeman who, while off duty, uses his state-issued fire arm to commit a robbery.

## Private Actors in Public Roles

There are two particular cases in which states may be directly responsible for the activities of private actors: first, where those private actors are undertaking public functions; second, where the state exercises 'effective control' over those actors.

## State-Owned Or Controlled Companies?

State responsibility for the activities of state-owned or controlled companies is based on the general principles of state responsibility for private actors; although, responsibility for the activities of such companies is not automatically attributed to the state. Generally, the concept of the corporate veil is applicable to public companies. These companies may be treated as being independent from the state;<sup>259</sup> however, where, there is evidence that the corporation is exercising public powers, or that the state is using its ownership to achieve a particular result, the conduct of the corporation will be attributable to the state.<sup>260</sup>

## Private Actors Undertaking Public Functions

Both the HRC and the ECHR have held states responsible for the activities of autonomous organs undertaking public functions, but they have established different bases for this responsibility. The HRC has held the state responsible for the activities of private actors where they are implementing State legislation, while the ECHR has held the state responsible for the activities of private actors where their activities are related to the social rights articulated in the *European Convention*.

In *Broeks v The Netherlands*,<sup>261</sup> the authors argued that the non-discrimination principle in the *ICCPR* was relevant to a social insurance scheme because that scheme fulfilled an obligation of the State under the *ICESCR*. The Committee found that the discussions in the *travaux*

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<sup>258</sup> *Estate of Jean-Baptiste Caire (France) v United Mexican States* (1926) V RIAA 516, 531 in Brownlie, above n 51, 437–8.

<sup>259</sup> See *Schering Corporation v Islamic Republic of Iran* (1984) 5 Iran-USCTR 361; *Otis Elevator Co v Islamic Republic of Iran* (1987) 14 Iran-USCTR 283 in *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 106.

<sup>260</sup> See *SEDCO, Inc v National Iranian Oil Co.*, (1987) 15 Iran-USCTR 23; *Phillips Petroleum Co Iran v Islamic Republic of Iran* (1989) 23 Iran-USCTR 79; *Foremost Tehran, Inc v Islamic Republic of Iran* (1986) 10 Iran-USCTR 228 in *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 107.

<sup>261</sup> Human Rights Committee, Communication No 172/1984, 29<sup>th</sup> sess., UN Doc CCPR/C/29/D/172/1984 (1990).

*préparatoires* of the ICCPR were inconclusive as to whether the protection against discrimination in art 26 extended to rights not otherwise guaranteed by the Covenant, and based its decision on the general application of art 26 to national legislation.<sup>262</sup> In *B d B v The Netherlands*,<sup>263</sup> the parties again disputed whether the non-discrimination principle applied to the implementation of a State social insurance scheme by a private board. The Committee stated: 'a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs'.<sup>264</sup> In both cases, functions seem to be considered public because they had been undertaken by the State through legislation.

A recent decision from the HRC affirmed the clear obligation on states with regard to human rights abuses occurring in prisons. In *Cabal and Bertran v Australia*,<sup>265</sup> the HRC invoked the general principle that a state will not be relieved of its obligations when it delegates some functions to other autonomous organs:

*the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication.*<sup>266</sup>

Due to the structure of the ECHR, cases under this system have considered state responsibility in relation to a broader range of rights. In *Costello-Roberts v United Kingdom*,<sup>267</sup> the ECHR found that a state had an obligation under the *European Convention* to protect children's right to education, and that school functions, such as disciplining children, are an inherent part of the education process. The State, therefore, could not escape responsibility for the manner in which children were disciplined in schools by allowing private schools to undertake education.<sup>268</sup> Similarly, in *Van der Musselle v Belgium*,<sup>269</sup> the State was responsible for the manner in which a legal aid scheme was managed by an independent body because the obligation to provide legal assistance to indigent people was created by the Convention.<sup>270</sup> In both of these cases, functions were considered to be public because they related to the human rights obligations of the state.

## 'Effective Control'

Article 8 of the ILC Draft Article states:

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*

The ICJ Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, established a standard of 'effective control' for attributing responsibility for the activities of private actors to the State. The Court clarified the meaning of 'effective control', holding:

*United States' participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the court, for*

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<sup>262</sup> Ibid [12.2].

<sup>263</sup> Human Rights Committee, Communication No 273/1988, 35<sup>th</sup> sess, UN Doc CCPR/C/35/D/273/1988 (1989).

<sup>264</sup> Ibid [6.5].

<sup>265</sup> Human Rights Committee, Communication No 1020/2001, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1020/2001 (2003).

<sup>266</sup> Ibid [7.2].

<sup>267</sup> (1993) European Court of Human Rights, Application no 13134/87.

<sup>268</sup> Ibid [27].

<sup>269</sup> [1983] ECHR 13.

<sup>270</sup> Ibid [29].

*the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.*<sup>271</sup>

In order to be responsible, the Court held that the US would either have had to have effective control of the specific operations during which the violations were committed or have had to have directed the perpetration of the violations.<sup>272</sup> While the US was not held responsible for the violations committed by the Contras, it was held responsible for the activities of the Unilaterally Controlled Latino Assets, who were paid by, and acted under the direct instructions of, American military or intelligence personnel.

The International Criminal Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v Tadić*<sup>273</sup> suggested somewhat less stringent requirements for a finding of state responsibility; however, the threshold for a finding of state responsibility remains high. The ICTY held that the capacity of a state to control a group is not sufficient to prove actual state control of that group; therefore, the capacity of a state to control a group does not automatically give rise to that state's responsibility for the activities of that group. The relevant issue in *Prosecutor v Tadić* was whether the Federal Republic of Yugoslavia was responsible for the activities of the army of the Republica Srpska. The ICTY Appeals Chamber held that a state could be found responsible for the acts of members of a group if it exercised 'overall control' of an organised and hierarchically structured group, even if it had not issued specific instructions to the actors in question, or if individual acts were contrary to specific instructions.<sup>274</sup> This standard is lower than the standard established in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* because it creates international responsibility where a state exercises control over a group, rather than over a specific operation or activity of that group.

Another example of a situation in which a human rights body has been willing to find a state responsible on the basis of its control over an actor is *Hertzberg v Finland*.<sup>275</sup> The HRC held that the State was responsible for the activities of the Finnish Broadcasting Company because it held a 90 per cent share in the company, and the company was placed under specific governmental control.<sup>276</sup> The reasoning in this decision appears similar to the reasoning of the ICTY in *Prosecutor v Tadić*: the government had the capacity to control the company because it was the dominant shareholder and there was a clear degree of government control. It may be easier to apply these principles to the operations of state-owned companies rather than to other operations because at least part of the state's role is clearly demarcated rather than inferred.

It is important to note that *Prosecutor v Tadić* occurred in a different context to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, and the ILC Draft Articles. In the Commentary to the ILC Draft Articles, the ILC notes that the ICTY decision was made in the context of an assessment of individual criminal responsibility, rather than state responsibility, and the ultimate question was about the applicability of international humanitarian law. The context of the *Prosecutor v Tadić* decision may not necessarily impede its application to state responsibility; however, the recent ICJ judgment for *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*<sup>277</sup> may weaken its applicability to state responsibility. The ICJ decided that the 'overall control' test in *Prosecutor v Tadić* 'ha[d] the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility'.<sup>278</sup> Moreover, the Court decided that the particular characteristics of genocide, at issue in the case, did not justify a departure from the effective control test of *Military and Paramilitary Activities in and against Nicaragua*

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<sup>271</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 64.

<sup>272</sup> *Ibid.*

<sup>273</sup> (15 July 1999) Judgment of the Appeals Chamber, International Criminal Tribunal for the Former Yugoslav Republic, Case No IT-94-1-T.

<sup>274</sup> *Ibid.* 49.

<sup>275</sup> Human Rights Committee, Communication No 61/1979, 15<sup>th</sup> sess, UN Doc CCPR/C/OP/1 (1985).

<sup>276</sup> *Ibid.* [91].

<sup>277</sup> Judgment of 26 February 2007.

<sup>278</sup> *Ibid.* [406].

(*Nicaragua v United States of America*) (*Merits*); therefore, it is likely that the 'effective control' test is the correct test in determining state responsibility under art 8 of the ILC Draft Articles.<sup>279</sup>

## Private Actors Undertaking Private Functions

Based on the previous discussion, a state will not be responsible for the activities of a private entity that is neither carrying out a public function, nor under the 'effective control' of the state. A state may, however, be responsible for failing to take measures to prevent violations of human rights by private actors, since the *ICCPR* and other international human rights instruments place obligations on the state to address human rights violations by private actors. These obligations arise under customary international law, which predates the human rights treaties.

In the Commentary on the ILC Draft Articles, the ILC notes that state responsibility depends on both the general rules of State responsibility, and, on the obligation at issue:

*In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved.*<sup>280</sup>

The positive obligations placed on states by *ICCPR* arts 2 (to respect and ensure rights) and 6 (to protect the right to life by law) are essential in determining when a state will be responsible for failing to prevent or address violations of human rights by private actors. In General Comment 31, the HRC held:

*the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amendable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights ...*<sup>281</sup>

## General Principles

An early statement on state responsibility for harms committed by private actors is found in the 1927 *Tellini Case*.<sup>282</sup> In this case, members of an International Commission were assassinated on Greek territory, and the League of Nations referred the ensuing case to the International Committee of Jurists. The Committee held:

*The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.*<sup>283</sup>

In modern international law, one of the most significant statements on state responsibility is the decision of the IACtHR in the *Case of Velásquez-Rodríguez v Honduras*. The IACtHR held:

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<sup>279</sup> Ibid [407].

<sup>280</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 124.

<sup>281</sup> *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, [8], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>282</sup> Report of the Commission of Jurists, League of Nations, Official Journal, 5th Year, No 4 (April 1924).

<sup>283</sup> Ibid 524.

*An illegal act which violated human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*<sup>284</sup>

It is clear that there is an obligation on states to protect against violations of human rights by private actors, at least in the circumstances mentioned above. It is also apparent that that obligation entails both preventing and redressing harms, and providing access to remedies. While suggestion of more specific obligations may be drawn from international jurisprudence, the precise parameters of these obligations have not been established. This lack of precision may reflect the state of development of this area of the law, and it may also reflect the strong connection between state responsibility and the particular circumstances of a case. The obligations that exist are not absolute, they are qualified by requirements that the state exercise 'due diligence', or balance the interests of the individual with the rest of society.

## Specific Requirements

Specific requirements for preventing or responding to violations of human rights emerge from the statements and jurisprudence of international human rights bodies, and from international human rights treaties. The positive obligations associated with the right to life are discussed in greater detail in the section on the right to life. These obligations may be summarised as follows: where the state knew or ought to have known of a real and immediate threat to the life of an identified individual or individuals, and the state failed to take measures within its power to prevent the harm, the state may be responsible. This obligation has generally been found to arise in limited circumstances, such as where the threat arises from criminal activity.

## Obligation to Introduce Legislation or Other Measures

Article 2(2) of the *ICCPR* requires that States Parties take steps to adopt domestic legislation or other measures to give effect to the rights protected in the Covenant:

*Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and within the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*

The HRC has specifically suggested that the obligation on states to protect against violations of human rights by private parties may require the adoption of legislation protecting those rights. For instance, in its concluding observation on Hong Kong in 1995, the HRC held:

*under the Covenant a State party does not only have an obligation to protect individuals against violations by Government officials but also by private parties. It thus notes with deep concern the absence of legislation providing effective protection against violations of Covenant rights by non-governmental actors.*<sup>285</sup>

In addition to the general obligation under art 2 to introduce national measures to protect Convention rights, there is the specific obligation under art 6 that the right to life be 'protected by law'. The parameters of this requirement beyond laws against homicide have not been established; however, it could be interpreted as requiring broad protections, especially in light of the premise that the right to life should not be interpreted restrictively. The possibility that art 6

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<sup>284</sup> *Case of Velásquez-Rodríguez v Honduras* (1988) 4 Inter-Am Ct HR (ser C) [172].

<sup>285</sup> *Comments on United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, Human Rights Committee, [10], UN Doc CCPR/C/79/Add.57 (1995).

could require broad protections does not mean that such an obligation currently exists under international law.

The ECHR in its decision in *Öneryıldız v Turkey* found an additional obligation on the state to provide information about an existing threat to life, or to establish regulations that would ensure that the public received such information.<sup>286</sup>

## Obligations to Investigate and Provide Remedies

Article 2(3) of the *ICCPR* requires States Parties to provide remedies for violations of Covenant rights:

*Each State party to the present Covenant undertakes:*

*(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

*(c) To ensure that the competent authorities shall enforce such remedies when granted.*

In General Comment 31, the HRC refers to an obligation on states to investigate and redress human rights violations by private actors, and to provide remedies for such violations:

*There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.<sup>287</sup>*

Similar obligations appear in the jurisprudence of other international human rights bodies. In the *Case of Velásquez-Rodríguez v Honduras*, for instance, the IACtHR noted that state responsibility may arise because the State has failed to respond to a violation as required by the *American Convention*.<sup>288</sup>

## Circumstances in Which Obligations Arise

While the obligation on states to protect against violations of human rights by private actors has generally been connected to certain limited situations, there are some suggestions that a broader obligation may exist, or could emerge.

The HRC decision in *Delgado Páez v Colombia*<sup>289</sup> represents the typical situation in which obligations to protect against violations by private parties arise: the individual had received

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<sup>286</sup> *Öneryıldız v Turkey* [2004] ECHR 657 (30 November 2004) [90].

<sup>287</sup> *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, [8], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>288</sup> *Case of Velásquez-Rodríguez v Honduras* (1988) 4 Inter-Am Ct HR (ser C) [172].

<sup>289</sup> Human Rights Committee, Communication No 195/1985, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/195/1985 (1990).

death threats and faced persecution as a result of his liberal views on theological and social issues. The HRC considered the matter under art 9, security of the person, and held:

*States Parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.*<sup>290</sup>

The ECHR's decision in *Öneryildiz v Turkey* is important because it suggests that state responsibility for private actors may arise outside of the typical criminal context. In that case, the applicant had lived in a slum next to a waste disposal site. Reports, which had been submitted to the Government, showed that the site was unsafe, and that there was a risk of a methane gas explosion. The Government had not taken steps to respond to this problem before a methane gas explosion occurred at the site, killing several people in the neighbourhood. The Court found a general obligation on the State to take measures to protect individuals against inherently dangerous activities. The Court found that the principles developed in connection with the use of lethal force could also apply in other categories of cases.<sup>291</sup> This extension of state obligations is a significant step in the development of international law. While further cases would be necessary to argue that *Öneryildiz v Turkey* represents the current state of customary international law, the case remains a useful precedent.

## Qualifications on the Obligations of States

The IACtHR has relied on a standard of 'due diligence' to describe the extent of a state's obligations to protect against violations of human rights by private actors. In the *Case of Velásquez-Rodríguez v Honduras*, the Court refers to responsibility arising because of the 'lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention'.<sup>292</sup> The HRC also uses the term 'due diligence' in General Comment 31, where it refers to the possibility of responsibility arising because of the failure of a state 'to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.<sup>293</sup>

The ECHR has limited the obligations of states by referring to the need to balance interests within society:

*In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest [of the community] and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden.*<sup>294</sup>

Where an obligation arises to protect against violations of human rights by private actors, that obligation may not be absolute. State responsibility will depend on whether or not the state has provided an adequate degree of protection.

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<sup>290</sup> Ibid [5.5].

<sup>291</sup> *Öneryildiz v Turkey* [2004] ECHR 657 (30 November 2004) [93].

<sup>292</sup> *Case of Velásquez-Rodríguez v Honduras* (1988) 4 Inter-Am Ct HR (ser C) [172].

<sup>293</sup> *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, 80<sup>th</sup> sess, 2187<sup>th</sup> mtg, [8], UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

<sup>294</sup> *Ilascu v Moldova and Russia* (2005) 40 EHRR 1030, [332].

## Section 7 - Non-State Actors

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There has been much speculation and public comment, and a significant degree of academic research on the role and responsibility of multinational corporations for much of the environmental degradation that affects the enjoyment of human rights. This leads to the question of whether non-state actors are obliged by international law to respect human rights, and whether there are mechanisms for holding these actors accountable for violations of human rights.

### International Human Rights Instruments

Generally, obligations for the promotion and protection of human rights contained in international human rights instruments are imposed on states. By their nature, these instruments consist of terms negotiated between, and acquiesced to by, States. The language of the *ICESCR*, *ICCPR*, *CEDAW*, *Convention on the Elimination of Racial Discrimination*<sup>295</sup> and *CRC* refers to undertakings by State Parties. There may, however, be exceptions to this norm. The preamble of the *UDHR* can be read as extending obligations to non-state actors: 'every individual and every organ of society ... shall strive ... to promote respect for these rights and freedoms and ... to secure their universal and effective recognition and observance'.<sup>296</sup> This text could be read either as requiring respect for human rights by non-state actors, or as encouraging these actors to promote the protection of these rights by states.

The CESCR has sought to clarify the general responsibilities of non-state actors as follows:

*While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.*<sup>297</sup>

### Precedents for Holding Private Actors Liable for Human Rights Violations

There are a number of cases in international law where private groups or individuals have been held directly responsible for violations of human rights. Individual responsibility for criminal acts is a key feature of international humanitarian law and perhaps one of the most frequently cited cases in this regard is the Nuremberg Trial:

*That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.*<sup>298</sup>

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<sup>295</sup> Entered into force 4 January 1969.

<sup>296</sup> Universal Declaration of Human Rights. Preamble.

<sup>297</sup> *General Comment No 11: The Right to Adequate Food (Art 11)*, Committee on Economic, Social and Cultural Rights, 20<sup>th</sup> sess, [20], UN Doc E/C.12/1999/5 (1999).

<sup>298</sup> *The Nurnberg Trial* (1946) 6 FRD 69, 110. See also *International Military Tribunal (Nuremberg), Judgment and Sentences* (1947) 41 *American Journal of International Law* 173, 220.

While organisations, such as the Nazi Party, were declared to be criminal by the Nuremberg Courts, this designation was used to hold individuals accountable for their membership in the organisations, rather than to hold the organisation itself accountable.

There have been other instances of attempts to encourage private actors to take responsibility for respecting and protecting human rights including in relation to the apartheid regime in South Africa, and the use of compulsory labour in Myanmar.

Despite the Nuremberg statement on the important role of individual liability for violations of international humanitarian law and human rights, the international human rights system generally focuses on individual rights and state responsibility.

In 1999, the UNGA introduced the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.<sup>299</sup> This document does not specifically articulate a responsibility for corporations to respect or protect human rights, but instead calls on anyone who, as a result of their profession, can affect human rights to respect those rights. While each of these resolutions calls on non-state actors to assume some degree of responsibility for respecting or promoting human rights, none of them purports to specifically bind these actors to do so.

## Environmental Treaties That Have Attempted to Introduce Corporate Accountability

Numerous environmental treaties include provisions that attempt to impose liability for environmental harms on private actors through the introduction of state legislation.<sup>300</sup> The following provision from the *International Convention on Civil Liability for Oil Pollution Damage*<sup>301</sup> 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.*

While these treaties set standards for private activities, they do not directly impose obligations on those private actors, instead they oblige or empower States to take action to address these private harms; they provide for implementation by national courts. For instance, the *Basel Convention* requires all States Parties to introduce legislation to prevent and punish the improper movement and disposal of hazardous wastes.

## Recent Efforts to Create Specific Instruments for Corporate Accountability

There have recently been numerous efforts to develop international principles of corporate accountability for violations of human rights and environmental damage. At the 1999 World Economic Forum in Davos, Switzerland, the UN Secretary-General called for a '*global compact*

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<sup>299</sup> GA Res 53/144, UN GAOR, 53<sup>rd</sup> sess, 85<sup>th</sup> plen mtg, UN Doc A/Res/53/144 (1999).

<sup>300</sup> See, for example, 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>301</sup> Entered into force 19 June 1975.

of shared values and principles'.<sup>302</sup> He called on corporations to support a precautionary approach to environmental harms, and to undertake initiatives to promote greater environmental responsibility. In his statement, however, the Secretary-General acknowledged that such action would be an initiative on the part of the corporations, rather than an obligation.<sup>303</sup> A number of private groups of corporations purport to support principles such as sustainable development, and social and environmental responsibility.<sup>304</sup>

There are, additionally, international documents that purport to articulate responsibilities for private actors. The ILO's *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*<sup>305</sup> calls on multinational enterprises (MNEs) to 'respect the sovereign rights of States'<sup>306</sup> and to 'respect the Universal Declaration of Human Rights and the corresponding International Covenants'.<sup>307</sup>

In 2003, the UN Sub-Commission on the Protection and Promotion of Human Rights adopted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*,<sup>308</sup> and transmitted them to the UNCHR to consider their adoption. These norms faced strong opposition both by industry associations, and by the US. A Special Representative was appointed to examine issues relating to business and human rights. The Norms specifically recognise that the protection and promotion of human rights is primarily the responsibility of states, but also contain strong language with regard to the obligations of corporations:

*Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of Indigenous peoples and other vulnerable groups.*<sup>309</sup>

The norms specifically attempt to impose an international obligation on non-state actors.

The OECD introduced *Guidelines for Multinational Enterprises*, in 2000. 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.<sup>310</sup>

Part V of the Guidelines specifically deals with environmental issues:

*Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to*

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<sup>302</sup> 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos' (Press release, 1 February 1999) <<http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>> at 17 April 2008.

<sup>303</sup> Ibid.

<sup>304</sup> Such groups include the World Business Council for Sustainable Development, the International Chamber of Commerce through its Business Charter for Sustainable Development, and the Coalition for Environmentally Responsible Economies.

<sup>305</sup> Adopted by the Governing Body of the International Labour Office at its 204<sup>th</sup> Session (Geneva, November 1977), as amended at its 279<sup>th</sup> Session (Geneva, November 2000) <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>> at 17 April 2008.

<sup>306</sup> Ibid art 8.

<sup>307</sup> Ibid.

<sup>308</sup> United Nations Sub-Commission on the Protection and Promotion of Human Rights, Res 2003/16, 55<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>309</sup> Ibid [1].

<sup>310</sup> Working Party on the OECD Guidelines for Multinational Enterprises, *Guidelines for Multinational Enterprises: Text, Commentary and Clarifications* (2001) Part II(2).

*conduct their activities in a manner contributing to the wider goal of sustainable development.*

The Guidelines then go on to outline 63 principles dealing with:

- appropriate environmental management (including consultation and environmental impact assessments);
- regular monitoring of environmental health;
- prevention and minimisation of environmental harm; and
- collection and provision of information.

The UN Global Compact is another international initiative to promote corporate social responsibility. Corporations voluntarily declare their commitment to a series of principles, which include support for and respect of human rights, and improvements in environmental responsibility.<sup>311</sup> As with the OECD Guidelines, the Global Compact is a voluntary regime.

## Alternative Mechanisms

At the national level, strong domestic legislation and legislation with extra-territorial application provide an additional mechanism for promoting the accountability of non-state actors.

### Alien Tort Claims Act (United States of America)

The ATCA is a US statute which provides that federal district courts: *'shall also 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'*.

Notwithstanding the limited scope of the ATCA as interpreted by the US Supreme Court,<sup>312</sup> a number of environmental cases have been brought before the US courts. The importance of such mechanisms is evident in a case brought against Unocal Corporation. In that case, Burmese villagers alleged that Unocal had knowingly used forced labour to construct the Yadana gas pipeline. The matter was settled, but an earlier opinion written by a judge of the US Court of Appeals for the Ninth Circuit stated that Unocal could be held liable under the ATCA, on the basis of aiding and abetting, for abuses that it knew about and substantially assisted in through practical encouragement or support.<sup>313</sup>

Remedies, such as those provided by the ATCA, are useful in providing potential litigants with a forum in which to raise their claims. Litigants may also benefit from the particular domestic legal framework in the US: for example, class actions, an option which may not otherwise be available in some litigants' own domestic jurisdiction. In addition, the Unocal settlement suggests that despite the challenges faced by litigants, a claim of substance can exert considerable pressure on multinational corporations, since the intention to litigate can raise public awareness of corporate actions that are likely to generate considerable negative publicity.

Absent specific human rights or environmental law mechanisms, other legislation may provide an opportunity to raise such concerns. In the American case of *Kasky v Nike Inc*,<sup>314</sup> a consumer activist utilised trade practices legislation to sue Nike for providing inaccurate information about

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<sup>311</sup> Further details about the UN Global Compact and Principles are available at <<http://www.unglobalcompact.org/>>.

<sup>312</sup> The United States Supreme Court in its 2004 decision of *Sosa v Alvarez-Machain*, 542 US 692 (2004), held that the ATCA does not create a cause of action tort for violations of international law. The Supreme Court limited the application of the act to claims resting 'on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized': at 725. The specific paradigms recognised by the Court were offences against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy.

<sup>313</sup> *Doe I v Unocal Corp*, 395 F 3d 932 (9<sup>th</sup> Cir, 2002).

<sup>314</sup> 27 Cal 4<sup>th</sup> 939 (Cal, 2002).

conditions in its factories. Nike successfully argued before lower courts that its statements were protected under freedom of speech, but the California Supreme Court held:

*because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages.*<sup>315</sup>

The case was ultimately settled, and did not specifically deal with environmental harms, but it illustrates an interesting approach of indirectly attacking the actual harms being caused by private actors.

## Summary

Despite the longstanding recognition of the role that corporations can and do play in human rights observance around the world, international law does not yet directly impose obligations on corporations for the protection of human rights. This ongoing situation poses a number of difficulties for the effective protection of the right to life from environmental harms caused by MNEs.

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<sup>315</sup> Ibid 946.

## Section 8 - State Responsibility for Environmental Harms Extending beyond the Territory of the State

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### General Principles Regarding Extra-Territorial Harm

Both the *UN Charter*<sup>316</sup> and the *ICCPR* recognise the right to self determination. Article 1 of the *ICCPR* provides:

*(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

*(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources ... based upon ... international law.*

The right to self determination, however, does not mean that a state can exercise rights in a manner that impacts adversely on another state. In the 1928 *Island of Palmas Case (Netherlands, USA)*,<sup>317</sup> which involved a territorial dispute between the Netherlands and the US over the Island of Palmas, the Permanent Court of Arbitration referred to 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.

In 1949, the decision of the ICJ in *Corfu Channel (United Kingdom v Albania) (Merits)* provided further guidance in this regard. Based on the principle articulated in art 74 of the *UN Charter*, it held that every state has an obligation not to 'allow knowingly its territory to be used for acts contrary to the rights of other States'.<sup>318</sup>

### General Principles regarding Extra-Territorial Environmental Harm

With regard to state action impacting on the environment and rights in territory external to the state, the seminal case is the *Trail Smelter Case (United States of America v Canada)*. The case involved a protracted dispute between the US and Canada, with the former alleging US farmers had been adversely affected by the emission of sulphur dioxide from a smelter operating over the border in British Columbia, Canada. The Tribunal held:

*no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*<sup>319</sup>

The exercise of state rights, and the obligation to consider the consequent impact beyond state borders, was further considered in the *Lac Lanoux Arbitration (France v Spain)*, which involved a proposal by France to divert the course of a river running through France to Spain. The tribunal stated that respondent, France, was 'entitled to exercise her rights [but] she cannot

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<sup>316</sup> *Charter of the United Nations*, art 1. See also Article 74 which establishes the principle of good-neighbourliness: '[m]embers of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters'.

<sup>317</sup> (1928) 2 IRAA 829.

<sup>318</sup> *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>319</sup> *Trail Smelter Case (United States of America v Canada)* (1941) 3 RIAA 1905, 1965.

ignore Spanish interests. Spain is entitled to demand that her rights be respected and her interests be taken into consideration'.<sup>320</sup>

This principle has been further recognised in international environmental law. In preparation for the 1972 Stockholm Conference, UNGA Resolution 2849 referred to '[the] right of each country to exploit its own natural resources in accordance with its own priorities and needs and in such a manner as to avoid producing harmful effects on other countries'.<sup>321</sup>

The position was subsequently affirmed in Principle 21 of the *Stockholm Declaration*, which is now recognised as a key principle of international environmental law. It provides:

*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 the following year, the principle was incorporated in either preambular or substantive provisions in numerous instruments,<sup>322</sup> and, after 20 years, was again endorsed in Principle 2 of the *Rio Declaration*.

By 1995, the principle was well accepted and was confirmed by the ICJ in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*:

*The existence of the general obligation of States to ensure that activities within their 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>323</sup>

## The Principle of Preventative Action

The principle of preventative action has the objective of minimising environmental damage. Distinguished from the principle previously discussed (which is based on state sovereignty and good-neighbourliness), this principle is applicable both internally and extra-territorially.

The principle has been endorsed internationally, in the *Stockholm Declaration* (Principles 6, 7, 15, 18 and 24), the *UNEP Draft Principles* (Principle 1), the *World Charter for Nature*, the *Rio Declaration* (Principle 11), and in more than 20 international or regional environmental treaties.<sup>324</sup> The principle also finds voice in numerous national environmental laws and practices, particularly those dealing with planning and development, environmental impact assessments, and related criminal sanctions.

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<sup>320</sup> (1957) 12 RIAA 281, 316 (informal translation from French).

<sup>321</sup> *Development and Environment*, GA Res 2849, UN GAOR, 26<sup>th</sup> sess, 2026<sup>th</sup> plen mtg (1971).

<sup>322</sup> See, eg, *International Plant Protection Convention* (entered into force 2 October 2005); *Nuclear Test Ban Treaty* (entered into force 10 October 1963); *African Convention on the Conservation of Nature and Natural Resources* (entered into force 16 June 1969); *Convention Concerning the Protection of the World Cultural and Natural Heritage* (entered into force 17 December 1975); *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (entered into force 30 August 1975); *UNEP Draft Principles*; *United Nations Convention on the Law of the Sea* (entered into force 16 December 1994); *World Charter for Nature*; *Convention on Biological Diversity* (entered into force 29 December 1993); *United Nations Framework Convention on Climate Change* (entered into force 21 March 1994).

<sup>323</sup> [1996] ICJ Rep 226, 241–2.

<sup>324</sup> Sands, above n 2, 248.

## Section 9 - Value of a Human Right to an Environment of a Particular Quality

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The terms of reference ask whether, in the context of environmental harms to human life, there would be additional value in articulating a specific right to environment.

The importance of the environment to the realisation of human rights is clearly articulated by Judge Weeramantry of the ICJ in his statement:

*the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself ... [D]amage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.*<sup>325</sup>

Similarly, Klaus Toepfer, the Executive Director of the UNEP, states:

*The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture.*<sup>326</sup>

As these statements and the discussion in section 1 show, the international community has clearly accepted the interrelationship between environmental conditions and human rights, and the need to ensure an environment of a quality suitable for human habitation for both current and future generations. Notwithstanding this acceptance, there has been a failure to elaborate a particular right. The question remains as to whether there would be any *additional* value in elaborating a right to environment, particularly given the increasing use of existing human rights in various fora.

At first instance, there may appear to be a certain attraction to the idea of articulating a specific human right to environment. Through a human right to environment, environmental concerns could attain greater prominence than they currently enjoy in human rights law and discourse. While not necessarily supporting calls for a human right to environment, Merrills states:

*[H]aving rights is significant in at least two ways. First, if I can show that I have a moral right to, say, a clean environment I have something which has to be taken into account in any discussion of the moral aspects of environmental policy. I am, so to speak, a player in the morality game. Secondly, and perhaps more important, such is the value that attaches to rights that if I am a rights-holder I am not just a player, but a serious, indeed a privileged player in the game. That is to say my right will tend to pre-empt not only preferences and other non-moral considerations, but other moral considerations as well. What is true of moral rights is true a fortiori of legal rights. Thus, having environmental rights incorporated in a constitution or recognised in international law cannot guarantee that the putative rights-holder will be successful in every dispute in which the right may be relevant, but certainly creates a situation in which not only must the right always be considered, but very good reasons will be needed for denying it[s] effect.*<sup>327</sup>

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<sup>325</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 92.

<sup>326</sup> United Nations Environment Programme, 'Living in a Pollution-Free World a Basic Human Right' (UNEP News Release 01/49, 27 April 2001) <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=197&ArticleID=2819&l=en>> at 24 April 2008.

<sup>327</sup> J G Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 25, 26–7.

Articulating a human right to environment provides legitimacy, both to the issue and the rights holder. In addition, it addresses other issues. As Atapattu states, such an approach:

*circumvents one major problem inherent in the litigation process, namely establishing injury. The other advantage of this approach is that timely action can be taken to remedy the environmental problem without waiting until significant injury to people has manifested itself. In some instances, establishing injury is not a problem, but by then, the environmental problem has persisted for so long that remedial action has become either impossible or too expensive.*<sup>328</sup>

Many commentators caution against this approach, questioning whether all issues and concerns affecting the human condition should be addressed in the language of human rights. Brownlie and others have commented at length on the use of human rights language to describe issues of broader interest to the human condition. They argue that such use, invariably coupled with confusion between *lex lata* and *lex ferenda* (that is, a confusion between what the law is and what the law should be), confuses and devalues the existing international law and human rights framework.<sup>329</sup> Rather than ask what additional value there would be in articulating a specific human right to environment, Boyle asks the separate but related question: 'is a substantive human right to environment an essential condition for the protection of the environment?'.<sup>330</sup>

In considering either approach, the need for determinacy is important since the failure to appropriately define a nascent human right to environment has the potential to lead to conflict and confusion with existing rights. Merrills posits several questions that should be considered:

- how is the right characterised, circumscribed and distinguished from existing rights?
- who is the rights-holder?
- who bears obligations arising from the content of the right and the designation of the rights-holder?
- what are the obligations? and
- how do these obligations relate to existing rights and obligations?<sup>331</sup>

The way in which a right to environment is characterised may affect its effectiveness. As is discussed by both Acevedo and Merrills, if a human right to environment is interpreted as a civil and political right, it has the potential to empower individuals and groups (with standing) to participate in environmental decision-making. If, however, the right is interpreted as an economic, social and cultural right, its potential for immediate impact is perhaps more limited. Notwithstanding that, and as Boyle indicates, characterising a right to environment as an economic, social and cultural right provides the right with a '*comparable status to other economic and social rights, and with priority over non-rights-based objectives*'.<sup>332</sup> In the alternative, the right might be conceived as a solidarity right. As with economic and social rights, this would provide explicit recognition, a degree of legitimacy and might provide developing countries, which have limited means, with an additional mechanism to pressure the international community for support in addressing environmental harm to global commons.<sup>333</sup>

The international community has not, as yet, been able to agree on how a right to environment should be characterised and defined. In 1972, the *Stockholm Declaration*, at Principle 1, referred to '*an environment of a quality that permits a life of dignity and well-being*'. In 1983, the World Commission Report contained legal principles for environmental protection and

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<sup>328</sup> Sumudu Atapattu, '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' (2002–2003) 16 *Tulane Environmental Law Journal* 65.

<sup>329</sup> James Crawford, *The Rights of Peoples* (1988) 111–13. See also Philip Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607.

<sup>330</sup> Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 44, 56.

<sup>331</sup> Merrills, above n 328, 35.

<sup>332</sup> Boyle, above n 331, 49.

<sup>333</sup> Mariana T Acevedo, 'The Intersection of Human Rights and Environmental Protection in the ECHR' (2000) 8 *New York University Environmental Law Journal* 437.

sustainable development, and proposed a right to 'an environment adequate for ... health and well-being'.

In 1992, the focus changed with the Rio Declaration, which stated:

*Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*

*Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*

*Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.*

In 1994, the report of the UNSR, which, importantly, was not endorsed by the UNGA, included the following draft legal principles:

- all persons have the right to a secure, healthy and ecologically sound environment (Principle 2); and
- all persons have the right to an environment adequate to meet equitably the needs of present generations in a way that does not impair the rights of future generations to meet equitably their needs (Principle 4).

It is interesting to note that notwithstanding the elaboration of these principles, the report in itself found it difficult to characterise the right clearly, referring at different times to a 'healthy and flourishing environment', a 'satisfactory environment' and, in the draft principles listed above, a 'secure, healthy and ecologically sound environment'.

In 2000, at the Millennium Summit, the international community acknowledged the 'threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs',<sup>334</sup> and resolved to 'integrate the principles of sustainable development into country policies and programmes' in MDG 7.

In 2002, the Johannesburg Declaration reaffirmed the Rio Declaration: 'that the protection of the environment and social and economic development are fundamental to sustainable development, based on the Rio Principles'.<sup>335</sup>

At the regional level, in 1981 and 1989, the African and Inter-American human rights instruments recognised respectively a human right to 'an environment favourable to [peoples] development' and a 'healthy environment'. At the national level, over 27 per cent of national Constitutions, and many of the more recent ones, variously define a right to a clean and healthy environment.

In the context of the right to life specifically, some jurisdictions (such as the Inter-American system) have articulated an expansive definition encompassing environmental conditions that 'guarantee a dignified existence',<sup>336</sup> stating further that the right to life may be violated through interference with the rights to food, water and health. Other systems (such as the European system) have interpreted the right to life more restrictively. More recently, domestic courts, such as those in India, have found that the right to life includes a right to a healthy environment.

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<sup>334</sup> *United Nations Millennium Declaration*, GA Res 2, UN GAOR, 55<sup>th</sup> sess, 8<sup>th</sup> plen mtg, [21], UN Doc A/55/L.2 (2000).

<sup>335</sup> *Johannesburg Declaration on Sustainable Development* (adopted at the 17<sup>th</sup> plenary meeting of the World Summit on Sustainable Development on 4 September 2002) [8].

<sup>336</sup> *Case of the 'Street Children' (Villagrán-Morales et al) v Guatemala* (1999) 63 Inter-Am Ct HR (ser C) [144]. See also *Case of the Yakye Axa Indigenous Community v Paraguay* (2006) 142 Inter-Am Ct HR (ser C) [160].

The degree of uncertainty at the international, regional and national level indicates clearly the difficulty in defining a human right to environment. As is indicated by Anderson, in trying to reach a consensus on this issue, members of the international community have struggled to find consensus when faced with varying levels of socio-economic development, problems associated with the cross cultural application of rights, and fundamental differences in their justiciability. In considering these difficulties, he suggests: '*international human rights law might be best confined to a general and supervisory role, while rights developed in national law may well evolve into crucial tools for everyday environmental management*'.<sup>337</sup> Alston would agree with such an assessment, expressing the view that existing human rights (including the right to life, health, privacy and family, property, non-discrimination and participatory rights) often provide mechanisms for addressing the problems that are raised in support of the development of new rights.<sup>338</sup>

If a right to environment were characterised as a civil and political right the problem of specificity may be overcome by focussing primarily on clarifying the scope of the ICCPR participatory rights in the environmental context. Again, some commentators would ask whether this is necessary, suggesting that the right to environmental information, along with other participatory rights, can be viewed simply as a component of basic democratic rights and the rule of law. On the other hand, there may be some utility in defining these rights specifically in relation to environmental contamination because of the frequency with which people have been exposed to environmental contaminants without their knowledge or consent. Specific rights would facilitate complaints about such exposure, and may open the possibility of complaining about such exposure without actually having to establish a violation of another, less well-defined right, such as the right to life or health.<sup>339</sup> In this regard, the *Draft Principles* contained in the UNSR's report are a useful starting point. They provide that there is:

*15. ... the right to information concerning the environment ... necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.*

*16. All persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.*

*17. All persons have the right to environmental and human rights education.*

*18. All persons have the right to active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development ...*

*19. All persons have the right to associate freely and peacefully with others for purposes of protecting the environment or the rights of persons affected by environmental harm.*

*20. All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm.*

As has been mentioned in section 4 above, participatory rights have been the subject of more recent and extensive articulation in the *Aarhus Convention* and in a significant number of international environmental treaties adopted since 1992. A robust environmental procedural right could provide a more context sensitive approach, the elements of which might include:

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<sup>337</sup> Michael R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 1, 2.

<sup>338</sup> Alston, above n 330.

<sup>339</sup> Pallemmaerts suggests that the traditional boundaries of participatory democracy are being pushed by citizen activism on environmental issues: Pallemmaerts, above n 184. On the basis of that argument, rights that are specifically tied to environmental objectives may at times be broader than basic participatory rights.

- right to information;
- right to be informed in advance of risks;
- right to participate in decision-making;
- right to environmental impact assessments;
- right to legal review of decisions concerning rights, including appropriate locus standi; and
- right to effective remedies.<sup>340</sup>

If this approach is pursued, it will be necessary to consider whether a state may have legitimate bases, such as security concerns, for abrogating elements such as the right to information. It would also be necessary to consider what would be required to discharge a state's obligations in each instance: would general legislation on access to information be sufficient? Or, would it be necessary to establish specific regulatory structures to ensure that adequate information is actually made available? Needless to say, the value of such a procedural right would vary depending on the robustness of domestic politico-legal structures, and the capacity of the community to access the right.

Problems of specificity and determinacy are perhaps not so pronounced if one considers a human right to environment in the framework of economic and social rights. Their broader characterisation and progressive realisation in the context of national circumstances may perhaps be better suited to a human right to environment. That said, the articulation of such a right would still need to address criticisms of redundancy, particularly given the broad scope of existing economic, social and cultural rights, and their potential to address environmental harms.

## Additional Issues Requiring Consideration

While there has been significant use of international, regional and national fora to address environmental harms infringing human rights, an issue arising in many jurisdictions has been that of standing. As discussed in the section on the right to life and environmental harms, one of the challenges facing applicants before the UNHRC has been their inability to meet the threshold of being a 'victim' of a rights violation. An applicant must actually be affected by the harm complained of, and the risk to life must be actual or imminent, not merely hypothetical.

Like the UNHRC, the ECHR also appears to have imposed a high threshold for finding that environmental harms violate the right to life. While the Court has specifically stated that it has never held that environmental harms could not affect the right to life, the only successful case on this issue involved a situation where numerous lives had been lost.<sup>341</sup>

The requirement that the threat be actual or imminent may limit the usefulness of complaints about environmental violations that affect the right to life, because it may be difficult to prove the existence of a threat until after the violation has actually occurred. As a result, applicants before the UNHRC and some regional human rights bodies are likely to rely on rights to privacy and home, and perhaps health, to raise such concerns. No doubt, various commentators might consider this an appropriate approach, with a sliding scale of severity of environmental harms delimiting the scope of application of the right to life, right to health, and right to privacy and home.

A further issue confronting those who would define a human right to environment is the need to clearly address the rights and obligations associated with environmental harm caused by private actors. As noted in the previous sections, much environmental harm is caused by private actors, and state responsibility for preventing such harms is not automatic. If a specific right to environment were articulated, it would be useful to ensure that the positive obligations of the state to prevent and redress violations by private actors were clear in the articulation of the right. This could require:

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<sup>340</sup> Anderson, above n 338, 9.

<sup>341</sup> *Önveryildiz v Turkey* [2004] ECHR 657 (30 November 2004).

- clarifying the obligations on states to regulate private actors;
- articulating which private acts give rise to a responsibility on the part of the state;
- ensuring that the public is provided with information about potential environmental threats; and
- providing recourse against perpetrators of environmental harms.<sup>342</sup>

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<sup>342</sup> Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 465.

## PART 2 - CONSTITUTIONAL PROTECTION IN THE ASIA PACIFIC REGION

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## Introduction

By 2005, approximately 60 per cent of all states had Constitutions that included provisions on the protection of the environment or natural resources. As was mentioned in section 2 of this paper, 109 Constitutions recognise the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm. Of these:

- 56 Constitutions explicitly recognise the right to a clean and healthy environment,
- 97 Constitutions make it the duty of the national government to prevent harm to the environment;
- 56 Constitutions recognise a responsibility of citizens or residents to protect the environment;
- 14 Constitutions prohibit the use of property in a manner that harms the environment, or encourage land use planning to prevent such harm;
- 20 Constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury; and
- 16 Constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.

In the Asia Pacific region, 21 Constitutions make reference to the environment and its protection. Though the provisions in each are unique, it is possible to discern some broad themes as follows:

- four Constitutions recognise a right to a healthy/healthful environment<sup>343</sup>;
- 16 Constitutions include a duty on the state to protect the environment;
- 11 Constitutions include a duty on the individual to protect the environment;
- two Constitutions provide general prohibitions in relation to environmental harm; and
- five Constitutions recognise the importance of intergenerational equity.

The constitutional provisions for each state are provided below.<sup>344</sup>

## Constitutional Provisions for APF Member States

### Afghanistan

The preamble to the 2004 Constitution refers to a '*prosperous life and a sound environment for all those residing in this land*'. The Constitution further indicates that the State is '*obliged to adopt necessary measures for ... proper exploitation of natural resources and the improvement of ecological conditions*' (Chapter 1, art 15).

Protection of the environment was also guaranteed under the previous 1990 Constitution which provided that '*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*' (Chapter II, art 32).

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<sup>343</sup> Mongolia, Republic of Korea, Republic of the Philippines, Timor l'Este.

<sup>344</sup> Most constitutional provisions in the following two sections have been drawn directly from the 2005 Earthjustice Report to the UN Commission on Human Rights (Earthjustice, above n 90) and a study on constitutional provisions relating to the environment compiled by Don Anton, Policy Officer for the Environmental Defender's Office, Australia (Don Anton, *Comparative Constitutional Language for Environmental Amendments to the Australian Constitution* (1998) <<http://www.elaw.org/resources/text.asp?ID=1082>> at 24 April 2008. Where possible, provisions have been cross-checked with other sources.

## India

The amended 1950 Constitution directs the State *'to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'* (Part IV, art 48A). The Constitution also makes it the duty of every citizen of India *'to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures'* (Part IVA, art 51A).

## Mongolia

The 1992 Constitution, as amended, provides that *'the citizens of Mongolia shall enjoy ... the right to a healthy and safe environment, and ... be protected against environmental pollution and ecological imbalance'* (Chapter Two, art 16(2)).

The Constitution further provides that *'the land, its subsoil, forests, water, fauna and flora and other natural resources shall be subject to ... state protection'* (Chapter Two, art 6(1)). The Constitution authorises the State to *'hold responsible the landowners in connection with the manner the land is used, to exchange or take it over with compensation on the grounds of special public need, or confiscate the land if it is used in a manner adverse to the health of the population, the interests of environmental protection and national security'* (Chapter One, art 6(4)). The Constitution also makes it the *'sacred duty'* of every citizen to protect nature and the environment (Chapter Two, art 17(2)).

## The Kingdom of Nepal

The 1990 Constitution directs the State to *'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, art 26).

## The Republic of Korea (South Korea)

The 1988 Constitution provides for the right of all citizens *'to a healthy and pleasant environment'* (Chapter II, art 35(1)). The Constitution directs the State and all citizens to *'endeavor to protect the environment'* (Chapter II, art 35(1)). The Constitution directs the State to *'protect the land and natural resources'* and to *'establish a plan necessary for their balanced development and utilization'* (Chapter IX, art 120(2)).

## The Republic of the Philippines

The 1986 Constitution provides that *'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'* (art II, s 16).

The Constitution requires the State to consider conservation and to take ecological concerns into account in developing regulations concerning the use and ownership of property (art XII, s 2). The Constitution makes it the duty of the State to *'protect, develop, and conserve'* communal marine and fishing resources, both inland and offshore (art XIII, s 7).

## The Democratic Socialist Republic of Sri Lanka

The 1978 Constitution provides that the *'State shall protect, preserve and improve the environment for the benefit of the community'* (Chapter VI, art 27(14)). The Constitution also makes it the duty of every person to *'protect nature and conserve its riches'* (art 28(f)).

## Thailand

The recently passed *Thai Constitution* recognises a person's right to *'the rights and freedoms of life and person'* (art 32) and *'to receive quality public health services provided by the State universally and efficiently'* (art 50).

The *Constitution* also guarantees procedural rights, which focus on the right of the community *'to participate in the management, maintenance, preservation and exploitation of natural resources and the environment'* (arts 55–9, 61, 65–6). 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 (art 56). These procedural rights are expressed as individual and community rights (arts 55–9, 61, 65–6). A person can *'invoke or exercise [their] human dignity, rights or freedoms'* (art 28), which includes *'[exercising their] judicial rights to cause the State to comply with [the constitutional rights and freedoms of the Thai people]'* (art 28). The Constitution specifically states that the community may sue the state *'to force performance of'* their community rights, which includes the above procedural rights (art 66).

## Timor l'Este

The 2002 Constitution states that *'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, art 61(1)).

The Constitution provides that it is the responsibility of the State to *'recognise the need to preserve and rationalize natural resources'* (art 61(2)). Additionally, *'the State shall promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy'*.

## Other Constitutional Provisions within the Asia Pacific Region

### Cambodia

The State protects the environment and balances of abundant natural resources. The State establishes a precise plan of management for land, water, air, wind geology, ecologic system, mines, energy, petrol, and gas, rocks and sand, gems, forests and forestial products, wildlife, fish, and aquatic resources (art 59).

### Islamic Republic of Iran

The preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence, is regarded as a public duty in Iran. Economic and other activities that inevitably involve pollution of the environment or cause irreparable damage to it are therefore forbidden (art 50).

### Lao People's Democratic Republic

The 1991 Constitution directs all organisations and citizens to *'protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere'* (Chapter II, art 17).

## The Federated States of Micronesia

The Preamble to the amended 1978 Constitution '*affirm[s] [the people of Micronesia's] common wish ... to preserve the heritage of the past, and to protect the promise of the future*'. The Constitution prohibits the testing, storing, using or disposing of radioactive materials, toxic chemicals, or other harmful substances within the jurisdiction of the Federated States of Micronesia, without the express approval of the national government of the Federated States of Micronesia (art XIII, Section 2).

## The Republic of Palau

The amended 1981 Constitution directs the national government to '*take positive action to ... conserve a beautiful, healthful and resourceful natural environment*' (art VI).

## Occupied Palestinian Territory

The draft Constitution, as revised in May 2003, establishes that the State '*shall strive to achieve a clean, balanced environment*' (art 15). It further provides that environmental protection is an '*official and community responsibility*' and that acts of environmental harm are punishable by law.

## The Independent State of Papua New Guinea

The amended 1975 Constitution establishes the goal that the country's natural resources and environment '*be conserved and used for the collective benefit of all and be replenished for the benefit of future generations*' (National Goals and Directive Principles). The Constitution accordingly calls for '*(1) wise use to be made of natural resources and the environment ... in the interests of development and in trust for future generations; and (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and (3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees*'.

The Constitution makes it the obligation of all persons '*to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations*' (Basic Social Obligations).

## Qatar

The 2003 Constitution provides that the State '*shall preserve the environment and its natural balance in order to achieve comprehensive and sustainable development for all generations*' (Part II, art 33).

## Saudi Arabia

The 1992 Constitution provides that '*the State works toward protecting and improving the environment, as well as keep it from being harmed*' (Chapter 5, art 32).

## Republic of China (Taiwan)

The 1947 Constitution provides that the '*with respect to the utilization of land, the State shall, after taking into account the climatic conditions, the nature of the soil and the life and habits of the people, adopt measures to protect the land and to assist in its development*' (Chapter XIII, s 6, art 169).

## United Arab Emirates

The 1971 Provisional Constitution provides that *'the natural resources and wealth in each Emirate shall be considered the public property of that Emirate'* and that *'society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy'* (Chapter 2, art 23).

## The Republic of Vanuatu

The amended 1980 Constitution provides that every person has the duty *'to himself and his descendants and to others ... to safeguard the natural wealth, natural resources and environment in the interests of the present generation and of future generations'* (Chapter 2, Part II, art 7).

## The Socialist Republic of Vietnam

The 1992 Constitution provides that *'state organs, units of armed forces, economic organizations, and individuals have the duty to implement state regulations on the rational use of natural resources and protection of the environment'* (Chapter 2, art 29). The Constitution prohibits *'all acts of depleting natural resources and destroying the environment'*. The Constitution requires organisations and individuals *'to protect, replenish, and exploit [land allotted to them] in a rational and economical fashion'* (art 18).

## The Right to Life in Domestic Courts: Some Regional Case Studies<sup>345</sup>

### India

Article 21 of the Indian Constitution states that *'no person shall be deprived of his life or personal liberty except according to procedures established by law'*. In addition, constitutional amendments explicitly incorporate environmental protection and improvement as a part of State policy. These amendments include:

- an obligation on the State to *'endeavour to protect and improve the environment and safeguard the forests and wildlife of the country'*,<sup>346</sup> and
- the responsibility of citizens *'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'*.<sup>347</sup>

The right to life in art 21 has subsequently 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 right to life guaranteed by art 21 of the Constitution to include the right to a wholesome environment.<sup>348</sup>

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<sup>345</sup> The case law outlined in the following section has been drawn directly from Background Papers provided to the Joint UNEP–OHCHR Expert Seminar on Human Rights and the Environment, held in Geneva on 14–16 January 2002 (Jona Razzaque, *Human Rights and the Environment: The National Experience in South Asia and Africa* (Background Paper 4, Joint UNEP–OHCHR Expert Seminar on Human Rights and the Environment, 14–16 January 2002, Geneva) <[http://www.unhcr.ch/environment/bp4.html#\\_ftn5](http://www.unhcr.ch/environment/bp4.html#_ftn5)> at 24 April 2008), and from Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996). Where possible, information has been cross-checked with other sources, but the availability of domestic law reports has been limited.

<sup>346</sup> *Constitution (Forty Second Amendment) Act 1976* (India) art 48A.

<sup>347</sup> *Constitution (Forty Second Amendment) Act 1976* (India) art 51A(g).

<sup>348</sup> *Charan Lal Sahu v Union of India* (1990) AIR SC 1480 in Razzaque, above n 346.

In *Subhash Kumar v State of Bihar*, the Supreme Court extended this approach, 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>349</sup> In *MC Mehta v Union of India*, the Supreme Court reiterated the obligation on the State to take positive steps to address environmental harms.<sup>350</sup> In a subsequent petition by the same applicant in relation to air pollution caused by motor vehicles, the Supreme Court imposed positive obligations on the relevant State agency designed to address environmental harms.<sup>351</sup>

The Supreme Court has also linked the right to life with the right to livelihood contained in art 41 of the Indian Constitution in several cases. Article 41 provides:

*[T]he State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*

In *Olga Tellis v Bombay Municipal Corporation*, the Court held that the right to life encompassed livelihood, and that the deprivation of livelihood, except in accordance with just and fair procedures established by law, could constitute a violation of art 21.<sup>352</sup> The Court held that issues relating to livelihood (including improvements in the standard of living and conditions of work impacting on health and injury) were relevant in a consideration of art 21.<sup>353</sup>

## Bangladesh

A right to environment is not recognised by the Constitution of Bangladesh. However, the right to life is incorporated in arts 31 and 32 which respectively provide:

*To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law [Article 31].*

*No person shall be deprived of life or personal liberty save in accordance with law [Article 32].*

In 1994, an application was made to the Supreme Court seeking orders to require relevant government agencies to address pollution caused by the emissions of hazardous smoke from motor vehicles and to adopt policies to ensure the reduction and removal of toxic and hazardous pollutants associated with these emissions. In considering this case, the Supreme Court held that the right to life extends to a safe and healthy environment.<sup>354</sup> The Supreme Court subsequently expanded its interpretation of the 'right to life' to include '*the enjoyment of pollution free water and air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity*'.<sup>355</sup>

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<sup>349</sup> *Subhash Kumar v State of Bihar* (1991) AIR SC 420; (1991) (1) SCC 598 in Razzaque, above n 346.

<sup>350</sup> *MC Mehta v Union of India* (1998) 9 SCC 589 in Razzaque, above n 346.

<sup>351</sup> *MC Mehta v Union of India* (1991) AIR SC 813 (Vehicular Pollution Case); (1992) Supp (2) SCC 85; (1992) Supp (2) SCC 86; (1992) 3 SCC 25 in Razzaque, above n 346.

<sup>352</sup> *Olga Tellis v Bombay Municipal Corporation* (1986) AIR SC 180 in Razzaque, above n 346.

<sup>353</sup> *Kirloskar Bros Ltd v ESI Corporation* (1996) 2SCC 682 in Razzaque, above n 346.

<sup>354</sup> *Dr M Farooque v Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others* (Unreported) in Razzaque, above n 346.

<sup>355</sup> *Dr M Farooque v Bangladesh* (1996) 48 Dhaka Law Reports 438.

On appeal, the Appellate Division stated that the Constitution affirmed that the 'right to life' included a right to a safe and healthy environment:

*Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.*<sup>356</sup>

## Pakistan

Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberty, save in accordance with the law. In *Shehla Zia v WAPDA*, a case involving alleged exposure to hazardous electro-magnetic fields and other hazards, the Court stated that:

*Under our Constitution, article 14 provides that the dignity of man and subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man and right to 'life' are guaranteed under article 9. If both are read together, [a] question will arise [as to] whether a person can be said to have dignity of man if his right to life is below [the] bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.*<sup>357</sup>

In a subsequent case dealing with the right to access to water and water contamination from industrial processes, the Supreme Court has stated:

*The word 'life' ... cannot be restricted to a vegetative life or mere animal existence. ... Where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself ... The right to have unpolluted water is the right to every person wherever he lives.*<sup>358</sup>

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<sup>356</sup> *Dr M Farooque v Bangladesh* (1997) 49 Dhaka Law Reports (AD) 1, [101] (Chowdhury J).

<sup>357</sup> *Shehla Zia v WAPDA* (1994) PLD SC 693 in Razzaque, above n 346.

<sup>358</sup> *West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore*, 1994 SCMR 2061 in Razzaque, above n 346.

## PART 3 - RESPONSES TO QUESTIONNAIRE

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# Questionnaire for Background Paper on Human Rights and the Environment

## Documentation

Please send the following documentation to the APF Secretariat by email or by mail:

### Constitutional provisions relating to:

1. the right to an environment of a particular quality;
2. obligations with respect to the environment;
3. the right to life
4. the relevance of international law in the domestic jurisdiction.

### Relevant legislation referring to:

1. a right to an environment of a particular quality;
  2. protections against environmental harms that affect human life or health
- (Please provide the full name and citation for legislation and regulations)

### NGO Reports

1. reports by local, national or international non-governmental organisations on environmental harms that affect the rights to life and health in your country

## Part 1: The “Right to Environment” in Your Country

- A. Has a “right to environment” been recognized in your constitution or national legislation?
- B. Have your national courts recognized a “right to environment” as a component of other human rights? If so, please provide copies some of the most significant decisions.
- C. Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.
- D. Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.

## Part 2: Issues Raised in the Terms of Reference

1. How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?
2. Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.
3. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in either public or private projects? Has the State been required:
  - a. To take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?
  - b. To provide remedies where violations have occurred?

4. Does your country have legislation or regulations imposing human rights obligations on non-State actors? Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?
5. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?

### Part 3: Activities of your Commission

1. Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health? If so, please indicate how many complaints you have received, and please describe some of the most important cases, and the role of your Commission in resolving the complaints.
2. Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.
3. Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.
4. Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the commission and the outcome of the cases. Please provide copies of any submissions and court decisions.
5. Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.
6. Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health? If so, in what way?
7. Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?
8. What jurisdiction does your Commission have over the activities of non-state actors? Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?

### Part 4: Current Situation

- a. Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?
- b. Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?

# Response of the Afghan Independent Human Rights Commission

Advisory Council of Jurists  
Questionnaire on Human Rights and the Environment

## Documentation

The following documentation is attached to this response:

### **Constitutional provisions:**

- a. the Constitution of Afghanistan<sup>359</sup>

Article 15 provides:

“The State is obliged to adopt necessary measures for safeguarding forests and the environment”.

### **Relevant legislation:**

- b. The Law on Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission; and
- c. The Environmental Law

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<sup>359</sup> Note: The Commission advises this is an unofficial English translation

# Response of the Australian Human Rights and Equal Opportunity Commission

## Advisory Council of Jurists Questionnaire on Human Rights and the Environment

### Documentation

The following documentation is attached to this response:

#### Constitutional provisions relating to:

1. **the right to an environment of a particular quality:** none are provided for in the Australian Constitution
2. **obligations with respect to the environment:** none are provided for in the Australian Constitution
3. **the right to life:** no “right to life” is expressly provided for in the Australian Constitution
4. **the relevance of international law in the domestic jurisdiction:**
  - a) Section 51(xxix) of the Australian Constitution gives the Federal Parliament legislative power to make laws with respect to external affairs (the “external affairs power”). This provision has been interpreted broadly to permit the Federal Parliament to pass laws which give effect to international treaties and rules of customary international law.<sup>360</sup>
  - b) International law is not enforceable in Australian courts unless the provisions of the international law have been enacted into domestic law by Parliament, but it may nevertheless influence the interpretation of Australian law.<sup>361</sup>

#### Relevant legislation referring to:

1. **a right to an environment of a particular quality:** no such “rights” are expressly provided in Australian legislation. Under Australian legislation environmental protection is largely focused on ensuring procedural rights.
2. **protections against environmental harms that affect human life or health:**

#### **(Please provide the full name and citation for legislation and regulations)**

1. National pollution standards to protect human health are set through National Environment Protection Measures (NEPMs) which are made under the *National Environment Protection Council Act 1994* (Cth) (NEPC Act).
2. The object of the NEPC Act is to ensure that people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia (s 3(a), NEPC Act).
3. NEPMs have been made for:<sup>362</sup>

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<sup>360</sup> See *Commonwealth v Tasmania* (1983) 46 ALR 625 (the Tasmanian Dams case) in which the High Court upheld the validity of legislation implementing the World Heritage Convention; and *The Constitution of the Commonwealth of Australia*, Annotated, 6th ed, Moens and Trone, Butterworths, 2001, at p 146 para 341.

<sup>361</sup> The High Court has held that customary international law is not as such part of the law of Australia, but a recognised rule of international law will be applied in Australian courts in so far as it is not inconsistent with rules enacted by statutes or finally declared by tribunals: see *Chow Hung Ching v R* (1949) 77 CLR 449, at 477 per Dixon J.

<sup>362</sup> A copy of each of these NEPMs can be found at: <http://www.ephc.gov.au/index.html>

- Ambient Air Quality
- National Pollutant Inventory
- Movement of Controlled Waste
- Used Packaging Materials
- Assessment of Site Contamination
- Diesel Vehicle Emissions, and
- Air Toxics.

### **NGO Reports:**

#### **1. reports by local, national or international non-governmental organisations on environmental harms that affect the rights to life and health in your country:**

- Does Australia need a human right to a healthy environment?* New Matilda,<sup>363</sup> author Elaine Johnson, 9 November 2005 (**Attachment A**).

This report contains a brief review of the arguments for the right to a healthy environment in Australia. The New Matilda report cites the following matters as examples of environmental threats which may have affect the right to a clean and healthy environment:

- Plans for nuclear waste dumps in the Northern Territory
  - The effects of climate change
  - Growing demands on clean drinking water
  - The release of genetically modified organisms into the environment.
- Greening the Proposed Australian Capital Territory Bill of Rights, Submission to the Bill of Rights Consultative Committee in deliberations on whether the ACT ought to establish a Bill of Rights, prepared by the Australian Centre for Environmental Law (Don Anton), 2002 (**Attachment B**)
  - The Case for Environment Related Human Rights: Submission to the ACT Attorney-General for consideration in the s 43 review of operation of the Human Rights Act 2004 (ACT), Environmental Defender’s Office (ACT), June 2005 (**Attachment C**).

## Part 1: The “Right to Environment” in Your Country

### The “right to environment in the Constitution and National Legislation

*Has a “right to environment” been recognized in your constitution or national legislation?*

No. Australia has neither a Bill of Rights in its national Constitution<sup>364</sup> nor a charter of rights in national legislation.<sup>365</sup> Indeed, the Australian Constitution expressly protects only a very limited number of rights.<sup>366</sup> The “right to environment” has not been expressly recognised under either our Constitution or national legislation.

Australia is a federation of eight separate states and territories. Two of these have each passed their own legislative bills of rights. The Australian Capital Territory (ACT) enacted the *Human*

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<sup>363</sup> New Matilda is an online magazine and policy portal, and is currently lobbying for a Human Rights Act to be introduced in Australia: see [www.newmatilda.com](http://www.newmatilda.com).

<sup>364</sup> The Commonwealth of Australia Constitution Act (Constitution).

<sup>365</sup> Australia is now in a unique position in relation to human rights. It is the only democratic nation in the world that has neither a constitutionally entrenched Bill of Rights nor a Bill of Rights as part of its ordinary legislation: see *A Charter of Rights for Australia*, George Williams, UNSW Press, 2007; and *Retreat from Injustice – Human Rights Law in Australia*, by Nick O’Neill, Simon Rice and Roger Douglas, Federation Press, 2004.

<sup>366</sup> These are: the right to acquisition of property on just terms (s 51 (xxi)); trial by jury (s 80); freedom of movement between States (s 92); freedom of religion (s 116); voting rights (ss 41 and 24)

*Rights Act 2004* and Victoria the *Charter of Human Rights and Responsibilities Act 2006*. Neither of these Acts contains an express right to environment.<sup>367</sup>

Environmental protection for individuals in Australia is delivered largely through specific environmental legislation. Complex and detailed environmental legislation exists throughout Australia at both the Federal and State/Territory levels. These laws regulate the administrative acts of government, for example, by specifying detailed processes for environmental approvals and by setting maximum thresholds for environmental harm.<sup>368</sup>

Procedural rights in relation to environmental matters, for example the right to public participation in environmental decision-making, the rights to information, and appeal rights (environmental democracy) are often quite extensive. These rights are provided through environmental legislation and the common law.<sup>369</sup>

On the whole, environmental law in Australia provides effective environmental protection to a greater or lesser extent in all jurisdictions, although there are a few notable examples where this has failed.<sup>370</sup>

## Recognition of environmental “rights” by the courts

Australia’s national courts have not recognized a “right to environment” as a component of other human rights. There have been no cases where national courts have recognized that environmental harms have violated the rights to life or health, or any other human rights.

## Part 2: Issues Raised in the Terms of Reference

### Environmental threats and the right to life

*How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?*

Australia has ratified the six major Human Rights Conventions and the First Optional Protocol to the Convention against Torture, which impose positive obligations on Australia to protect the rights contained in these instruments. The ICCPR is scheduled to the Human Rights and Equal Opportunity Commission Act, 1986 (Cth) (the HREOC Act), and the inherent right to life, articulated in Article 6 of that Convention, is a human right protected by the HREOC Act.

Although the right to life, as articulated in these international instruments, has not been the subject of direct interpretation in Australian Courts, the right to life, and its protection and preservation, is a central tenet of the common law of Australia. Protection of the inherent sanctity of life is also central in the criminal law, and is reflected in the severity of sentences imposed by courts where death results from a crime.

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<sup>367</sup> Despite extensive submissions being made on the topic, efforts to include a Right to a healthy environment in the ACT’s Human Rights Act 2004 have failed: see submissions from the ACEL and ADO attached.

<sup>368</sup> For example, national pollution standards are set through National Environment Protection Measures (NEPMs) which are made under the National Environment Protection Council Act 1994. The object of the Act is to ensure that people enjoy the benefit of equivalent protection from air, water or soil pollution and from noise, wherever they live in Australia (s 3(a), NEPC Act). NEPMs have been made for: Ambient Air Quality, National Pollutant Inventory, Movement of Controlled Waste, Used Packaging Materials, Assessment of Site Contamination, Diesel Vehicle Emissions and Air Toxics.

<sup>369</sup> For example, the Environmental Protection and Biodiversity Conservation Act 1999 (Commonwealth) contains extensive rights to participate in environmental decisions, the opportunity to access information about environmental decisions (often via legal requirements that government decision-making processes be published on the internet, and appeal rights for individuals and NGOs; and the Environmental Planning and Assessment Act 1979 (NSW) contains open-standing provisions granting “any person” the right to bring proceedings to enforce planning laws: s 123.

<sup>370</sup> See the discussion in Part 4 below of some particular examples where environmental law has failed to protect the right to environment.

*Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.*

Australia's national courts do not recognise customary international law as a source of law unless the law has been "received" into the common law, or enacted into statute.<sup>371</sup> Accordingly, there are no cases relating to the "right to life" under customary international law.

### **Environmental threats caused by non-State actors**

*What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in either public or private projects?*

Australia does not have a rights-based constitution, or a legislative Bill of Rights that gives rise to a positive obligation to protect individuals against violations of their rights by non-State actors.

The State is not required by statute to take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health, or to provide remedies where violations have occurred.

It is unlikely that the common law imposes any legally enforceable obligation of this kind on the State, even to warn against known or probable risks.

However, HREOC does have jurisdiction to inquire into alleged breaches of human rights committed by persons acting on behalf of the Commonwealth. This is discussed further in Part 3.

*Does your country have legislation or regulations imposing human rights obligations on non-State actors?*

Australia does not have legislation or regulations imposing human rights obligations on non-State actors in relation to a right to an environment of any particular quality.

*Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?*

There are no cases where a court has imposed obligations on non-State actors to protect against environmental harms arising from their activities based on a human right to life or health. However, the common law provides remedies for harm to health or property caused by noxious activities amounting to nuisance, or where reasonable steps have not been taken to prevent foreseeable harm from activities that cause environmental damage.

### **Environmental threats outside Australia**

*If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems?*

A significant threat to human life and health caused by activities outside Australia is posed by climate change.

Although Australia has signed and ratified the UN Framework Convention on Climate Change (UNFCCC), it has not signed the Kyoto Protocol. Rather, the Australian Government has sought to establish an alternative international arrangement outside the UNFCCC and Kyoto Protocol processes, known as the Asia-Pacific Partnership on Clean Development and Climate (or AP 6).

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<sup>371</sup> See footnote 2 above.

The six founding countries represented in AP 6 are: Australia, Japan, the US, China, India and South Korea. The AP 6 is voluntary, non-legally binding framework for international cooperation intended to influence the behaviour of the major emitters of greenhouse gases from developing countries which do not have binding targets under the Kyoto Protocol (i.e. China, India and South Korea).

The AP 6 has been criticised for having no binding targets, no price signals (it does not contain a carbon trading proposal), and no enforcement mechanisms.

## Part 3: Activities of your Commission

### Complaints concerning environmental harms

*Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health?*

HREOC has received a number of complaints from people which assert environmental harms have affected their health. These types of claims are generally lodged by people with disabilities such as chemical sensitivities or allergies who allege that organisations such as local councils have used chemicals in the local area which affect their disabilities or that service providers or government agencies do not properly accommodate their disabilities in the use of chemicals or toxins in premises or in the services they provide and this affects their disability.

These types of complaints are generally lodged under the *Disability Discrimination Act 1992* (Cth) and relate to the provision of goods services and facilities. Although HREOC is unable to provide specific statistics on the complaints received about these types of issues, they are generally very small in number; that is under five per year.

Where a complaint about alleged discrimination is received and is within HREOC's jurisdiction it is generally allocated to an Investigation Conciliation Officer who will contact the parties to the complaint and obtain information about the issues raised by the complaint. If appropriate the officer will 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. If the complaint is not resolved through conciliation HREOC will terminate its inquiry. Following the Notice of Termination, the complainant is entitled to pursue the complaint through the federal courts to determine whether the defendant's activity constituted unlawful discrimination.

### Legal developments relating to human rights and the environment

*What jurisdiction does your Commission have over the activities of non-state actors?*

Under the HREOC Act HREOC has a function to inquire into alleged breaches of human rights committed by the Commonwealth or persons acting on behalf of the Commonwealth.<sup>372</sup> This will include non-state actors acting on behalf of the Commonwealth. Under the HREOC Act "human rights" are broadly defined to mean the rights and freedoms recognised in the ICCPR or declared by other specified human rights instruments.

*Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health?*

No, HREOC has not intervened in any court proceedings on the issue of the environment and the rights to life and health.

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<sup>372</sup> s 11(1)(f) and s 3, HREOC Act

*Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?*

No, HREOC has not proposed legislation or regulations relating to environmental harms that affect the rights to life and health.

However, HREOC regularly makes submissions to parliamentary inquiries into proposed legislation. It has done so in relation to environmental harms in a recent submission to the Australian Senate Employment, Workplace Relations and Education Committee on the Inquiry into the *Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006 (Attachment D)*.

*Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?*

Yes, please see below for further details.

### **Policy work relating to human rights and the environment**

*Has your Commission conducted research on the connection between environmental harms and the rights to life or health?*

Yes, this research has been incorporated into HREOC reports; please refer to text below for further details.

*Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health?*

No, HREOC has not undertaken awareness and education campaigns that directly relate to environmental harms affecting the rights to life or health. Although, environmental issues are implicit in HREOC current *Close the Gap* campaign. The campaign, run in conjunction with Oxfam Australia, focuses on combating the 17 year difference in life expectancy between Indigenous and non-Indigenous Australians. The campaign website is: <http://www.oxfam.org.au/campaigns/indigenous/health.php>.

*Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports?*

Yes, under the HREOC Act<sup>373</sup> the Aboriginal and Torres Strait Islander Social Justice Commissioner on behalf of HREOC is to submit an annual report regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders. A number of these reports have considered the effect of environmental harms on the rights to life and health, particularly in the context of heritage protection, Indigenous land, hazardous waste storage on Indigenous land, and social determinants of Indigenous health. In particular, please refer to Chapter Two of the *Social Justice Report 2005 (Attachment E)*.

*Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health?*

Yes, HREOC has been involved in a number of activities aimed at raising awareness amongst both government and non-government agencies about the relationship between human rights and sustainable development. These activities have generally been undertaken in collaboration with a number of civil society stakeholders.

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<sup>373</sup> s 46C(1)(a), HREOC Act

In 2003 HREOC published a handbook titled *Resource Development on Indigenous Land: a Human Rights Approach (Attachment F)*. The handbook sets out principles for developers coming onto Indigenous land including principles for environmental management. It also lists the human rights standards on which these principles are based. The principles included in the handbook were drawn up during an intensive three-day forum in Alice Springs in May 2002, which brought together Indigenous communities from Australia's major mineral resource regions. Mining industry companies and non-government organisations were also invited to attend the forum.

Between 2004 and 2006 HREOC was involved in the Mining Certification Evaluation Project (MCEP), a three year, multi-stakeholder, research project to investigate the feasibility of third party certification of environmental and social performance of mine sites based on sustainability principles. The MCEP attracted the support and participation of a range of stakeholders, including mining companies such as BHP Billiton and Rio Tinto, the Minerals Council of Australia, non-government organisations, researchers, and financial and assurance companies. The final report of the MCEP was released in January 2006.<sup>374</sup>

In March 2007 HREOC also participated in a stakeholder Dialogue with BHP Billiton to discuss its policy on community engagement and sustainability and to give input into their 'Community Engagement' report. The dialogue focused particularly on the principle of free, prior and informed consent by communities affected by BHP's activities. The report is still to be finalised.

In May 2007 HREOC was involved in a workshop conducted by the Commonwealth Department of Environment and Conservation (DEC) to develop a National Action Plan for Education for Sustainable Development. The Plan sets out the Government's strategy for the implementing the UN Decade of Education for Sustainable Development 2005-2014. HREOC emphasised the need to include a program for education on social equity issues, as well as the environmental and economic issues normally associated with sustainability.

HREOC has also received funding from the federal government to assist with Indigenous participation in international deliberations. This funding allows for:

- support for attendance of Indigenous delegates to the UN Permanent Forum on Indigenous Issues (held annually in New York in May);
- convening domestic preparatory meetings ahead of significant international meetings; and
- establishing processes for disseminating information within Australia about international developments.

Issues considered in these deliberations include biological diversity and the environment. These are key issues in the dialogue on Indigenous rights, for example through the Declaration on the Rights of Indigenous Peoples.

## Part 4: Current Situation

### Current Environmental Problems

*Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?*

Current examples of environmental problems which could affect the rights to life and health, but which are not being addressed as human rights issues include:

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<sup>374</sup> The Final Report of the MCEP can be found at:  
[http://www.minerals.csiro.au/sd/Certification/MCEP\\_Final\\_Report\\_Jan2006.pdf](http://www.minerals.csiro.au/sd/Certification/MCEP_Final_Report_Jan2006.pdf)

- I. The failure of new freeway tunnels to address serious point source pollution from exhaust stacks, demonstrated by the M5 East Motorway; and
- II. The extensive dust pollution from an industrial plant affecting a local community in Whyalla, South Australia ("Whyalla Red Dust Case").

These cases are described below.

### **M5 East Motorway case, NSW**

#### *Background*

In 1998, the Roads and Traffic Authority (RTA) proposed to construct a four-kilometre long four-lane motorway connecting Mascot Airport to the western parts of Sydney ("M5 East Freeway").

Following the preparation and public exhibition of an environmental impact statement, the RTA announced that it wished to modify the activity by, among other things, replacing three planned exhaust stacks which would exhaust the tunnel emissions into the atmosphere with a single 35 metre high ventilation stack, to be placed in a different locality. The stack would be located in a light industrial / residential area of Sydney called Turella. The RTA did not carry out a fresh EIS for the new stack. The local residents were concerned that there had been no direct assessment of the likely health impacts of the relocated single exhaust stack on the local community in Turella.

#### *Unsuccessful court challenge by residents*

Through the Transport Action Group Against Motorways Inc, local residents brought proceedings in the Land and Environment Court (and the NSW Court of Appeal) against the failure of the RTA to carry out a further EIS.<sup>375</sup> The residents were unsuccessful in their appeals.

#### *Inadequate health studies*

Within two months of the M5 East tunnel and single stack opening in December 2001, local residents living within 600 metres of the ventilation stack started complaining of odour nuisance and various health symptoms (itchy eyes, headaches, breathing problems). The tunnel was carrying about 85,000 vehicles per day, close to its design capacity of 90,000 vehicles per day.

In response to community concerns, the NSW Health Department conducted a two-phase study in 2004 into the likely health impacts of the ventilation stack.<sup>376</sup> The study concluded that there was "no evidence of an association between the prevalence of reported symptoms and the modelled emissions from the M5 East Stack".

However, these findings were strongly criticised by independent experts. An independent report which reviewed the methodology used by the Health Department, (called for by local Turella residents and commissioned by another local council, which was itself facing the prospect of a new tunnel and exhaust stack in its local area) concluded that:

- a. the NSW Health Department's report did not use the "best feasible epidemiological approach"
- b. disputed the finding that there was no scientific justification to conduct further health studies into the impacts on the community living under the stack, and

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<sup>375</sup> The case was heard in the first instance by the Land and Environment Court, and then in the Court of Appeal: see *Transport Action Group Against Motorways Inc. v Roads and Traffic Authority (NSW)* (1999) 46 NSWLR 598. Note: domestic remedies were not exhausted in this case, as leave to appeal to the final court of appeal in Australia, the High Court, was not sought, largely because the Residents Group lacked the funds to do.

<sup>376</sup> Investigation into the possible health impacts of the M5 East Motorway Stack on the Turella community, NSW Department of Health, April 2004, at [www.health.nsw.gov.au/pubs/2006/pdf/m5\\_health\\_impact.pdf](http://www.health.nsw.gov.au/pubs/2006/pdf/m5_health_impact.pdf)

- c. found that residents under the age of 17 had been excluded from the Health Department's study, which was particularly problematic given that children and infants are more vulnerable to impacts on air quality.<sup>377</sup>

Local residents in the Turella area continue to experience symptoms which they say are caused by particulate emissions from the stack and portals (i.e. tunnel exits and entrances). Residents are lobbying the NSW Government to carry out a further health study into the health impacts of the emissions, and to invest in technology to improve air quality in the tunnel, such as filtration equipment.<sup>378</sup>

## **The Whyalla Red Dust case, South Australia**

### *Background*

The OneSteel ("Company") iron pellet plant has been operating in Whyalla, a small town in South Australia since 1968. The plant produces approximately 1.5 million tones of iron ore pellets per year. Approximately 2,000 people are employed at the plant.

The process of transporting the iron oxide ore to the plant and crushing it to talcum powder fineness results in vast amounts of red dust being generated. This red dust has affected large parts of the industrial town of Whyalla and adjacent residential areas.

### *Dust exceeds national emission standards*

A health report commissioned by the local community showed that dust from the plant exceeded national pollution standards by a significant extent every year.<sup>379</sup> The Report concluded that "Evidence from the literature strongly suggests that local Whyalla residents are actually dying prematurely from the effect of particulates."<sup>380</sup>

### *New pollution licence requires dust control*

The Company operated for many years under a pollution control licence which had no effective dust control requirements. On 31 January 2005, the South Australian Environment Protection Authority issued the Company with an amended pollution licence which required the Company to adopt red dust control measures for the first time.

The Company appealed against the terms of the new pollution licence to the Environment Resources and Development Court, and the Whyalla Red Dust Action Group Inc was also given permission to join the case (but was subsequently denied standing by the Supreme Court).

### *Strict pollution licence overturned by special legislation*

Before the court case could be decided, the South Australian Government passed special legislation:

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<sup>377</sup> A copy of the Katestone Environmental Report can be found on the Lane Cove Council website at: [www.lanecove.nsw.gov.au/Your%20Council/Lane%20Coves%20Future/Have%20your%20Say/documents/ReviewHealthImpactStudiesfinal.pdf](http://www.lanecove.nsw.gov.au/Your%20Council/Lane%20Coves%20Future/Have%20your%20Say/documents/ReviewHealthImpactStudiesfinal.pdf)

<sup>378</sup> For further information on the health impacts of the M5 East tunnel, please contact Mark Curran, a convenor of one of the local residents' groups, at [markcurran@optusnet.com.au](mailto:markcurran@optusnet.com.au).

<sup>379</sup> Based on monitoring by the Environment Protection Authority in 2003, there were an established 65 exceedences of national air quality standards at the Hummock Hill monitoring site, National Environment Protection Measure for Ambient Air Quality PM (particulate matter) 10 (26 June 1998), referred to in A Very Dirty Story – Protecting the Whyalla Community from Red Dust Pollution Caused by the OneSteel Pellet Plant, Report for the Whyalla Red Dust Action Group Inc., by April Muirden and Mark Parnell, published by the Environment Defender's Office (SA), 12 December 2003, Section 1.2 ("Action Group Report").

<sup>380</sup> See the Action Group Report, Executive Summary.

- which had weaker dust control provisions (eg it contained no dust reduction targets)<sup>381</sup>; and
- granted the Company a new 10-year pollution licence; and
- prohibited the Environment Protection Authority from subsequently varying that licence.

This Act expressly overrode the statutory independence of the Environment Protection Authority in carrying out its pollution licensing functions.<sup>382</sup> After the Act was passed, OneSteel discontinued its appeal.

In 2007, residents report that they are still experiencing very high dust levels. The Company is currently expanding the steelworks and making operational changes and claims that these changes will greatly reduce dust levels.

## The value of a specific right to the environment

*Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?*

Yes. Even though there are reasonably strong environmental laws at both State and Federal levels in Australia, there are still cases where either the common law or environmental legislation is inadequate to ensure a healthy environment. These cases are discussed further below:

### Special legislation may circumvent environmental laws

As demonstrated by the Red Dust case above, it is open to parliaments to change the law through special legislation when it suits it, thus circumventing environmental laws. For example, Parliament can overturn an unpalatable court decision using special, retrospective legislation, or retrospectively validating or issuing an environmental approval.

In the absence of human rights protections, including protection of the right to a healthy environment, those laws and actions are not open to challenge on the grounds that they might violate human rights or the right to environment.

In addition to the Whyalla Red Dust case, two other recent examples of cases where the government has used special legislation in environmental matters are described below:

#### *(a) The Collex Waste Transfer Terminal case*

In 2003, local residents successfully challenged an approval for a new waste transfer facility in the NSW Land and Environment Court.<sup>383</sup>

In that case, the Land and Environment Court, after a hearing lasting more than a year, concluded that approval for Collex should be refused because of:

- the inadequacy of the assessment of environmental impacts, including the absence of any cumulative impacts,
- the inadequacy of the investigation and analysis of alternative sites;
- the likely adverse environmental impacts of odour, dust and noise emissions; and
- the likely adverse social and economic impacts on the local community of the proposal.

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<sup>381</sup> Broken Hill Proprietary Company's Steel Works Indenture (Environmental Authorisation) Amendment Act 2005: s 15 and Schedule 3.

<sup>382</sup> The Environment Protection Authority is established under the Environment Protection Act 1993 (SA). Section 11 of the Act provides that the Authority is "subject to the direction of the Minister except in relation to: (a) ... (b) the performance of its functions under the Part 6 [i.e. its pollution licencing functions]; and (c) the enforcement of this Act.

<sup>383</sup> Drake & Ors; Auburn Council v Minister For Planning And Anor; Collex Pty Ltd [2003] NSWLEC 270.

After the court case, the NSW Government introduced the *Clyde Waste Transfer Terminal (Special Provisions) Act 2003* to deem the development consent (approval) to have been validly granted under the *Environmental Planning and Assessment Act*, despite the Court's finding to the contrary. The Act also exempts the transfer station from any merits appeals, and from any inconsistent zoning requirements.

*(b) The Port Kembla Copper Smelter case*

The Port Kembla Copper smelter, located in Wollongong two hours south of Sydney, started operation in 1908. In the 1980's and 1990's, residents complaints began to increase about the highly acidic fallout of sulphur dioxide and lead from the smelter's stack called "brown-spotting", which causes corrosion and staining of any exposed surfaces such as homes and cars.

The smelter was also immediately adjacent to three schools. Local residents were concerned that the area was experiencing high rates of cancer and a high incidence of leukemia and that this might be partly connected to the pollution from the copper smelter.

The copper smelter closed in 1995 because it was unable to meet pollution control standards. When it received a new development consent to reopen a few years later, Helen Hamilton, a local resident, brought proceedings in the Land and Environment Court challenging the new approval.

However, on the night before the Land and Environment Court hearing began, the NSW Government passed special legislation declaring the new development consent to be valid despite any court decision to the contrary.<sup>384</sup> Helen Hamilton had no choice but to discontinue the proceedings.

Since reopening in early 2000, the smelter has been fined for breaches of its pollution licence due to on-going brown-spotting.<sup>385</sup>

In August 2003 it announced that it was going to cease operations due to financial difficulties.

*The right to environment and retrospective legislation*

Would the outcome of these cases be any different if Australia had the right to a healthy environment in its Constitution or in legislation?

Assuming that it could be shown that these developments had a significant impact on the health of residents living near the developments, it is arguable that the special legislation might be invalid if its effect is to violate the right to a healthy environment.

The existence of a right to a healthy environment would at least establish some basic legal protection against the unfettered use of special legislation to override environmental laws.

**The common law does not offer comprehensive environmental protection**

While the common law system in Australia goes some way towards protecting the right to environment, it is by no means comprehensive in its protection.

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<sup>384</sup> Port Kembla Development (Special Provisions) Act 1997.

<sup>385</sup> In its start-up phase in early 2000, it was fined a total of \$150,000 for six breaches involving brown-spotting during Jan-March 2000. [See for example Environment Protection Authority v Port Kembla Copper Pty Ltd [2001] NSWLEC 174 (2 August 2001).] During February - July of 2002 there were three incidents of highly acidic fall-out from the smelter on neighbouring areas of "brown spotting". In one of those incidents, the impact on the community was very high with numerous vehicles and homes being affected. The Land and Environment Court fined Port Kembla Copper a total of \$95,000 for these offences and ordered it to pay the EPA's costs of \$25,000 in October 2003. The company has so far paid more than \$112,000 for property damage caused by this incident.

For example, the tort of nuisance by which a person is entitled to complain about an unreasonable interference with the use and enjoyment of that person's land, constitutes one cause of action which a person may use to protect their right to a clean and healthy environment. A nuisance case might be brought, for example, to restrain and obtain damages for, smoke, smells, noxious fumes, noise and general amenity impacts.

However the tort of nuisance has a number of limitations. For example:

1. A plea of nuisance can be defeated by the defence of statutory authority.<sup>386</sup> The basic principle is that a nuisance may be authorised by a statute, such as pollution legislation, so long as the activity is carried out in accordance with the permit.
2. A nuisance action may also fail because the right to bring proceedings in nuisance (or trespass or negligence for that matter) may always be abrogated by special legislation.

### **There is no positive duty on the government to act on environmental matters**

Environmental problems are often the result of government inaction; that is a failure to regulate.

However, under Australian law, it is very difficult to bring proceedings to compel a government authority to carry out its public statutory duties, for example an action against an Environment Protection Authority or local council for failing to properly regulate an activity.<sup>387</sup>

This difficulty has been partly overcome by allowing the public "open standing" to enforce environmental laws in some jurisdictions.<sup>388</sup>

Nevertheless, there is often a concern in the public that the government is not "taking action" on environmental matters when it should. Depending on how the right might be framed in legislation, a right to environment could impose a positive duty on government to act to protect that right thereby allowing communities adversely affected by pollution to assert that right through the courts. A right to an environment of a particular quality would also create a relevant matter that executive authorities would have to take into account when making administrative decisions, such as planning decisions.

## Summary of Attachments

**Attachment A:** Johnson, *Does Australia need a human right to a healthy environment?* New Matilda (9 November 2005)

**Attachment B:** Australian Centre for Environmental Law, *Greening the Proposed Australian Capital Territory Bill of Rights* (2002)

**Attachment C:** Environmental Defender's Office (ACT), *The Case for Environment Related Human Rights* (June 2005)

**Attachment D:** HREOC, *Submission to the Inquiry into the Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006* (November 2006)

**Attachment E:** HREOC, Chapter Two of the *Social Justice Report 2005*

**Attachment F:** HREOC Handbook: *Resource Development on Indigenous Land: a Human Rights Approach* (2003)

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<sup>386</sup> Van Son v Forestry Commission of NSW (1995) 86 LGERA 108

<sup>387</sup> Such an action is known as a writ of mandamus: see the discussion on prerogative writs in environmental cases in Environmental Law in Australia, Gerry Bates, 6th edition, LexisNexis Butterworths, 2006, at para 7.56.

<sup>388</sup> For example, see s 123, Environmental Planning and Assessment Act 1979 (NSW).

## List of acknowledgements

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- Mark Parnell MP, Greens, Member of Parliament, South Australia
- Mr Jeff Smith, Executive Direction, Environmental Defender's Office (NSW)

# Response of the National Human Rights Commission of India

## Advisory Council of Jurists Questionnaire on Human Rights and the Environment

### Documentation

Please send the following documentation to the APF Secretariat by e-mail or by mail:

#### Constitutional provisions relating to:

- The right to an environment of a particular quality;
- Obligations with respect to the environment;
- The right to life;
- The relevance of international law in domestic jurisdiction.

Article 48A - Protection and Improvement of Environment and Safe guarding of forests and wild life:-

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

Article 51A- It shall be the duty of every citizen of India – (a) to (g) to protect and improve natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

Article 21 Protection of life and personal liberty. — No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 51 Promotion of international peace and security. —

The State shall endeavour to—

- (a) promote international peace and security;
- (b) maintain just and honorable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

Article 253 Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 246 VII schedule list I (Union) Entry 13 - Participation in international conferences, associations and other bodies and implementing of decisions made thereat. Entry 14 - Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

The Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of State policy through the insertion of Article 48A. Article 51A (g) imposed a similar responsibility on every citizen “to protect and improve the natural

environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures.”

In T.N. Godavarman Thivumalaped V. union of India (2002)10 SCC 606, state of W.B. V. shjit Kumar Ranor (2004 4 SCC 129, state of Gujarat V. Mirzapur etc. (2005) 8 SCC 534 S.C. read Article 48-A and 51-A together as laying foundation for a jurisprudence of environmental protection and held that today state and citizens are under a fundamental obligation to protect and improve the environment, including forests, lakes, rivers wild life and to have compassion for all living creatures.

These two articles have to be read in the light of Article 21 of constitution which provides that no person shall be deprived of his life or liberty except in accordance with procedure established by law. Any disturbance of our basic environment elements air, water or sun, which are necessary for life would hazardous to life with in mean of Article 21 of the Constitution M.C. Mehta V. Kermal Nath 2000(b) SCC 213

The right to life has been used in a diversified manner in India. It includes, inter alia, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood.

Relevant legislations referring to:

- A right to an environment of a particular quality
- Protections against environmental harms that affect human life or health

### **As per Annexure – A**

#### NGO Reports

- Reports by local, national or international non-governmental organisations on environmental harms that affect the rights to life and health in your country
- Several NGO's have filed petitions before Superior Courts in India on question re: environment apart from individuals interested in the matter. The manner in which law has developed in this regard is put in to.

## Part 1: The “Right to Environment” in Your Country

1. Has a “right to environment” been recognized in your constitution or national legislation?

Ans.

Yes. Article 21 of the constitution is interpreted to include wrong aspect of environment which is requested for decent and dignified life or living of human beings.

The Constitution of India, contains specific provisions relating to certain aspects of the environment, more specially for the protection of the forests and wildlife in the country, These provisions are incorporated in Part IV- Directive Principles of the State Policy and Fundamental Duties.

The provisions specifically relating to environment protection and nature conservation are mentioned in Part IV of the Constitution i.e. Directive Principles of State Policy in (Article 48A) which reads that “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”. Further in Part IV-A of the Constitution i.e. Fundamental Duties (Article 51-A(g)) which states that It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Furthermore in the Seventh Schedule of the Constitution (Article 246)

List III - Concurrent List

Item no. 17 Prevention of cruelty to animals

Item no. 17A Forests

Item no. 17B Protection of wild animals and birds.

These provisions have been read into Article-21.

2. Have your National Courts recognized a "right to environment" as a component of other human rights? If so, please provide copies of some of the most significant decisions.

Ans.

Yes.

The fundamental Right to Life is guaranteed under Article 21 states that "No person shall be deprived of his life or except according to the procedure established by law". Over the years, Public Interest Litigation (PIL) has become one of the most important tools of legal aid and has served to bring justice in many cases involving social and environmental concerns. Under a PIL, any public-spirited individual or group can move the court of law (under Article 226 of the Constitution for High Courts, and Article 32 for the Supreme Court) in case of breach of any fundamental right, to seek judicial redressal.

The Supreme Court played a pivotal role. The Court, in its interpretation of Article 21, has facilitated the emergence of the environmental jurisprudence in India. Supreme Court has essentially interpreted the right to life under Article 21 to include a right to healthy and pollution free environment.

Rural Litigation and Entitlement Kendra v. State of U.P. (AIR 1985 SC 652) was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The expanded concept of the right to life under the Indian Constitution was further elaborated on in Francis Coralie Mullin v. Union Territory of Delhi (AIR 1981 SC 746) where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life. The importance of this case lies in the willingness on the part of the Court to be assertive in adopting an expanded understanding of human rights. It is only through such an understanding that claims involving the environment can be accommodated within the broad rubric of human rights. The link between environmental quality and the right to life was further addressed by a constitution bench of the Supreme Court in the Charan Lal Sahu v. Union of India (AIR 1990 SC 1940) Similarly, in Subash Kumar v. State of Bihar (AIR 1991 SC 420) the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the Court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

The Supreme Court has used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution. (V. Mathur v. Union of India (1996) 1 SCC 119) It has directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community.(M.C. Mehta v. Union of India (1996) 4 SCC 351) The courts have taken a serious view of unscientific and uncontrolled quarrying and mining, (Rural Litigation and Entitlement Kendra v. State of U.P. (AIR 1991 SC 2216))issued orders for the maintenance of ecology around coastal areas,(Indian Council for Enviro-Legal Action v. Union of India (Coastal Protection case), (1996) 5 SCC 281) shifting of hazardous and heavy industries( M.C. Mehta v. Union of India, (1996) 4 SCC 750) and in restraining tanneries from discharging effluents.(M.C. Mehta v. Union of India (Ganga water case) AIR 1988 SC 1037)

Another expansion of the right to life is the right to livelihood (article 41), which is a directive principle of state policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between the right to livelihood and the right to life in the context of environmental rights has thus been established over the years. Especially in the context of

the rights of indigenous people being evicted by development projects, the Court has been guided by the positive obligations contained in article 48A and 51A(g), and has ordered adequate compensation and rehabilitation of the evictees.

Matters involving the degradation of the environment have often come to the Court in the form of petitions filed in the public interest. This mode of litigation has gained momentum due to the lenient view adopted by the Court towards concepts such as locus standi and the 'proof of injury' approach of common law. This has facilitated espousal of the claims of those who would have otherwise gone unrepresented.

In the *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598, it was observed that "Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists.

In the case of *Vellore Citizen Welfare Forum vs. Union of India* (AIR 1996 SC 2715.) the Supreme Court through Justice Kuldip Singh had opined "... we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country". We have issued comprehensive directions for achieving the end result in this case. It is not necessary for the Court to monitor these matters further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a Special Bench "Green Bench" to deal with this case and other environmental matters. The High Court shall treat this matter as a petition under Art. 226 of the Constitution of India and deal with it in accordance with law and also in terms of the directions issued by the Court. As elucidated in the case of *Vellore Citizen Welfare Forum vs. Union of India*, (AIR 1996 SC 2715.) precautionary principle includes the following points.

- 1) Environmental measures by the state government and the local authority must anticipate, prevent and attack the causes of environmental degradation.
- 2) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- 3) The 'onus of proof' is on the actor or the developer to prove that his action is environmentally benign (AIR 1996 SC 2715.)

One of the earliest cases in which the Supreme Court had to deal with the question of Development v. Environment is *Rural Litigation and Entitlement Kendra v. Dehradun v. State of U.P* (1987) Supp SCC 487.) In this case the matter related to illegal and unauthorized mining that was causing ecological imbalance and also causing environmental disturbance. The court rightly pointed out that "it is always to be remembered that these are permanent assets and not to be exhausted in one generation". The Supreme Court after much investigation, ordered the stopping of mining work and held that: "This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment." This judgment could also be considered in the context. This was the first time such a question is coming before the Supreme Court.

The first case on which the apex court had applied the doctrine of 'Sustainable Development' was *Vellore Citizen Welfare Forum vs. Union of India* (AIR 1996 SC 2715.) In the instant case, a dispute arose over some tanneries in the state of Tamil Nadu. These tanneries were discharging effluents in the river Palar, which was the main source of

drinking water in the state. This is considered to be the most important case as far as the evolving of the environmental law and the contribution of the Indian Supreme Court towards that direction.

In this case the judgment given by Justice Kuldip Singh is of utmost importance, he has observed in his judgment that “the traditional concept that development and ecology are opposed to each other, is no longer acceptable. 'Sustainable Development' is the answer”. He goes on to explain about the development of Sustainable development as well accepted principle in the international level. Justice Kuldip Singh observes that “we have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law...” While accepting 'Sustainable Development' as the part of the environmental law of the land the reasoning given by Justice Kuldip Singh shows great power Supreme Court have to make the law rather than just to interpret the law. Justice Kuldip Singh held that “ Once these [here Sustainable development] principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which is not contrary to the municipal law shall be deemed.

In the case of Consumer Education Research Society v. Union of India, 2000 Vol. 2 SCC 599, the Supreme Court while considering the question of validity of the resolution passed by the State legislature reducing the boundary of wild life sanctuary issued an order restraining the State Government from giving permission to others to carry on any mining operation within the area of 10 km. from the periphery of old sanctuary area and also directed the government to take step to monitor air and water pollution.

In M.C. Mehta v. Kamal Nath and Others (1997) 1 SCC 388, the court added that ‘it would be equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required.

The parliament has enacted the Public Liability Insurance Act, 1991. This act provides Public Liability Insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for regulating matter connected therewith. As per the provisions of the said Act, every owner handling hazardous substance are required to take insurance policy or policies, within a period of one year, for an amount not less than the paid-up capital of the undertaking handling hazardous substance. The owner is also required to pay an amount equal to the premium for crediting to the Relief Fund. The Act provides a schedule for providing immediate relief and the claimants are disbursed the relief, depending on the injury caused to the victim or the damage caused to the property, as the case may be.

The Parliament has also passed the National Environment Tribunal Act, 1995 with a view to establish National Environment Tribunals for effective and expeditious disposal of cases on the principle of strict liability for payment of damages to the victims during any accident while handling any hazardous substance.

It is also mentioned that National Forest Policy, 1988, Indian Forest Act, 1927, as well as the regulations under it, provide comprehensive basis for forest conservation and management. The national Environment Policy, 2006 seeks to give legal recognition of the traditional entitlement of forest department communities taking into consideration the provisions of the Panchayats (Extension of the Scheduled Area) Act, 1996 (PESA).

Forests in the country are the environmental and social resources. They meet the substance needs of the people living in the around forests. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has been enacted to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generation but whose rights could not be recorded; to provide for a

framework for recording the forest rights so vested and the nature of evidence required for such recognitions and vesting in respect of forest land.

The above said Act has empowered communities for habitational and occupation right on force along with the responsibilities for conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forest.

3. Have your national courts recognized the environment harms have violated the right to life or health?. If so, please provide copies of some of the most significant decisions.

Ans.

The expanded concept of the right to life under the Indian Constitution was elaborated by the Supreme Court in Francis Coralie Mullin v. Union Territory of Delhi (AIR 1981 SC 746) where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life. The importance of this case lies in the willingness on the part of the Court to be assertive in adopting an expanded understanding of human rights. It is only through such an understanding that claims involving the environment can be accommodated within the broad rubric of human rights. The link between environmental quality and the right to life was further addressed by a constitution bench of the Supreme Court in the Charan Lal Sahu v. Union of India (AIR 1990 SC 1940) Similarly, in Subash Kumar v. State of Bihar (AIR 1991 SC 420) the Court observed that 'right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' Through this case, the Court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

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Another expansion of the right to life is the right to livelihood (article 41), which is a directive principle of state policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between the right to livelihood and the right to life in the context of environmental rights has thus been established over the years. Especially in the context of the rights of indigenous people being evicted by development projects, the Court has been guided by the positive obligations contained in article 48A and 51A(g), and has ordered adequate compensation and rehabilitation of the evictees.

Copies of the Orders dated 28.08.1996 passed by the Hon'ble Supreme Court of India in Writ Petition No.914 of 1991 and dated 09.01.1991 in Writ Petition(Civil) No.381 of 1988 are enclosed.

4. Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health?. If so, please provide copies of some of the most significant judgments.

Ans.

Yes, the courts have recognised that environmental harms are violation of human rights such as in case of P. A. Jacob v. The Superintendent of Police, Kotta Yani AIR 1993 Ker.1

Here, claiming a fundamental right to use a loud speaker at public meetings to voice his views, petitioner sought to restrain respondents from interfering with the use of a loud speaker by him.

The main issue for contention was whether the Constitution guarantees a right to use a sound amplifying device or whether use of such a device is part of the right to freedom of speech guaranteed under Art. 19 (1)(a).

The court held that Operation of mechanical sound amplifying devices conflicts with quite enjoyment of men and park. But freedom of speech does not involve freedom to use sound amplifiers to drown out natural speech of others. Further, while the petitioner has a right to express his views, he has no right to force his message upon an audience declining to receive it. Freedom guaranteed is freedom of expression of ideas, not freedom of expression of ideas, not freedom of modes of expression. Thus, compulsory exposure of unwilling person to dangerous and disastrous levels of noise amounts to infringement of their right to life under Art. 21 of constitution of India.

## Part 2: Issues Raised in the terms of Reference

1. How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?

Ans.

Please refer Q.2 for interpretation of Right to life. The Commission stand on the right to life is in consonance with the Constitution of India and that of the Supreme Court of India delivered through various important judgments on Right to Life, some of the cases which have been referred to above.

The right to life and liberty has been recognized as a Fundamental Right (Art.21) under the Constitution. The Supreme Court has in several judgements pronounced that the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head.

The Commission has repeatedly and unequivocally condemned all acts of terrorism, and those who perpetrate such acts, as deeply hostile to human rights, including the most fundamental of all rights, the right to life itself. The Commission has therefore focused on the grave challenge posed by such acts with great care, enunciating its position on the principles that should guide the country in dealing with this menace. The Commission is of the firm view that though nothing justifies terrorism, far too many people live in conditions where it can breed. It is common knowledge that systemic human rights violations for long periods of time are often the root cause of conflicts and terrorism. It cannot be denied that disillusionment with a society where there is exploitation and massive inequalities and whose systems fail to provide any hope for justice are fertile breeding grounds for terrorism, which more often than not thrives in environments where human rights and more particularly Economic, Social and Cultural Rights are denied by the State and Political rights are violated with impunity both by the State and non-State actors. Any worthwhile strategy to resolve conflicts and terrorism will have to ensure enjoyment of the full range of Economic, Social and Cultural Rights.

2. Do your courts recognize customary international law as source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.

Ans.

In Ganga Tanneries Case, the Hon'ble Supreme Court had relied on the international principles, for example to mention, precautionary principle, polluter pays principle and sustainable development, which are largely debated by various scholars as part and parcel of customary international law. This case law and the rationales therein have led to a varied process to invoke the customary international law rules in the individual cases by the higher courts.

In Vellore Citizen Welfare Forum vs. Union of India (AIR 1996 SC 2715.) Justice Kuldeep Singh observes that:

“we have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the Customary International Law...” While accepting 'Sustainable Development' as the part of the environmental law of the land the reasoning given by Justice Kuldeep Singh shows great power Supreme Court have to make the law rather than just to interpret the law. Justice Kuldeep Singh held that “ Once these [here Sustainable development] principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which is not contrary to the municipal law shall be deemed.

3. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors in either public or private projects? Has the State been required:

- to take steps to prevent potential harm
- to provide remedies where violations have occurred?

Ans.

There are enough statutory provisions in the country to protect individuals against violations of their rights by non-state actors in the course of executing their projects. The authorities are also taking steps to prevent potential harm and in case of such harm, depending up on the grievousness and degree of harm, the remedies are also provided for in the existing laws.

4. Does your country have legislations or regulations imposing human rights obligations on non-state actors?. Have your national courts found that non-state actors have obligation to protect the rights to life and health against environmental harms arising from their activities?

Ans.

Following are some of the Environment and Related Laws and Policies in India which put an implicit obligation on different organization for the preservation of environment:

**The Water (Prevention and Control of Pollution) Act, 1974, amended 1988:** An Act to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water.

**Forest (Conservation) Act, 1980, amended 1988:** An Act to provide for the conservation of forests and for matters connected therewith or ancillary or incidental thereto.

**The Air (Prevention and Control of Pollution) Act 1981, amended 1987:** An Act to provide for the prevention, control and abatement of air pollution.

**The Environment (Protection) Act, 1986, amended 1991:** An Act to provide for the protection and improvement of environment and for matters connected therewith with the following key rules/notifications:

- Declaration of Coastal Stretches as Coastal Regulation Zone (CRZ), 1991, amended 2001
- The Scheme on Labelling of Environment Friendly Products (ECOMARK), 1991
- Eco-sensitive Zone (a series of notifications declaring specific sites)
- Environment Impact Assessment Notification, 1994, amended 2002
- The Rules for the Manufacture, Use, Import, Export and Storage of Hazardous micro organisms Genetically engineered organisms or cells, 1989
- Hazardous Substances Management (a series of Rules dealing with municipal solid wastes, batteries, recycled plastics, chemical accidents hazardous micro-organisms and genetically engineered organisms/cells, hazardous chemicals, biomedical wastes, and other hazardous wastes).

- Noise Pollution (Regulation and Control) Rules, 2000

**The Forest Policy, 1988:** A policy that emphasises the twin objectives of ecological stability and social justice. Highlighting the need for stronger conservation measures, it points to symbiotic relationship between tribals and other poor people and forests. It recommends treating local needs as 'the first charge' on forest produce, and creates space for the participation of forest-dependent communities in the management of forests.

**The Public Liability Insurance Act, 1991, amended 1992:** An Act to provide for public liability-insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith or incidental thereto.

**Constitution (73rd Amendment) Act 1992:** An Act to empower panchayat bodies to manage local affairs, including environmental resources such as water, land, agriculture, animal husbandry, social/farm forestry, minor forest produce, and fisheries.

**National Conservation Strategy and Policy Statement on Environment and Development, 1992,** with guidelines for integrating environmental considerations into development.

**The National Environment Tribunal Act, 1995:** An Act to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or incidental thereto.

**Panchayat (Extension to Scheduled Areas) Act 1996:** An Act to extend the 73rd Constitutional Amendment to Scheduled (predominantly tribal) areas, providing ownership or control over some natural resources such as minor (non-timber) forest produce.

**The Right to Information Act 2005:** An Act to provide the right to information to all citizens (useful in accessing information regarding environmental matters, including projects/processes that affect the environment).

**Scheduled Tribes (Recognition of Forest Rights) Bill 2005:** A bill to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

#### **National Courts and obligation on non-State actors**

In *M. C. Mehta vs. Union of India & Ors.* 1987 SCR (I) 819 (the Oleum Gas Leak case), the Supreme Court established a new concept of managerial liability – 'absolute and non-delegable' – for disasters arising from the storage of or use of hazardous materials from their factories. The enterprise must ensure that no harm results to anyone irrespective of the fact that it was negligent or not.

In *Vellore Citizens Welfare Forum vs. Union of India*, AIR 1996 SC 2715, the Supreme Court held that industries are vital for the country's development, but having regard to pollution caused by them, principle of '**Sustainable Development**' has to be adopted as the balancing concept. '**Precautionary Principle**' and '**Polluter Pays Principle**' has been accepted as a part of the law of the country.

In *Indian Council of Enviro-Legal Action vs. Union of India*, 1996 3 SCC 212 (the Bichhri pollution case), following the decision in the Oleum Gas leak case and based on the polluter pays principle, the polluting industries were directed to compensate for the harm caused by

them to the villagers in the affected areas, specially to the soil and to the underground water.

**'Precautionary Principle'** as interpreted by the Supreme Court means that the required environmental measures should be taken by the State and statutory authorities and the lack of scientific certainty cannot be a ground for postponing such measures where there are serious threats to ecology. That the State and statutory authorities must anticipate, prevent and address the causes of environmental degradation and the 'onus of proof' is on the industry to show that its actions are environmentally benign.

**'Polluter Pays Principle'** as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damage to the environment.

A Policy for environment management has been comprehensively provided in the National Environment Policy (NEP) framed in the year 2006. NEP contains the National Conservation Strategy and Policy Statement on Environment and Development, 1992; the policy Statement on abatement of Pollution, 1992. Besides, it also includes some sector policies such as the National Agriculture Policy, 2000; National population Policy, 2000; and National Water Policy, 2002. These have contributed significantly in the environmental management and in recognized the need for sustainable development. NEP also recognizes some of the principles and approach namely:-

- Human beings are at the Centre of Sustainable Development concerns;
- The Right to Development;
- Environmental Protection is an Integral part of the Development process;
- The precautionary Approach;
- Economic Efficiency;
- Polluter pays principle;
- Public trust doctrine
- Preventive action.

5. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligation on State to protect against harms to human rights that originate outside the State?

Ans.

**Global Warming:** In the above context, attention is invited to the phenomena of Climate Change/ Global Warming being observed world over. One of the reasons for Climate Change/ Global Warming is accumulation of greenhouse gases (CHGs) in the atmosphere. It has been observed that anthropogenic greenhouse gases caused to rapid industrialization by the developed world is one of the major reasons of increase of GHG in the atmosphere. Recognizing this aspect the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) mandated developed countries to reduce their emissions by 5.2 % below their 1990 levels by the year 2008-12. USA and Australia are major countries who have not ratified the Kyoto Protocol and therefore have no such commitments. These greenhouse gases have a residual life of many years in the atmosphere and developing countries including India are likely to be affected because of global warming / climate change.

In the various international negotiations on Climate Change/ Global Warming, India has been urging developed countries to take wider and deeper commitments so that these emissions can be reduced so as to prevent climate Change/ Global Warming.

**Application/ use of genetic of engineered technology:** Modern biotechnology is a new and expanding technology with very useful applications especially in the areas of

pharmaceuticals and agriculture. But from an environmental and health point of view, the development and application of biotechnology can be compared to that of other new technologies where the useful applications are often outweighed by adverse environmental and health impacts if the technology is not applied safely.

The Cartagena Protocol on Biosafety adopted on 29 January 2000 which came into force on 11 September 2003.

The Protocol applies to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. It establishes an advance informed agreement (AIA) procedure for ensuring that countries are provided with the information necessary to make informed decisions before agreeing to the import of such organisms into their territory.

In India products derived from modern biotechnology are regulated under the Manufacture, Use/ Import/ Export and Storage of Hazardous Microorganisms/ Genetically Engineered Organisms or Cells, Rules, 1989, notified under E(P) Act, 1986. The other Biosafety regulations which have come into existence include the National Biodiversity Act 2002, the Plant Quarantine Order, 2004, Food Safety and Standards Act, 2006, the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR), draft Seed Bill, 2004 etc. As on date only one transgenic crop (Bt cotton) and 20 recombinant therapeutic products have been approved for commercial use in India.

Even though the rules and guidelines followed by India are one of the most stringent in the World, the recent judicial ruling dated 8.5.2007, in Writ Petition No. 260/2005, given by the Hon'ble Supreme Court of India mandates additional precaution:

- All trials should have a lead scientist's name with contact details who would be responsible for all aspects of the trials including regulatory requirements.
- An isolation distance of 200 m would be maintained during field trials.
- Prior to bringing out the GM material from the green house for conduct of open field trial the Company should submit a validated event specific test protocol at an LOD of at least 0.01% to detect and confirm that there has been no contamination.

**Management of Hazardous Waste:** The Hazardous Waste (Management and Handling) Rules, 1989 have been amended from time to time. These Rules also provides the safeguards for import/ export of Hazardous Waste in consonance with the Basel Convention. The key objective of the Basel convention is to minimize the generation of hazardous wastes in terms of quantity and hazardousness; to dispose of them as close to the source of generation as possible and to reduce the Transboundary movement of hazardous wastes. In a public Interest Litigation W.P. No. 657 of 1995- Research Foundation for Science Technology National Resource Policy Vs. Union of India & Ors. – the Hon'ble Supreme Court has issued various directions to the authorities, charged with the responsibility of management of hazardous waste management, to take effective steps for management of hazardous waste including import of waste in accordance with the Basel Convention. The case is still being heard by the Supreme Court. In the said case, vide order dated 5th may, 1997, the Supreme Court had directed that no authorization/ permission would be given by any authority for the import of hazardous waste items which have already been banned by the Central Government or by any Court or any other authority or any person, of any person, of any hazardous waste which is already banned under the Basel Convention or to be banned hereafter with effect from the dates specified therein.

### Part 3: Activities of your Commission

1. Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-state actors, have affected their right to life or health?. If so, please indicate how many complaints you have received, and please

describe some of the important cases, and the role of your Commission in resolving the complaints.

Ans.

The Commission has taken suo-moto cognizance of environmental issues on various reports published in different news papers.

Acting on a news report telecast by ETV, the National Human Rights Commission (NHRC) has asked the District Magistrate, Warangal, to send a report within two weeks on allegations of stone quarrying in a residential area of Ambedkar Nagar near Warangal.

The television channel quoted residents as saying that the quarrying had caused cracks in the houses of residents, and health-related problems because of the dust emitted from the stones. Residents also complained that they were unable to sleep because of the quarrying in the day and during the night.

The commission stated that if the news report was true, it raised a serious issue of violation of human rights. (Source: The Hindu Wednesday, Apr 05, 2006)

The National Human Rights Commission has sought the comments of the Delhi Administration on a newspaper report that the water supplied to slum clusters and resettlement colonies in the city is full of filth and germs. Taking suo-motu cognizance of a report, the Commission has given Chief Secretary, NCT and the Chairman, Delhi Jal Board four weeks time for their response.

The report published on December 28, 2006 in The Hindustan Times said that according to a study carried out by the NGO Hazard Centre, 92% of water samples collected from five slum clusters and six resettlement colonies were not fit for human consumption due to an alarming presence of a variety of pollutants including biological wastes. The report further added that the same authorities provide better quality water to the affluent parts of the city. The Commission, after going through the contents of the report said if true, they raise a serious issue of violation of Human Right to Health of the citizens.

The National Human Rights Commission has the Statutory responsibility for reviewing the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation; review the factors that inhibit the enjoyment of human rights and recommend appropriate remedial measures (Section 12 (d) and (e) of the Protection of Human Rights Act, 1993). The Commission is deeply concerned about the in human and degrading practice of manual handling of night soil, which is prevalent even today in certain parts of the country. The Commission considers this to be an affront to human dignity and a major social evil.

The Commission has been vigorously pursuing the need to end the degrading practice of manual scavenging in the country. The Commission has taken up this matter at the highest echelons of the Central and State Governments through a series of personal interventions by the Chairperson of the Commission.

The Commission, on its part, too has urged all the State Governments and Union Territories to work with greater determination to implement the Act so as to ensure that the dehumanizing practice can be effectively stopped.

The Commission held a number of meetings with the State Governments. The last such meeting was held on 25 February 2006 on Eradication of Manual Scavenging under the Chair of the Hon'ble Chairperson, NHRC with the representatives of Central and the State Governments and other stakeholders.

On the basis of the detailed deliberation in the meeting, the following of Action Points emerged:

- The process of identification of people engaged in Manual Scavenging is to be carried out by the States/UTs at the earliest and for each individual rehabilitation plan be executed and monitored.
  - The survey and identification should cover not just urban areas but also the rural areas.
  - The Ministries may also explore the possibility of involving NGOs in the process of identifications and rehabilitation of manual scavengers.
  - There is a need to amend the existing regulation in regard to low cost sanitation scheme particularly with regard to the level of subsidies so that new construction should have wet latrines. States/Union Territories (UTs) should set six-monthly targets for converting the dry latrines into wet latrines and for making efforts to rehabilitate the identified scavengers and should be monitored regularly.
  - Steps have to be taken by the States/UTs to impart education at the primary level on eradication of Manual Scavenging and advantages of wet latrines.
  - The training of Scavengers and their dependent should be in all such vocations, which have market value and will lead sustainable employment.
  - There is a need to construct more and more public toilets in low-income housing areas by all States and UTs.
  - There is a need to examine the existing subsidy scheme by Ministry of Urban Development (MUD) and Housing And Urban Development Corporation Limited (HUDCO) in regard to financial pattern of the low cost sanitation scheme and the subsidy should be raised to 50% of the cost of super structure uniformly to all the families having bucket privies to make it more feasible.
  - Government of India is committed to eradicate Manual Scavenging by 2007. All States/UTs should adhere to the target date for the eradication of manual scavenging.
2. Have your Commission conducted research on the connection between environmental harms and the rights to life or health?. If so, please provide the results of this research.

Ans.

The Commission conducted a research on Dependency on Forests for Livelihood and Its Impact on Environment: A case of the Baiga Tribe of Mandla District, Madhya Pradesh. The study was entrusted to the Lal Bahadur Shastri National Academy of Administration, Mussoorie. The objectives of the study were to:

- Understand the changes in livelihood system of Baiga people with special reference to dependence on forests.
- Understand the conditions, which impact such dependency and their impact on the nature of forest cover in the area.
- Understand the relationship between land and forest use in order to see how the Baiga may get gainful employment.
- See the relationship between Baiga livelihood patterns and government schemes
- Study the impact of the implementation of these schemes with special reference to forests
- Analyse the impact of laws and policies on the Baiga people.
- Suggest measures by which the Baiga's can benefit through a sustainable use of their local natural resources.

The report of the study concludes that the land based activities reduce dependence on forests and, therefore, a viable and sustainable model of agriculture is necessary. The report recommends that urgent steps should be taken to provide employment opportunities and access to credit and infrastructure support for enhancing the capabilities of the Baiga people.

3. Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health?. If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.

Ans.

The Commission is also deeply concerned about the health dimensions of fluorosis, which

affects nearly 66 million persons in 196 districts in 19 States of the country. The Commission had therefore sought information related to fluorosis from 19 endemic States. There is a need for a concrete Policy to deal with it in all its dimensions – prevention/detection/diagnosis/treatment.

A meeting to discuss the human rights issues relating to fluorosis was convened by the Commission. The Secretary, Health, Govt. of India, Director General Health Services, Director, National Institute of Communicable Diseases, Deputy Director General, Indian Council of Medical Research and Prof. (Dr.) A.K.Susheela from the Fluorosis Research and Rural Development Foundation, Delhi participated in this meeting. After a detailed discussion, Department of Health, Ministry of Health and Family Welfare, agreed to:

- Mount a National Programme covering endemic States affected by fluorosis;
- Prepare a Plan of Action in consultation with the Director General Health Services, ICMR and Dr. Susheela within a month;
- Take up the issue of fluorosis in its various manifestations and dimensions in the next meeting of the Central Council of Health and Family Welfare scheduled in December 2004, which will be attended by all Health Ministers and Health Secretaries of all States;
- Department of Health to give a directive to the Medical Council of India (MCI) to include fluorosis in the training of medical interns, which will enable MCI in turn to send a circular to all medical colleges;
- Creation of awareness about treatment among the general public;
- ICMR and NICD to develop a standardized treatment;

The Commission proposes to monitor the situation closely in the coming year.

The Commission observed that the right to health and clean drinking water are critical to lead a life with dignity and therefore decided to focus on these areas. In pursuance of these, it decided to:

- Call for information from all States/UTs and the concerned authorities in the Central Government on the steps being taken/proposed to be taken for providing facilities for health which should, inter alia, include ensuring quality services in hospitals, availability of facilities and minimum standards in this regard. The already available standards in the Bureau of Indian Standards could be examined for taking further necessary action.
- To seek information from all authorities concerned regarding any strategy and plan of action drawn for realizing the right to clean drinking water by everyone and in particular, persons from the poor and vulnerable sections of society.

Thereafter, the relevant form from Ministry of Health and Family Welfare, which it uses for collecting information from various States and Union Territories, was consulted. Annual Reports of the concerned Ministry and relevant 10th Plan documents, website of State Governments and website of Department of Programme and Implementation were also consulted and thereafter parameters on Rights to Health was prepared. These parameters were sent to Director General of Health Services and National Institute of Communicable Disease and their comments were obtained. In the light of their comments, a questionnaire was evolved. The proforma of the questionnaire adopted has the following parameters:

- Access to health and infrastructure availability in ANM, PHC, CHC and District Hospitals;
- Funds allocated for drugs;
- State-wise/ System-wise number of hospitals;
- Health coverage under tribal Sub Plan and Special Component Plan for Scheduled Castes;
- Steps taken/proposed to be taken for ensuring quality services in hospitals, availability of facilities and minimum standards in this regard;
- Right to Health Care of Vulnerable Sections;
- Pregnant women with anaemia (as %).

On the issue of Silicosis NHRC calls for upgrading healthcare facilities in the country; to constitute a special group for recommendations on this issue.

The Commission has published Dossiers on Environment and Human Rights which is a source material on human rights education in Indian Universities in collaboration with Karnataka Women's Information and Resource Centre (KWIRC), Bangalore(NGO)

- 4 Has your Commission intervened in court proceedings on the issue of environment and the rights to life and health?. If so, please provide details of the cases, the role of the Commission and outcome of the cases. Please provide copies of any submissions and court decisions.

Ans.

The Supreme Court of India on 26 July 1997 in a Writ Petition filed by Indian Council of Legal Aid and Advice and Others (WP(Civil) No.42/97 directed that since NHRC is seized with the matter (Starvation deaths in KBK Districts of Orissa) and it is expected to deliver some order, the petitioner could approach the Commission. Realizing the urgency of the matter the Commission acted quickly and initially prepared an interim measure for the two years period and also requested the Orissa State Government to constitute a Committee to examine all aspects of the Land Reform question in the KBK Districts. The Commission observed that as starvation deaths reported from some pockets of the country are invariably the consequence of mis-governance resulting from acts of omission and commission on the part of the public servant. The Commission strongly supported the view that to be free from hunger is a Fundamental Right of the people of the country. Starvation, hence, constitutes a gross denial and violation of this right.

Pursuant to the orders of the Supreme Court, the Indian Council of Legal Aid and Advice, filed a petition before the Commission on the 1st of September 1997, making a number of suggestions in regard to interim relief to the affected population. After due consideration of the matter, the Commission, on 17-02-1998, arrived at the view that some interim measures should be undertaken for an overall period of two years. The Commission also requested the Orissa State Government to constitute a Committee to examine all aspects of the Land reform question in the KBK districts. Further, the Commission, with the assistance of its Special Rapporteur, has been regularly monitoring the progress of the implementation of its directions.

In the last hearing in July 2006, the Commission took final assessment/stock taking of the various departmental projects and found the performance of the State Government satisfactory in sectors of Rural Water Supply, Social Security targeted public distribution system, Rural Development and Afforestation. Deficiencies were however, observed in Public Health Care, execution of Soil Conservation Projects and implementation of Land Reforms. The Commission expressed its distress over the failure of the State in dealing effectively with the menace of Malaria and even Diarrhoea in KBK region.

The Commission recommended improvement in Primary Health Care by filling up vacancies of Medical Officers and posting of Specialists, opening of additional Sub Centres, strengthening of Immunisation Programme and intensification of drive against Malaria. It requested the Government of India to suitably enhance the allocation of BPL rice to the State to enable it to meet its commitment of providing 35 Kg. Per month to all the BPL households. Besides the launching of a special campaign to detect the cases of alienation of tribal land, under the amended provisions of Regulation 2/56, the State Government has been asked to bring forth similar amendments in Orissa Land Reforms Act so as to completely ban the transfer of tribal land to non-tribals.

It recommended that all the students in the schools run by ST/SC Department should receive the benefit of the scholarship scheme and Government of India should allot BPL rice in sufficient quantity to meet full requirements of rice for hostels run by ST/SC Departments. A thorough review of the educational infrastructure and position of teachers especially in pre-dominantly tribal pockets of these Districts was another important recommendation made by the Commission. A special system of monitoring with peoples'

involvement was recommended for ensuring efficiency and transparency in the execution of all developmental projects in the region.

- 5 Has your Commission addressed the effect of the environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.

Ans.

The Commission has published dossier on Environment and Human Rights and has on number of occasions taken cognizance of health related environmental issues such as in annual report 2004-05 on public hearing on right to health at page 102 and Plan of Action to tackle Fluorosis at page 10. For more details kindly refer to our website (<http://nhrc.nic.in/Documents/AR/AR04-05ENG.pdf>)

6. Does your Commission work in collaboration with civil society, including private sector, government or U.N. agencies or multilateral donors, such as World Bank, on the issues of the environmental harms affecting the rights to life and health?. If so, in what way?

Ans.

Environmental degradation constitutes a grave threat to the basic and fundamental right to life and the right to health and clean environment. As, such problems are increasingly multiplying. The significant role played by National Human Rights Commission in adopting an innovative approach to address the issue. in 1996, only three years after Commission was set up, it issued notice to a particular State Government, seeking details about the ecological disaster faced by people in some districts due to high levels of arsenic in their drinking water.

The Commission has taken up the task of preparing the National Action Plan. The Commission constituted a Working Group and an Advisory Committee including representatives of various departments of the Government, NGOs and eminent lawyers to prepare a National Action Plan for Human Rights. The Working Group decided to focus on the following areas which would require a continuous dialogue and discussion before taking an appropriate shape for its documentation in the body of National Action Plan for Human Rights: health and environment, Human rights education; tribals, disabled etc.). The Working Group has recently decided to prepare draft chapters of the proposed National Action Plan for Human Rights and these chapters will be extensively discussed with the concerned ministries/departments of the Government of India before they are finalized.

- 7 Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?

Ans.

Besides the Constitutional provisions on environment and Supreme Court guidelines and decisions, there are already a number of legislations on environment in India which deal with the problem of environmental pollution.

- 8 What jurisdiction does your Commission have over the activities of non-state actors? Has your Commission undertaken any activities to address the environmental harms caused by non-state actors that are affecting the rights to life or health?

Ans.

No

## Part 4: Current Situation

1. Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?

Ans.

The Commission has been taking various steps in order to address the issue of environment as part of the right to life and human rights.

2 Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?

Ans.

Yes, it will be significant in addressing the problem of health.

# Response of the Human Rights Commission of Malaysia

## Documentation

Constitutional provisions relating to:

### **The right to an environment of a particular quality; & Obligations with respect to the environment;**

The Malaysian Federal Constitution did not specifically states on this matter. Nevertheless Article 5 of the Federal Constitution (stated below), provides for liberty of a person which in such a way it became the responsibility of the government to provide for quality and clean air, healthy environment with no pollutions in the country. Besides that various act, regulations, orders have been enacted to overcome the issue.

### **The right to life**

#### **Article 5 of the Malaysian Federal Constitution - Liberty of the person.**

- (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
- (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
- (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
  - Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be have been an integral part of this Article as from Merdeka Day:
  - Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":
  - And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.
- (5) Clauses (3) and (4) do not apply to an enemy alien.

## The relevance international law in the domestic jurisdiction

### 1) Universal Declaration of Human Rights (UDHR)

#### Relevant legislation referring to:

A right to an environment of a particular quality;

- Environmental Quality Act 1974/ Act 127
- Environmental Quality (Clean Air) (Amendment) Regulations 2000, PU(A) 309/2000
- Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996, PU(A) 429/1996
- Environmental Quality (Control of Emission From Petrol Engines) Regulations 1996, PU(A) 543/1996
- Environmental Quality (Compounding of Offences) (Open Burning) Rules 2000, PU(A) 310/2000
- Environmental Quality (Compounding of Offences) Rules, 1978, PU(A) 281/1978
- Environmental Quality (Control Of Lead Concentration In Motor Gasoline) Regulations, 1985, PU(A) 296/1985
- Environmental Quality (Delegation of Powers) (Halon Management) Order 2000, PU(A) 490/2000
- Environmental Quality (Delegation of Powers) (Investigation of Open Burning) Order 2000, PU(A) 311/2000
- Environmental Quality (Dioxin and Furan) Regulations 2004, PU(A) 104/2004
- Environmental Quality (Motor Vehicle Noise) Regulations, 1987, PU(A) 244/1987
- Environmental Quality (Prescribed Premises) (Crude Palm-Oil) Regulations, 1977, PU(A)342/1977
- Environmental Quality (Prescribed Conveyance) (Scheduled Wastes) Order 2005, PU(A) 293/2005
- Environmental Quality (Sewage And Industrial Effluents) Regulations 1979, PU(A) 12/1979
- Exclusive Economic Zone Act 1984

Protection against environmental harms that affect human life or health

- Environmental Quality Act 1974/ Act 127
- Environmental Quality (Clean Air) (Amendment) Regulations 2000, PU(A) 309/2000
- Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996, PU(A) 429/1996
- Environmental Quality (Control of Emission From Petrol Engines) Regulations 1996, PU(A) 543/1996
- Environmental Quality (Compounding of Offences) (Open Burning) Rules 2000, PU(A) 310/2000
- Environmental Quality (Control Of Lead Concentration In Motor Gasoline) Regulations, 1985, PU(A) 296/1985
- Environmental Quality (Delegation of Powers) (Halon Management) Order 2000, PU(A) 490/2000
- Environmental Quality (Dioxin and Furan) Regulations 2004, PU(A) 104/2004
- Environmental Quality (Motor Vehicle Noise) Regulations, 1987, PU(A) 244/1987
- Environmental Quality (Prescribed Premises) (Crude Palm-Oil) Regulations, 1977, PU(A)342/1977
- Environmental Quality (Prescribed Conveyance) (Scheduled Wastes) Order 2005, PU(A) 293/2005
- Environmental Quality (Sewage And Industrial Effluents) Regulations 1979, PU(A) 12/1979

## NGO Reports

- 1) Malaysia – Environmental Health Country Profile, WHO
- 2) The State of Corporate Environmental Reporting in Malaysia, ACCA

## Part 1: The “Right to Environment” in your country

1. **Has a “right to environment” been recognized in your constitution or national legislation?**

YES – *Environmental Quality Act 1974*

2. **Have your national courts recognized a “right to environment” as a component of human rights? If so, please provide copies same of the most significant decisions.**

*None so far.*

3. **Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.**

YES – *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v. PP [2001] 7 CLJ*

*Woon Tan Kan & Ors v. Asian Rare Earth Sdn. Bhd.[1992] 3 CLJ (Rep)*

*Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ*

4. **Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.**

*None so far.*

## Part 2 : Issues raised in the Terms of Reference

1. **How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?**

Background- References that have been made to the right to life by various institutions and documents

1. *The Federal Constitution*

*Art 5(1) of the Malaysian Federal Constitution reads as follows:-*

*“No person shall be deprived of his life or personal liberty save in accordance with the law”.*

*Art 4(1) states that:*

*“This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

2. *The Human Rights Commission of Malaysia Act 1999, Art 4(4) states as follows:*

*“For the purposes of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.*

*It is therefore presumed that regard should be had for Article 3 of the Universal Declaration of Human Rights 1948 which states:*

*“Everyone has the right to life, liberty and security of person”*

3. *The Annual Report of the Attorney General’s Chambers’ International Affairs Division Annual states that “Malaysia by virtue of being a member of the United Nations has subscribed to the philosophy, concepts and norms of provided by the Universal Declaration of Human Rights 1948 (UDHR) which sets out the minimum and common standard of human rights for all peoples and all nations. Apart from the UDHR, subject to the provisions of the Malaysian Constitution and the applicable laws and policies, Malaysia also adheres to the principles laid down in various international human rights instruments, which include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESR), the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)”<sup>389</sup>.*
4. *A total of 48 Non-Governmental Organisations have adopted the Malaysian Charter of Human Rights which makes express reference to the right to a healthy environment as set out below:-*

*Article 7- Environment*

1. *Everyone is entitled to live in a clean, healthy, safe and sustainable environment free from agricultural and industrial pollution.*
2. *All peoples and nations have a right to participate in decisions regarding local, regional and global environmental issues such as nuclear arsenals, storage, transportation and dumping of toxic wastes, pollution and location of hazardous industries.*

*The aforesaid Charter also provides that the right to life should be protected even under a validly declared state of emergency:-*

*Article 20- Even under a validly declared emergency, governments shall not deny nor violate the following rights and freedoms: right to life, right to recognition of personal dignity and legal personality, freedom of conscience and of religion, freedom from torture, retroactive penal measures, and cruel punishment, the right to leave from and return to one's own country, the right to habeas corpus, the right of access to civil courts and to fair, public and speedy trial.*

*The right to life as interpreted by the Malaysian Courts*

1. *The word “life” in Article 5(1) of the Malaysian Federal Constitution was given a broad definition in the case of **Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261** that was decided by the Court of Appeal.*

*The case was in relation to the dismissal of a Senior Assistant from the Education Service as he had been found guilty of criminal breach of trust.*

*One of the issues discussed by the Court was whether or not the reference to the word “life” in Article 5(1) included the right to livelihood as well.*

*Gopal Sri Ram JCA, in delivering the judgment of the Court quoted Gwyer CJ with approval in “**Re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, AIR 1939 FC 1** who stated as follows:*

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<sup>389</sup> International Affairs Division’s Annual Report for the year 2005, p. 23, <http://www.agc.gov.my/agc/agc/int/rep/report05.pdf>

“I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it [the Constitution]...”

His Lordship also quoted from the Indian case **Bandhua Mukti Morcha v Union of India and Others**, AIR 1984 SC 802 which dealt with Article 21 of the Indian Constitution which is broadly similar to Article 5(1) of the Malaysian Constitution. The case stated that the word “life” in the Indian Constitution:-

“includes protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity...”

The Malaysian Court of Appeal therefore held that:

“They (Judges) should when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression “life” in Art 5(1) is given a broad and liberal meaning. **I have reached the conclusion that the expression ‘life’ appearing in Art. 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life.** Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. **It includes the right to live in a reasonably healthy and pollution free environment.**” (Emphasis added)

– Per Gopal Sri Ram JCA at 288

2. The above case was followed in the Court of Appeal case of **Hong Leong Equipment S/B v Liew Fook Chuan** [1996] 1 MLJ 481.

The judgment of the Court was again delivered by Gopal Sri Ram JCA who confirmed his earlier decision of the broad interpretation of the word “life”. It was held there that the right to livelihood is guaranteed under Article 5(1) of the Federal Constitution.

3. The Court of Appeal reaffirmed the two cases mentioned above in **Sugumar Balakrishnan v Pengarah Imigresen Sabah & Anor** [1998] 3 MLJ 289. It was held that “the liberty of an aggrieved person to go to Court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by Article 5(1) of the Federal Constitution.

His Lordship Gopal Sri Ram J stated that “**the expression ‘life’ in Article 5(1) is not limited to mere existence but is a wide concept that must receive a broad and liberal interpretation.**” (Emphasis added)

He also opined that life and personal liberty as stated in Article 5(1) are equally dynamic concepts and should be interpreted similarly.

4. The broad and liberal approach given to the right to life and personal liberty however was not followed in the appeal to the Federal Court in **Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan & Anor** [2002] 3 MLJ 72.

The Federal Court disagreed with the findings of the Court of Appeal in the Sugumar case and stated that the words personal liberty should not be given a dynamic interpretation but should be read in the context of Article 5 of the Federal Constitution as a whole.

Their Lordships referred to an older Federal Court case **Government of Malaysia v Loh Wai Kong** [1979] 2 MLJ 33 which had held that the words personal liberty in Article 5(1)

only guarantees a person freedom from being unlawfully detained and do not include the right to travel overseas and to hold a passport.

Mohamed Dzaidin FCJ stated that:-

*“I disagree that the words personal liberty should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Federal Constitution under “Fundamental Liberties” viz, protection against retrospective criminal laws an repeated trials (Art 7); equality (Art 8); freedom of speech, assembly and association (Art 10); freedom of religion (Art 11); rights in respect of education (Art 12) and rights of property (Art 13).*

His Lordship went on to state that “it is clear from the authorities that the constitutional rights as guaranteed under Article 5(1) can be taken away in accordance with the law.

5. The aforesaid view is quite apparent in the case of **Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors** [1997] 3 MLJ 23 (Court of Appeal). In this case, approximately 10,000 indigenous people’s livelihood, land and customary rights were affected by the proposal to build a dam in the area in which they lived and worked. There were provisions however in the Land Code of Sarawak for them to be resettled by the State which were duly exercised.

One of the arguments raised on behalf of the Plaintiffs was that the aforesaid dam project would deprive them of their Constitutional right to life under Article 5(1) of the Federal Constitution.

It was however held that as the deprivation of the land and customary rights were carried out in accordance with the law as provided for under the aforesaid article, no injury had been suffered by the Plaintiffs and there was no infringement of their right to life under the Constitution.

6. Therefore, although there have been attempts by the Courts to broaden the interpretation of the right to life and personal liberty as enshrined in the Federal Constitution, these attempts have been curtailed by the decision of the Federal Court in the **Sugumar** case.
7. It is also probably worth mentioning that the death penalty still exists and is still used in Malaysia for a number of offences<sup>390</sup> including:-
  - Murder (s.302 of the Penal Code);
  - Possession of certain drugs over a prescribed quantity (15 grams for heroin and 200 grams for cannabis) (s.39B(2) Dangerous Drugs Act 1952);
  - Treason (s.121 Penal of the Penal Code); and
  - Possession of firearms (Firearms (Increased Penalties) Act 1971.

2. Do your national Courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.

The Malaysian Courts have tended to be rather cautious when considering international law in their judgments.

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<sup>390</sup> see **Capital and Corporal Punishment** (SUARAM report) (<http://www.aliran.com/oldsite/hr/js12.html>)

In the case of **Merdeka University Berhad v Govt of Malaysia** [1981] 2 MLJ 356, the Court was invited to consider the principles of the Universal Declaration of Human Rights 1948 in making its judgment.

- a) It was however held by Abdoocader J (at p. 366) that the “Universal Declaration of Human Rights 1948 was adopted by the General Assembly of the United Nations. **It is not a legally binding instrument as such** and some of its provisions depart from existing and generally accepted rules. **It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.** (Emphasis added)
- b) It was the Court’s view that international law principles would only have binding effect once it had been incorporated in an Act of Parliament.

This position in the **Merdeka University** case was upheld by the Federal Court in the case of **Mohamad Ezam v Inspector General of Police** [2002] 4 MLJ 449.

- a) In the above case, the Court was invited to have regard to international standards when determining the extent and scope of Article 5(3) of the Federal Constitution which involved access to legal representation. It was argued that the approach taken by international communities and reliance on United Nations documents on the subject of legal representation had already received statutory recognition in Malaysia by the passing of the Human Rights Commission of Malaysia Act 1999. Section 4(4) of the aforesaid act states as follows:-

“For the purposes of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

- a. The Court was therefore invited to consider two documents that had been adopted by the United Nations General Assembly namely the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.
- b. The Court however in the judgment of Siti Norma Yaakob FCJ held that the position of Malaysian law with regard to the incorporation of international standards had not changed from that enunciated in the Merdeka University case. This was despite the passing of the Human Rights Commission of Malaysia Act 1999.
- c. Her Ladyship stated that:

“In my opinion, the status and weight to be given to the 1948 Declaration have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for an observance of human rights and fundamental freedoms. **Since such principles are declaratory in nature, they do not, I consider, have the force of law or are binding on member states.** If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law” (Emphasis added) - per Siti Norma Yaakob FCJ at page 514

- d. Her Ladyship stated that the Act only stipulated that “regard shall be had” to the UDHR. This was interpreted to mean “an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them.”
- e. The Court was of the opinion that Malaysia had sufficient laws to deal with the issue of legal representation and that there was no necessity to resort to the two United Nations documents suggested by the Plaintiff’s Counsel.

- b) It has been argued that although the Court has held in **Ezam** that the UDHR does not have the force of law, perhaps it could then be argued that treaties which have been ratified or acceded to by Malaysia would then be binding on the Courts. This was implied in the statement of Her Ladyship Siti Norma Yaakob J who stated that principles in a convention or treaty to which member states can ratify or accede to would then have the force of law.
- a. Malaysia is a signatory to CRC and CEDAW. Ratification of the aforesaid Conventions however is usually taken to mean that Acts of Parliament have been passed to give effect to the principles enunciated in those conventions.
- c) It may also be inferred that Malaysian Courts may utilise principles of international law when there are no equivalent local provisions and where those principles are not in conflict with the Federal Constitution and the local climate.
- a. The case of **Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors** [2002] 2 CLJ 543 involved a dispute on whether or not members of an indigenous group (Temuan tribe) had proprietary customary communal title in State land which was occupied by them and not merely usufructuary rights (right of use) over the land.
- b. The learned High Court Judge in a judgment that was later affirmed by the Court of Appeal stated that:-
- “My view is that, although I am inclined to wear blinkers in considering the issues involved in this case by confining only to our existing laws and local conditions, I am compelled not to be blinkered by the decisions of the courts of other jurisdictions which deserve much respect, in particular on the rights of the aboriginal people which are of universal interest, especially when there is no clear and plain indication to the contrary in our laws.
- c. The Court relied heavily on the Australian cases of **Mabo v Queensland (1991-1992)** 175 CLR 1 (Mabo No 2) and **The Wik Peoples v The State of Queensland and Others** (1996) 187 CLR 1 and found that the group of Temuans not only had a right of use over the land but also community title to the land. They were therefore entitled to compensation when the land was taken from them by the State.
- d. The learned Judge went on to quote Brennan J in **Mabo No. 2**:-
- “The common law does not necessarily conform with international law, but **international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights**. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our own law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of indigenous inhabitants of the settled colony, denies them a right to occupy their traditional lands” (Emphasis added).
- e. His Lordship then concluded that “in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land”.
- f. As stated above, the High Court decision that the orang asli had an interest in and to the land was affirmed by the Court of Appeal. Leave however has been granted by the Federal Court for the State to appeal the decision of the Court of Appeal and the case has yet to be heard.
3. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in other public or private projects? Has the state been required:
- a. take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?
- b. To provide remedies where violations have occurred?

Various acts have been enacted intended to protect the environment and promote health and safety and promote orderly development to improve the quality of life<sup>391</sup> such as the:-

- Environmental Quality Act 1974 (“EQA”);
- Street, Drainage and Building Act 1974
- Town and Country Planning Act
- National Forestry Act 1984
- Fisheries Act 1985
- Sewerage Services Act 1993
- Wildlife Act 1976
- Continental Shelf Act 1966; and
- Petroleum Mining Act 1966.

The Department of Environment was also set up in 1974 within the Ministry of Science, Technology and Environment and is charged with environmental administration<sup>392</sup>.

The aforesaid acts govern a wide host of activities that affect the environment. For example, section 22 of the EQA prescribes restrictions on pollution of the atmosphere and gives a limited definition on what constitutes “emitting or discharging waste” into the atmosphere. The EQA also contains restrictions on noise pollution, pollution of the soil, pollution of inland waters and prohibition of discharge of oil into Malaysian waters.

- a. The Environmental Impact Assessment Order 1987 was introduced to ensure that an environmental impact assessment would be conducted on all prescribed activities before approval was granted.

The acts also prescribe penalties for anyone acting in contravention of the provisions in the acts. For example, anyone contravening the section on restrictions on pollution to the atmosphere is deemed guilty of an offence and shall be liable to a fine of not more than RM1,000.00 or to imprisonment for a period not exceeding five years or both.

Prosecutions for offences under the various acts however can only be instituted by the Attorney General. There is no provision giving standing to individuals and organisations to initiate legal proceedings to remedy or restrain any breach of the EQA<sup>393</sup>.

It has been said that despite the significant numbers of breaches of environmental law, the proportion of prosecutions or other enforcement action is extremely low<sup>394</sup>.

- b. For example, in a report by James Barclay of The Guardian (UK), he stated, “Asked if there is ever punishment or prosecution for logging practices that violate the ostensibly sound official logging code, such as cutting trees that are too small or cutting too many trees per hectare, one logger answered, “No, there’s no prosecution. There’s only corruption.” – “Penan’s last stand against timber industry pirates”, by James Barclay, Guardian, in **Penan’s last stand against timber industry pirates**, 10 January 1992 quoted in Human Rights Watch- Indivisible Human Right

Individuals often bring actions in nuisance or negligence instead of on the various acts relating to the environment as in most Acts, the power to institute proceedings lies with the Attorney-General’s Chambers.

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<sup>391</sup> See *Access to Justice by Mohideen Abdul Kader*, delivered at the 13th Malaysian Law Conference

<sup>392</sup> See JICA Country Profile on Environment: Malaysia

<sup>393</sup> See *Access to Justice by Mohideen Abdul Kader*, delivered at the 13th Malaysian Law Conference

<sup>394</sup> See *Challenges in Implementing and Enforcing Environmental Protection Measures in Malaysia* by Ainul Jaria bt Maidin presented at the 13th Malaysian Law Conference

Information about threats to the public's life or health, advisories are usually sent out by the Ministry of Health, Malaysia on serious health issues such as the Severe Acute Respiratory Syndrome (SARS) or avian flu<sup>395</sup>.

**4. Does your country have legislation or regulations imposing human rights obligations on non-State actors? Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?**

As far as legislation or regulations imposing human rights obligations on non-State actors are concerned, as stated above, Part II of the Federal Constitution of Malaysia provides for "Fundamental Liberties" which should be available to all. The Human Rights Commission Act 1999 also provides for 'regard to be had' to the UDHR as far as it does not conflict with the Federal Constitution.

Court findings

There have been several, but not many Court cases that have involved the environment in the last 10 years.

A few actions against non-State actors involved in polluting the environment have been brought under the tort of negligence and nuisance where the offending company was found to have caused damage to specific individuals.

One of these cases was the case of **Eng Thye Plantations Bhd v Lim Heng Hock & Ors** [2001] 4 MLJ 26 which went up to the Court of Appeal. The Plaintiffs were involved in the breeding of fish at the mouth of a river. A few years later however, they discovered that there was effluent in the river which was causing the fish to leap out of the water. Eventually, all the fish died. One of the plaintiffs testified that he traced the source of the effluent to the Defendant's waste disposal area. The Fisheries Department also later found that the river was grossly polluted.

- i. The Plaintiffs filed the suit under the tort of negligence. The Sessions Court initially found against the Plaintiffs however this decision was overturned by subsequent High Court and Court of Appeal decisions.
- ii. Gopal Sri Ram JCA stated at page 31:

*"The law as to environmental protection is not in doubt. So far as it is dependent on the common law, **the relevant principles that deal with the protection of the environment are to be found in the law of nuisance and in the tort of negligence.** In order to succeed they had to establish that the defendant owed them a duty of care, that the duty was breached and that the breach occasioned harm that was not remote".*  
(Emphasis added)

- iii) In the case of **Public Prosecutor v Ta Hsin Enterprise Sdn Bhd** [1998] 6 MLJ 748, an action was successfully brought by the State against the Defendant for having discharged effluents in excess of the level prescribed in the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979.

Concerned individuals and environmental non-governmental organisations however have at times been barred from taking legal action with regards to projects that affect the environment due to lack of standing. It is also worth mentioning that when the State is involved in these development projects, the laws and decisions have tended to favour them as illustrated in the case below.

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<sup>395</sup> For examples, go to <http://www.2sars.com/advisory.htm>, <http://72.14.235.104/search?q=cache:Cc7ghf6Q01J:www.mma.org.my/pps/avian.doc+%22ministry+of+health%22+malyasia+advisory+avian+flu&hl=en&ct=clnk&cd=6&gl=my>,

In the case of **Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors** [1997] 3 MLJ 23, the building of the Bakun Dam by the State involved the flooding of about 70,000 hectares of tropical rainforest and the displacement of a few thousand indigenous people<sup>396</sup>.

3 of the affected people brought a suit against the State highlighting that the project was illegal as provisions in the EQA relating to the distribution of the Environmental Impact Assessment on the project had not been complied with. Under the EQA, it was required that an Environmental Impact Assessment be submitted to the Director-General of the Department of Environment and also that it be made available for public comment. This had not been done.

However, a Minister's Order namely the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) (Order) 1995 was passed to provide that the state in which the Bakun Dam was being built that is the state of Sarawak, was to be exempt from the effects of the very provision upon which the Plaintiffs were relying. The said Minister's Order was proclaimed to have retrospective effect and was sufficient to cover the initial works of the dam site.

The Plaintiffs' action therefore failed. In making their finding, the Court of Appeal also ruled that the Plaintiffs lacked the relevant standing (*locus standi*) to make the application as they had suffered no special injury by the building of the dam which was over and above the injury suffered by the other few thousand indigenous people who had been affected.

The Court also ruled that whether or not the provisions of the EQA were complied with was a matter for the Attorney General of Malaysia to decide as breach of these provisions carried a penal sanction. The Plaintiffs could not come to Court to try and enforce a penal sanction.

Finally, the Court of Appeal ruled that public interest must be taken into account when making their decision that is, the interest of justice from both the Defendants as well as the Plaintiffs' point of view.

The denial of *locus standi* to a concerned individual also took place in the case of **Abdul Razak Ahmad v Kerajaan Negeri Johor & Anor** [1995] 2 MLJ 287. In that case, it was held that to institute action against a public body, the Plaintiff must show that he has suffered a peculiar damage by the alleged wrong and that he has a genuine private interest to protect. The Court went on to hold that even if there were breaches of the law, the Plaintiff must show how his legal rights or interests would be affected.

5. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?

Since the 1990's, Malaysia has been experiencing thick haze in the months of September and October on an almost annual basis which have been blamed on brush fires in Indonesia. It is believed that many of the brush fires are as a result of farmers clearing land each year.

- i. The haze has been described as feeling like "sandpaper on the back of one's throat"<sup>397</sup>.

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<sup>396</sup> See **Law and Politics under Mahathir: Legitimacy, Challenge and Response** under the heading "The Bakun Dam Case" by Marzuki Mohamad presented at the 4th International Malaysian Studies Conference 2004 at Universiti Kebangsaan Malaysia

<sup>397</sup> See BBC News Report **Malaysia Haze Triggers Emergency**, 11 August 2005 (<http://news.bbc.co.uk/2/hi/asia-pacific/4140660.stm>)

- ii. *The haze has also resulted in an increase in complaints of eye, throat and chest problems amongst the public. The long-term health effects of the annual haze have yet to be determined.*
- iii. *The economic loss caused by the haze especially in 1997 was enormous and has yet to be fully determined.*

*The haze reached such unhealthy levels that a state of emergency was announced in August 2005 for the areas of Port Klang and Kuala Selangor as air pollution levels had breached the dangerous level i.e. above a reading of 500 on the Air Pollution Index.*

*A state of emergency was also declared in September 1997 in the state of Sarawak after the Air Pollution Index indicated that the air pollution was at dangerous levels.*

*Malaysia has tried to help Indonesia put out the brush fires by sending firefighters to Indonesia. In 2005, cloud seeding operations which were being carried out in Malaysia were also extended to Indonesia.*

*In 2005, the then Malaysian Environment Minister, Dato' Seri Adenan Satem also held meetings in Indonesia with Indonesian Forestry Minister Malam Sambat Kanan on ways to combat the annual haze.*

*ASEAN Environmental Ministers agreed in June 1995 on an ASEAN Cooperation Plan on Transboundary Pollution. The Plan contains broad policies and strategies to deal with transboundary pollution<sup>398</sup>. The primary objectives of the plan are:*

- i. *to prevent land and forest fires through better management policies and enforcement;*
- ii. *to establish operational mechanisms to monitor land and forest fires; and*
- iii. *to strengthen regional land and forest fire-fighting capability and other mitigating measures.*

*ASEAN member countries also signed the ASEAN Agreement on Transboundary Haze Pollution in 2002 with the exception of Indonesia. Indonesia has been repeatedly urged by its neighbours, including Malaysia, to ratify the said agreement.*

- i. *Attempts to work together to combat the annual occurrence have also been dogged by various accusations and counter-accusations<sup>399</sup>. Indonesia has accused Malaysia of owning some of the plantations where land clearing by burning is taking place.*

*Ratification of the aforesaid treaty would result in the setting up of an ASEAN Coordinating Centre for Transboundary Haze Pollution Control.*

*Malaysia has participated in the ASEAN ministerial meeting on haze and on the ASEAN Environment Haze Technical Task Force. Malaysia also participates in sub-regional fire fighting arrangements and the Sub-Regional Ministerial Steering Committee on Transboundary Haze Pollution<sup>400</sup>.*

*Reuters has recently quoted ecologist Faizal Parish of Malaysia's Global Environmental Centre (GEC) who stated that the Indonesian haze is set to become 'Asia's first truly global environmental headache'. He went on to state that 'the massive carbon emissions from*

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<sup>398</sup> <http://www.haze-online.or.id/help/rhap.php> Regional Haze Action Plan

<sup>399</sup> See Reuters Report *Asia struggles to stop relentless "pollution calendar"*, 2nd May 2007 ([http://news.yahoo.com/s/nm/20070502/wr\\_nm/asia\\_pollution\\_dc](http://news.yahoo.com/s/nm/20070502/wr_nm/asia_pollution_dc))

<sup>400</sup> See Department of Environment Website

([http://www.doe.gov.my/index.php?option=com\\_content&task=view&id=1442&Itemid=749&lang=en](http://www.doe.gov.my/index.php?option=com_content&task=view&id=1442&Itemid=749&lang=en))

peatland forest fires made Indonesia the world's third largest emitter of emissions linked with climate change'.<sup>401</sup>

*However, with Indonesia's refusal to wilfully enter into a treaty to combat the haze, Malaysia is unable to force it to 'clean up its act'.*

### Part 3: Activities of your Commission

- 1. Has Your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their rights to life or health? If so, please indicate how many complaints you have received, and please described some of the most important cases, and the role of your Commission in resolving the complaints.**

*Since its inception, the Commission has yet to receive complaint specifically on environmental issues. Thus far, the Commission has been receiving complaints from indigenous communities on the deprivation of their rights to land and hence The Commission investigates such complaints on the basis of right. The complaints on environmental issues are, however, incidental to their claim to land. The lost of land to a logging company is said to affect their livelihood and also the serene environment they have been living in. As such, the Commission, acting within its scope recommends to the relevant agencies to adequately ensure that the right to land are respected and hence the environment would be protected.*

- 2. Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.**

*SUHAKAM has not conducted any research on environmental harm and the rights to life and health per se. However, the issue of environmental harm is highlighted in SUHAKAM's research on the Millennium Development Goals and on the Penans in Ulu Belaga: Right to Land and Socio Economic Conditions.*

*In addition, SUHAKAM also organised programmes on right to basic needs, adequate housing, culture of human rights in Malaysia and right to health which touches environmental related issues.*

- 3. Does your Commission work in collaboration with civil society, including the private sector, government of U.N. agencies or multilateral donors, such as the World Bank , on the issue of environmental harms affecting the rights to life and health ? IF so, in what way?**

*None so far.*

*However, SUHAKAM worked in partnership with UNDP on a High Level Policy Dialogue: "A Human Rights Perspective on MDGs and Beyond".The dialogue focuses on the MDGs which certain goals related to health and the environment.*

- 4. Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the commission and the outcome of the cases. Please provide copies of any submissions and court decisions.**

*None so far.*

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<sup>401</sup> see Reference 11 above

5. **Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.**

*None so far*

6. **Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank on the issues of environmental harms affecting the rights to life and health ? If so, in what way?**

*SUHAKAM, in collaboration with UNDP, organised a High Level Policy Dialogue: "A Human Rights Perspective on MDGs and Beyond". High ranking officials from Government agencies and NGOs attended the Meeting. Issues on the environment, together with other aspects under the MDGs were discussed.*

*The outcome of the dialogue was a list of recommendations which was forwarded to the Government for consideration.*

7. **Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?**

*No proposals so far.*

8. **What jurisdiction does your Commission have over the activities of non-state actors? Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?**

*The Commission does not have jurisdiction over the activities of non-state actors. Section 4 of the Human Rights Commission Act 1999 sets out the functions and powers of the Commission which do not include any powers over non-state actors.*

*The Commission has not undertaken any specific activities at this point of time with regard to environmental harms caused by non-State actors.*

#### Part 4: Current Situation

1. **Are there currently environmental problem in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?**

*None so far.*

2. **Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?**

*Yes, in order to triumph over contentious issues as being discussed in question 4 and 5 of Part 2.*

# Response of the New Zealand Human Rights Commission

## Advisory Council of Jurists Questionnaire on Human Rights and the Environment

### Documentation

*Please send the following documentation to the APF Secretariat by email or by mail:*

#### Constitutional provisions relating to:

##### 1. *The right to an environment of a particular quality*

New Zealand's Constitution: New Zealand's Constitution is said to be unwritten since it is not found solely in a document or a group of documents. New Zealand's Constitution can be found in a range of documents, constitutional conventions, and in the Westminster traditions which form part of British constitutional history. The documentary sources of the New Zealand Constitution include:

- a) New Zealand statutes and those Imperial statutes which are part of New Zealand law;
- b) the common law;
- c) the law and custom of Parliament;
- d) legal commentaries, such as Blackstone and Dicey
- e) customary international law;
- f) the principles of the Treaty of Waitangi.

There is no Constitutional provision in New Zealand that provides for a general right to an environment of a particular quality.

##### 2. *Obligations with respect to the environment*

Since 1991, New Zealand's environmental laws have contained a number of common themes. Chief among these is the principle of sustainability, which is the umbrella principle for management of natural and physical resources, indigenous forests, and fisheries. The Resource Management Act 1991 is the cornerstone of New Zealand's environmental legislation. It sets out how New Zealand manages its environment, including air, water, soil, biodiversity, the coastal environment, noise, subdivision and land use planning in general. There are a large number of laws that touch on the environment, some of which are:

- a) Aquaculture Reform (Repeals and Transitional Provisions) Act 2004
- b) Biosecurity Act 1993
- c) Climate Change Response Act 2002
- d) Conservation Act 1987
- e) Crown Minerals Act 1991
- f) Energy Efficiency and Conservation Act 2000
- g) Environment Act 1986
- h) Fiordland (Te Moana o Atawhenua) Marine Management Act 2004
- i) Fisheries Act 1996
- j) Forests Act 1949

- k) Hazardous Substances and New Organisms Act 1996
- l) Health Act 1956
- m) Local Government Act 2000
- n) Ozone Layer Protection Act 1996
- o) Resource Management Act 1991
- p) Soil Conservation and Rivers Control Act 1941
- q) Smoke-free Environments Act 1990
- r) Wildlife Act 1953

The website [www.legislation.govt.nz](http://www.legislation.govt.nz) provides access to unofficial versions of New Zealand legislation.

### 3. *The right to life*

There are four sections in Part 2 of the New Zealand Bill of Rights Act 1990 (NZBORA) which concern the right to life and security of the person. The most pertinent of those is s. 8 which provides:

*“No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.”*

### 4. *The relevance of international law in the domestic jurisdiction*

Two statutes considered to be sources of New Zealand’s Constitution are the NZBORA and the Human Rights Act 1993 (HRA). The long titles to each of those Acts contain references to New Zealand’s commitment to its international law obligations. The long title to the NZBORA is:

“An Act —

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.”

The long title to the HRA is:

“An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with UN Covenants or Conventions on Human Rights.”

There are many other statutes which also provide references to New Zealand’s commitment to its international law obligations.

#### Relevant legislation referring to:

##### 1. *A right to an environment of a particular quality*

A general right to an environment of a particular quality is not contained in legislation. However there are references in legislation which could be seen as being about the quality of an aspect of the environment e.g. in relation to water the Local Government Act requires that a territorial authority must assess the provision within its district of —

- (a) water services; and
- (b) other sanitary services.

The assessment must contain statements about issues relating to the quality and adequacy of supply of drinking water for each community and the health and environmental impacts of discharges of stormwater and sewage arising from the current and future demands. The Act goes on to provide the authority with enforcement powers.

2. *Protections against environmental harms that affect human life or health*

*(Please provide the full name and citation for legislation and regulations)*

Protections against environmental harms that affect human life or health can be found in numerous pieces of legislation. Some of the main protections will be found in:

1. Hazardous Substances and New Organisms Act 1996
2. Resource Management Act 1991
3. Biosecurity Act 1993
4. Health Act 1956.

*NGO Reports*

1. *Reports by local, national or international non-governmental organisations on environmental harms that affect the rights to life and health in your country*

Whilst it is not an NGO the OECD on 4 April 2007 released its Environmental Performance Review of New Zealand. The OECD undertook the review in 2005/2006. The conclusions and recommendations are available from the OECD's website. The OECD concluded that New Zealand has improved its environmental performance over the past decade, but should reinforce water and waste management, energy efficiency and climate protection efforts. The OECD called on New Zealand to:

- Better protect surface and ground waters. The report shows that the water quality of streams, rivers and lakes is declining due to diffuse pollution, and irrigation is taking a toll on some aquifers.
- Clarify and strengthen climate protection policy. The suspension of the climate protection policy package in 2005, in particular the planned carbon tax, has created great uncertainty about how New Zealand will meet its Kyoto target.
- Upgrade waste management. The OECD noted improvements in waste management policies. The report also pointed out the need for systematic tracking of movements and treatment of hazardous wastes.
- Improve environmental reporting at the national level. The OECD pointed to the need for better coordination of regional-level monitoring to enable the development of national-level indicators to track progress towards environmental sustainability goals.

The OECD report touches on some aspects of the rights to life and health, amongst other things it was noted that:

- a. Over 15% of the population is supplied drinking water that does not meet national drinking water guidelines.
- b. Water quality in rivers and lakes has declined in regions dominated by pastoral farming, where high nutrient inputs and microbiological contamination destabilise natural ecosystems and pose risks to human health.
- c. Although still good overall, air quality has deteriorated in some urban areas, due mostly to emissions from motor vehicles, home heating and industry.
- d. Poor indoor air quality and drinking water that does not comply with guidelines entail health risks, with socio-economically disadvantaged and Maori households disproportionately affected.

- e. New Zealand has a high rate of waterborne disease compared to other OECD countries.
- f. Ambient air quality in large urban areas has deteriorated, posing health risks.
- g. In agricultural areas, exposure to pesticides from spray drift is a public concern.

## Part 1: The “Right to Environment” in Your Country

### A. *Has a “right to environment” been recognized in your constitution or national legislation?*

There is no Constitutional provision in New Zealand that provides for a general right to an environment of a particular quality.

### B. *Have your national courts recognized a “right to environment” as a component of other human rights? If so, please provide copies some of the most significant decisions.*

To the best of the Commission’s knowledge there has been no recognition by the courts of a right to the environment as a component of other human rights. Section 8 of the NZBORA deals with the right to life. In the text *The New Zealand Bill of Rights Act: a commentary* Butler and Butler write:

“s. 8 is directed not to the quality of life that a person enjoys, but rather to whether or not that person continues to be alive ... Inferior housing, poor quality health systems, poor criminal law enforcement that leads to vicious but non-fatal attacks are not covered by s 8 of BORA. [In a footnote they refer to the decisions of the Indian courts concerning pollution and the right to life] In short, s 8 is aimed at acts (or omissions) that produce fatality; anything short of fatality does not engage s 8.

In *Lawson v Housing New Zealand* it was argued that ‘life’ in s 8 embraced things necessary to support and ensure a person’s existence, such as adequate, affordable housing ... Williams J doubted that ‘life’ in s 8 of the BORA extended to social and economic factors, but left the matter open.”

### C. *Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.*

To the best of the Commission’s knowledge, no.

### D. *Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.*

To the best of the Commission’s knowledge, no.

## Part 2: Issues Raised in the Terms of Reference

### A. *How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country?*

Section 8 of the NZBORA deals with the right to life. In the text *The New Zealand Bill of Rights Act: A commentary* Butler and Butler write:

“s. 8 is directed not to the quality of life that a person enjoys, but rather to whether or not that person continues to be alive ... Inferior housing, poor quality health systems, poor criminal law enforcement that leads to vicious but non-fatal attacks are not covered by s 8 of BORA. [In a footnote they refer to the decisions of the Indian courts concerning pollution and the right to life] In short, s 8 is aimed at acts (or omissions) that produce fatality; anything short of fatality does not engage s 8.

In *Lawson v Housing New Zealand* it was argued that 'life' in s 8 embraced things necessary to support and ensure a person's existence, such as adequate, affordable housing ... Williams J doubted that 'life' in s 8 of the BORA extended to social and economic factors, but left the matter open."

*What positive obligations have been placed on the State to protect this right?*

In *The New Zealand Bill of Rights Act: A commentary* Butler and Butler consider this question. They focus on the key word in s. 8 of the NZBORA "deprive" and consider whether it extends to cover:

"State failures to intervene to protect persons from premature death (for example, is the failure of the State to protect a person from intentional, and/or accidental, death by private citizens unless the law 'permits' it, for example, through the 'right' to self-defence, a violation of s 8 of the BORA)? If 'deprived' covers accidental killing then it is highly likely that accidental deaths caused by acts [covered by the BORA] will always amount to a violation of s 8 because few accidental deaths are permitted by law (and hence they could not meet the requirement of being 'in accordance with the law'). Equally, very few laws 'authorise' State officials to ignore specific known threats of harm to individuals, when the State is aware of the potential for harm. Accordingly, if the failure of the State to intervene amounts to a deprivation of life then a finding of a breach of s 8 will follow.

Overseas it has been found that equivalent provisions can, in certain instances, be violated by the failure of law enforcement authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal act of another person ..."

On this latter point a recent decision of the England and Wales Court of Appeal (EWCA) is particularly pertinent, *Van Colle & Anor v Hertfordshire Police* [2007] EWCA Civ 325 (24 April 2007). Giles Van Colle was murdered on 22 November 2000 just days before he was due to give evidence for the prosecution at the trial of Daniel Brougham. Subsequently Daniel Brougham was convicted of the murder of Giles Van Colle. The EWCA decided that the police were under a positive obligation under Article 2 of the European Convention on Human Rights to consider a serious threat to a prosecution witness in a criminal trial; to take appropriate action in the light of it; and to keep the situation under review where the life of a witness was at risk from the criminal actions of another individual. [Article 2 provides that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.] By failing to take action where they should have known that there was a real risk to the life of a witness, the police were in breach of their duty under Article 2 and were liable to pay damages.

Sir Anthony Clarke, Master of the Rolls, giving the judgment of the court, said that the centre of the case was the scope of the positive obligation on a State under Article 2 of the ECHR to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual. The obligation had to be interpreted so as not to impose an impossible or disproportionate burden on the authorities. It was sufficient for a claimant to show that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Witnesses were a class of person who might be in need of special protection, depending on the circumstances of the particular case. On the facts, the police should have taken action to protect the deceased. They should have known that there was a real risk to his life and that the risk was and would remain immediate until the date of the accused's criminal trial. In those circumstances they should have done all that could reasonably have been expected of them to minimise or avoid the risk. The police did nothing to that end. The police were under a duty to take preventive measures in relation to Giles Van Colle. They were in breach of that duty and therefore acted incompatibly with his right to life under Article 2. The obligation on

the police was not an onerous one. It was simply to give consideration to a serious threat to Giles Van Colle; to take appropriate action in the light of it; and thereafter to keep the situation under review in the light of further information. That obligation should help to engender the exercise of care and skill to be expected of the police to protect vulnerable witnesses in appropriate cases. [This summary was taken from *The WLR Daily*.]

In *The New Zealand Bill of Rights Act: a commentary* the Butlers wrote that an earlier decision of the ECHR which formulated the principles applied by the EWCA did not necessarily represent orthodoxy; that comment may well need to be revised. The Butlers went on to say that if the principles were followed in NZ:

“...questions could arise outside the law enforcement field and raise issues, for example, as to whether or not agencies working with troubled families violate s. 8 of the BORA if they fail to exercise statutory powers to intervene in family affairs, even though they are aware that there is a real and immediate threat to the life of a child or other family member.”

The Butlers go on to say that if the law concerning the state’s obligation to protect the right to life extends to accidental deprivation of life [that is not yet established] then it:

“could have application to situations where governmental agencies are aware of a real risk to life through accident (such as the failure to observe safe working, roads, food, and so on, practices by private persons or other government agencies), yet fail to intervene.”

The comments by the Butlers are speculative but the decision in *Van Colle* means that it is possible to foresee New Zealand law accepting that this facet of the right not to be deprived of life should extend at least as far as it has been recognized in England and Wales.

In their text the Butlers go on to consider another facet of the right not to be deprived of life and that is premature death. They write:

“...the state of modern medicine and public health is such that there are many actions that can be undertaken to prevent and/or cure and/or ameliorate fatal diseases and conditions. Where the State or a public functionary refuses to, or fails to, provide treatment for fatal disease, or fails to institute public health measures that would prevent persons within the community from contracting a fatal disease, has it violated s 8 of the BORA? ... The [New Zealand] Court of Appeal examined this potential application of s 8 of BORA in *Shortland v. Northland Health Limited* [1998] 1 NZLR 433. In that case, the defendant hospital had withdrawn renal dialysis treatment from a patient suffering from a fatal form of renal disease. The withdrawal was based on a clinical judgment that the patient’s best interests were not served by continued dialysis, and that his treatment should move to palliative care. That judgment was made in accordance with standard medical practice and was enforced by general guidelines on patient access to the dialysis. The Court held that, in the circumstances, it could not be said that the hospital’s actions in refusing to provide dialysis treatment would ‘deprive’ the patient of his life in terms of s 8 of the BORA. This conclusion, in turn, was informed by the Court’s earlier decision that the withdrawal of dialysis had only occurred after a careful process of review and clinical judgment had been exercised.”

- B. *Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.*

In *Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> edition) Prof. Joseph writes:

“Principles of customary international law form part of the common law and are a source of constitutional law ... The [New Zealand] Court of appeal has held [in a 1995 decision] that broadly couched statutes will not displace principles of customary international law incorporated into the common law of New Zealand.”

In the *New Zealand Handbook on International Human Rights* – Ministry of Foreign Affairs and Trade, 2003 – it says:

“Custom is automatically a source of New Zealand law without the need for legislative action and can thus be applied directly by the Courts in the absence of any contrary statutory provision ... the Court of Appeal [in 1995] held that a general statute should not be read as excluding rules of customary international law unless this was its clear intention.”

To the best of the Commission’s knowledge there are no New Zealand cases that refer to rules of customary law as establishing the scope of the right to life.

*C. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in either public or private projects?*

It is assumed that the answer to this question is intended to be confined to the context of the right to an environment of a particular quality. Otherwise the answer must be an extremely length one giving consideration to the extent of New Zealand’s obligations whether created by international law or domestic law in all situations where the rights of individuals are violated by non-State actors engaged in either public or private projects.

To the best of the Commission’s knowledge there is no such obligation. There is however in New Zealand a comprehensive and elaborate legislative and administrative regime which has as one of its purposes the prevention of potential harms and ensuring the public are informed about any potential threats to their health or to their life.

*Has the State been required:*

*a. To take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?*

The Commission is not aware of instances where the State has been required either by international law or by domestic law to undertake such steps. There is however in New Zealand a comprehensive and elaborate legislative and administrative regime which has as one of its purposes the prevention of potential harms and ensuring the public are informed about any potential threats to their health or to their life.

*b. To provide remedies where violations have occurred?*

To the best of the Commission’s knowledge, no.

An example of where the State reacted to claims about threats to health as a result of an environmental issue can be provided. Current and former residents of Paritutu raised fears about their health as a result of non-occupational exposure to dioxins. The exposure arose from a chemical plant, owned by a private company. In October 2001 the Ministry of Health commissioned a study to investigate the claims. The final report released in 2005 showed that some of the residents had blood serum levels of dioxin significantly above those of the general New Zealand population and that based on international findings this may cause increased rates of disease, in particular cancer. On 27 March 2007 the Ministry of Health commissioned a firm of consultants to undertake the design of, and consult on, a health support programme for the group exposed to dioxins. The programme is being developed to address the health needs of the residents and former residents.

*D. Does your country have legislation or regulations imposing human rights obligations on non-State actors?*

Part 2 of the Human Rights Act (HRA) provides the Commission with a limited jurisdiction in relation to the activities of non-state actors. In order for the Commission to have jurisdiction under Part 2 of the HRA there needs to a complaint of unlawful discrimination by reason of

one of the prohibited grounds of discrimination, in one of the areas of public life covered by the HRA. The areas of public life in relation to non-state actors covered by the HRA are:

- access to public places, vehicles and facilities
- access to education
- employment
- industrial and professional associations, qualifying bodies and vocational training bodies
- partnerships
- provision of goods and services
- provision of land, housing and accommodation.

The prohibited grounds of discrimination are:

- age (from age 16 years)
- colour
- disability
- employment status
- ethical belief (lack of religious belief)
- ethnic or national origins (includes nationality and citizenship)
- family status (having dependents, not having dependents, being married to, or in a civil union or de facto relationship with, a particular person or being a relative of a particular person)
- marital status (single, married, in a civil union or a de facto relationship, separated, a party to a marriage or civil union now dissolved, widowed)
- political opinion (including having no political opinion)
- race
- religious belief
- sex (includes childbirth and pregnancy)
- sexual orientation (heterosexual, homosexual, lesbian, bisexual).

Part 1A of the HRA imposes human rights obligations on non-State actors in circumstances where they are performing a public function, power, or duty conferred or imposed on that person or body by or pursuant to law. Those obligations are limited to requiring the person or body either by act or omission not to discriminate by reason of any of the above grounds of discrimination.

The ambit of the New Zealand Bill of Rights Act (NZBORA) in relation to non-State actors is broader. Section 3(b) of the NZBORA provides that it applies to acts of non-State actors where they are performing a public function, power, or duty conferred or imposed on that person or body by or pursuant to law. The NZBORA affirms a broad range of rights and freedoms which not only include the right to be free from discrimination but also include the right not to be deprived of life, the right not to be subjected to medical or scientific experimentation and the right to refuse to undergo medical treatment. In the context of a discussion about the right to an environment of a particular quality it is the potential of the NZBORA to apply to non-State actors that is likely to be more significant than the narrower anti-discrimination focus of the HRA. It is however worth noting that there is a wider dimension to the HRA which can come into play in relation to the actions of both non-State and State actors and that is the Commission has a number of functions in s. 5(2) which allow it:

- (a) to be an advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights.
- (c) to make public statements in relation to any matter affecting human rights ...
- (f) to receive and invite representations from members of the public on any matter affecting human rights

- (h) to inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights.
- (k) to report to the Prime Minister on –
  - (i) any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights
  - (ii) the desirability of New Zealand becoming bound by any international instrument on human rights.

The provisions in s. 5(2) of the HRA do not impose human rights obligations on non-State actors but they are a means by which human rights considerations can be brought to bear on their actions.

*Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?*

If such recognition has taken place it would have been a consequence following on from the breach of a statute or pursuant to a common law claim and not as a result of the recognition of a general human right to an environment of a particular quality.

*E. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems?*

In February 2007 the Prime Minister, the Rt. Hon. Helen Clark, delivered a speech to Parliament which had a strong emphasis on long term sustainable strategies for the economy, society, the environment, culture, and the way of life. In relation to the environment the Prime Minister said the vision of the Government was to move to carbon neutrality. The Prime Minister referred to:

1. The draft New Zealand Energy and Energy Efficiency and Conservation strategies.
2. In recognition of the important contribution of forestry to climate change mitigation strategies the announcement in 2006 of a Permanent Forest Sinks Initiative.
3. The release before Christmas 2006 of wide ranging proposals for sustainable land management in agriculture and forestry.
4. Raising the awareness of households about sustainable practice in energy and water use, transport, and waste disposal.

In a speech on sustainability delivered last week the Prime Minister referred to work done over a number of years to introduce sustainability principles into legislation and policy:

1. In January 2003 the Government launched a Sustainable Development Programme of Action setting out the broad principles for policy and decision-making, and applying them in practical projects across water, energy use, urban development, and child and youth development.
2. In the rewrite of the land transport legislation an emphasis was put on sustainability.
3. Sustainable outcomes are a key purpose of the Local Government Act in 2002.
4. The first generation of climate change mitigation policies included provision for greenhouse gas agreements with industry; support for projects to reduce emissions, which helped stimulate renewable energy investment; investments in research on pastoral greenhouse gas reductions; and development of the policy for the Permanent Forest Sinks initiative.
5. Over the last two years it has become apparent that New Zealand's net Kyoto position is in deficit, and not in credit as had long been forecast. That has led the Government to

prepare a second generation of policies which will be comprehensive in their reach across energy, transport, and land management, and includes consideration of emissions trading.

In addition to the above responses there also 3 other strategies being developed:

- a. Measures to reduce greenhouse gas emissions in New Zealand post-2012.
- b. Transitional measures: options to move towards low emissions electricity and stationary energy supply and to facilitate a transition to greenhouse gas pricing into the future.
- c. Sustainable land management and climate change.

*Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?*

To the best of the Commission's knowledge, no.

### Part 3: Activities of your Commission

1. *Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health? If so, please indicate how many complaints you have received, and please describe some of the most important cases, and the role of your Commission in resolving the complaints.*

From mid-2003 until late 2004, the Commission received 11 complaints about a government agency conducting an aerial spraying programme for the eradication of the Painted Apple Moth. Several of the complaints did not relate to an unlawful ground of discrimination under the HRA and were not progressed. Other complaints were notified to the government. The agency said that programme was not discriminatory "...because it is considered justifiable on the basis of its purpose, effectiveness and on the basis of the steps ... taken to limit the adverse effects of the spray." Several mediation meetings were held with the government and three of the complainants in an attempt to resolve the complainants' objections to the aerial spraying programme. In certain situations, the agency accommodated the needs of the complainants to be moved from the spray zone for certain periods. For some complainants, the agency's response resolved the matter for them. Other complainants were referred to the Human Rights Review Tribunal.

Since January 2002, 21 matters have been received to do with 'water and fluoridation'. Of the nine specifically relating to fluoridation, complainants contend that the fluoridation of the water supply amounts to a breach of their human rights, some relating it to the NZBORA provision relating to the right to refuse medical treatment. The Commission's response has been along the lines of saying:

"While fluoridation would fall within s. 11 of the NZBORA there is sufficient case law not only from New Zealand but jurisdictions such as Ireland, Canada and the United States – along with academic comment – which suggests that restriction of the right to refuse medical treatment is justified if fluoride has not been proved to be dangerous ... This position is supported further by publications such as the World Health Organisation's Guidelines for Drinking Water Quality which outline best practice in treatment of drinking water. The level of fluoride in the drinking water is compatible with that recommended by the WHO. The Commission will therefore not be pursuing your complaint as a wider human rights matter."

2. *Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.*

No.

3. *Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.*

No.

4. *Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the commission and the outcome of the cases. Please provide copies of any submissions and court decisions.*

No.

5. *Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.*

In September 2004 the Commission published, *Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu*, the first comprehensive assessment of the status of human rights in New Zealand. Following on from the work done in the status report in March 2005 the Commission published *The New Zealand Action Plan for Human Rights – Mana ki te Tangata*. The plan identifies key human rights outcomes and what must be done over the next five years so that the human rights of everyone in New Zealand are better recognised, protected and respected. The following passage in the action plan is of relevance:

*“Human Rights in New Zealand Today / Ngā Tika Tangata O Te Motu concluded that achieving the highest attainable standard of health for all people in New Zealand depends first and foremost on environmental factors (clean air, clean water and waste disposal) and on socio-economic determinants, as well as access to appropriate health services, especially primary care. A human rights-based approach to health emphasises equality and non-discrimination in accessibility of health services, especially for the most vulnerable and marginalised sections of the population. Some groups for whom there are serious barriers to health services, and for whom health outcomes are significantly poorer than for the rest of the population, were also identified.*

In a report to the Minister of Health in 2002, the Public Health Advisory Committee identified obstacles to addressing environmental impacts on health effectively. The Government has since launched a programme of Action for Sustainable Development, addressing water quality and allocation, energy, sustainable cities and child and youth development as priorities. This initiative needs to be strengthened and extended to address other environmental issues. The recent first report of the National Occupational Health and Safety Advisory Committee showed that occupational diseases are killing and harming more New Zealanders each year than occupational injuries are.

Priorities for action:

- a. Strengthen and extend a whole of government approach (including territorial authorities) to protection and improvement of environmental health determinants, including air quality, water quality and allocation, the built environment and workplaces.
  - b. Include a focus on non-injury health issues in occupational safety and health programmes.”
6. *Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health? If so, in what way?*

No.

7. *Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?*

No.

8. *What jurisdiction does your Commission have over the activities of non-State actors?*

Part 2 of the HRA provides the Commission with a limited jurisdiction in relation to the activities of non-state actors. In order for the Commission to have jurisdiction under Part 2 of the HRA there needs to be a complaint of unlawful discrimination by reason of one of the prohibited grounds of discrimination, in one of the areas of public life covered by the HRA. The areas of public life in relation to non-state actors covered by the HRA are:

1. access to public places, vehicles and facilities
2. access to education
3. employment
4. industrial and professional associations, qualifying bodies and vocational training bodies
5. partnerships
6. provision of goods and services
7. provision of land, housing and accommodation.

The prohibited grounds of discrimination are:

1. age (from age 16 years)
2. colour
3. disability
4. employment status
5. ethical belief (lack of religious belief)
6. ethnic or national origins (includes nationality and citizenship)
7. family status (having dependents, not having dependents, being married to, or in a civil union or de facto relationship with, a particular person or being a relative of a particular person)
8. marital status (single, married, in a civil union or a de facto relationship, separated, a party to a marriage or civil union now dissolved, widowed)
9. political opinion (including having no political opinion)
10. race
11. religious belief
12. sex (includes childbirth and pregnancy)
13. sexual orientation (heterosexual, homosexual, lesbian, bisexual).

It is however worth noting that there is a wider dimension to the HRA which can come into play in relation to the actions of both non-State and State actors and that is the Commission has a number of functions in s. 5(2) which allow it:

- (a) to be an advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights.
- (c) to make public statements in relation to any matter affecting human rights ...
- (f) to receive and invite representations from members of the public on any matter affecting human rights

- (h) to inquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights.
- (k) to report to the Prime Minister on –
  - (i) any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights
  - (ii) the desirability of New Zealand becoming bound by any international instrument on human rights.

The provisions in s. 5(2) of the HRA are a means by which human rights considerations can be brought to bear on the activities of non-State actors.

*Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?*

No.

## Part 4: Current Situation

- a. *Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues?*

Yes, as illustrated in the OECD report there are a number of environmental problems in New Zealand that are affecting the rights to health and life. To the best of the Commission's knowledge they have not been addressed as human rights issues; they are seen as social, health and economic problems.

*If so, what obstacles exist to addressing the human rights consequences of these environmental problems?*

The initial obstacle is that there is not yet established a recognized right to an environment of a particular quality.

- b. *Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?*

In the Commission's opinion the answer is yes.

## Source material

*The New Zealand Bill of Rights Act: a commentary*, A Butler and P Butler, 2005.

*Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> edition), P A Joseph, 2001.

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The WLR Daily website: <http://www.lawreports.co.uk/WLRD/update.htm>

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# Response of the Palestinian Independent Commission on Citizen's Rights

## Advisory Council of Jurists

### Questionnaire on Human Rights and the Environment

#### Part 3: Activities of our Commission

Environment is a very important issue. Every individual has the right to clean, safe and quality life, free from any harm or damaging consequences that might undermine his/ her health. The Israeli and Palestinian violations to the Palestinian environment cause more suffering and life difficulties to the Palestinian citizen's human life. It create a life with poor quality, that might bring fatal diseases; as in cases of chemical waste and water pollution, and force people to live in under civilized conditions; both in its mental and physical components.

#### **Summery of complains about environment violations addressed to our commission, and those who committed those violations**

Between January 1 of 2005 and May 16 of 2007, the Independent Commission for Human Rights had received 42 environment related complains; 20 of them in Gaza and 22 in the West Bank. All of those complains were filed against state actors; 30 of them against municipalities, 2 against Ministry of Communications, 6 against Ministry of Local Governance, 1 against Ministry of environment, 1 against police forces, 1 against Petroleum Commission and 1 against Ministry of Education. 29 of those complains were initiated by large groups of citizens and received by our field researchers.

#### **Types of environment violation complains addressed to our commission**

Environmental violations addressed to our commission included the following:

- a. Widespread of sewage exposure inside the neighbourhoods and lack of sewage networks in many areas.
- b. Manufactures that are close to neighbourhoods.
- c. Setting up mobile services cables and power stations on top of the buildings.
- d. Failure to solve sewage problems near houses.
- e. Failure to deal with solid waste dumping locations close to neighbourhoods.
- f. Widespread of animal farming in neighbourhoods.
- g. Lack of rain water networks.

The environmental violations in the Palestinian residences caused great damage to the natural resources and increased pollution level in the air, drinking water and agricultural land. For example, certain complains were asking Ministry of Local Governance and municipalities to move a cement or plastic factory, to clean a beach across from citizens' houses, to control petroleum transportation from Israel, to solve exposed sewage, to move animal farming from living areas or prevent construction of gas stations or stone workshops close to neighbourhoods. However, the most important of those complains were the ones asking municipalities to take care of sewage and rainwater networks, solid waste dumping and regular picking up the housing trash. It caused diseases and created insects incubators.

#### **Measures taken by the commission to stop violations to the environment**

Not only does the commission receive environmental complains from individuals and groups of citizens, but it also visits the concerned locations, and conducts open meetings awareness

campaign to the law of the right to life and health. In order to help stop such violations, and make sure that state and non- state actors respect and comply with the law, the commission, usually, takes the following steps:

- After receiving a complaint, all supporting data and documentation are being reviewed to insure its accuracy; photos, medical reports, communications with state or official offices.
- Communicating the actor complained against, explaining type of violation and demands of the complaining party, and asking for a response in three weeks. If no response was given by the end of three weeks, another reminder to be sent and given two weeks for a response.
- Meetings with concerned officials and explaining the issue.
- Follow up all responses and results, documenting all details and then monitoring those results on regular basis. All that documentation, regardless of the case results and satisfaction, are included in the commission yearly report.

### **Effectiveness of the commission follow-ups to environment violations**

The commission work in addressing complains of environment violations in the last 29 months and a half had accomplished results on various levels, and they can be summarized as follows:

- So many of those environment violations ended; they stopped completely. For example, Mr. R. M. KH, with a group of citizens in Dora (Hebron) had reported, on July 31<sup>st</sup> of 2005, using solid waste dump at residential area, which caused serious environmental and health damages (; diseases, insects and bad smell). The commission staff in Hebron contacted the city mayor and communicated him so many times. They were able to convince him to remove that dump and locate it in a remote area.
- Revealing measures being taken by officials to stop violation to the environment. For example, Zaytun neighbourhood residents in Gaza issued a complaint against Gaza municipality regarding sewage pools, near Almaslakh residence. The pools were constructed during the Israeli occupation to Gaza and in coordination with Gaza municipality at that time. They are close to the school and the health centre, and it is supposed to be treated and redirected to schools for human use. Nobody ever checked if it was completely treated before returning it to the school. Besides, it is uncovered and without gates. It became a source for insects, rats and strong smell, in addition to providing a dangerous trap for children. Agricultural land and drinking water were not safe, either. Those pools were leaking all the time; down inside the ground and over the surface. Dinking water and planted areas were destroyed and polluted, nothing to say about the smelly and nasty roads.

On June 6 of 2005, the commission contacted the mayor, but with no response. We reminded him, again, on July 18 of the same year, but no response, either. We contacted the municipality legal advisor, on August 7. After discussing the matter with him, he informed us that a committee from legislative council members, cabinet members and Gaza municipality representatives was formed to take care of the problem. The committee put forward a comprehensive to solve that issue. The plan included securing donors' fund of Euro 70 millions to rehabilitate the entire sewage system in that area. We delivered that information to the concerned citizens.

- Mediating between citizens and officials. For example, a group of Jafa street residents in Gaza has complained to the municipality about a random waste dump located right at the street. It caused several health problems, in addition to producing bad smell and damaging the neighbourhood view. Citizens also complained that municipality would not pick up trash, but once a week, despite residents' repeated requests for more.

In order to solve the problem, our field researcher met with the cleaning department officer in the municipality and explained damages caused by that dump and residents' requests. The officer agreed to set a daily trash pick up, only if residents agree to gather it in one spot. Citizens agreed to do that,. We visited that location later on to find that the dump disappeared.

- Directing citizens to officials and courts in order to solve their problems. For example, members of Jurba village council have complained against Ministry of Environment about constructing a plastic factory on a nearby agricultural land. They claim it harmed their plants, produced strong smell and smoke and caused fire breakouts and drinking water pollution.

We visited the head of ministry office and explained the complaint to him. He responded that the ministry is aware of the factory construction. He added that conditions have been imposed on the owner in order to eliminate any possible pollution and his staff was supposed to conduct frequent visits to the premises, but political conditions prevented that from happening. He advised residents to pursue their case legally and ask authorities to monitor judgment compliance. The commission told the residents to do that.

- There were cases in which state officials did not cooperate, or do anything to solve the problem. For example, on May 20<sup>th</sup> of 2005, a group of representatives to several cities and villages in Bethlehem governance (Bethlehem, Beit Sahur, Alkhader and Duheisha refugee camp) had complained against Ministry of Communications power stations constructions within residential areas. They contacted Ministry of Communications, the governance office, local municipalities and Ministry of Environment. They conducted scientific studies to prove how dangerous those stations were to their lives, but they received no response. On July 3 of 2005, the commission communicated the ministers' council, and asked minister of communication to form a committee of experts in order to study the basis on which such stations are given the permission to function and not violating peoples' right to life and health. Nobody ever responded to our request.

## **Conclusions**

Based on the commission work in the previous cases, we may conclude the following:

1. Most complaints had to do with sewage pools and sewage networks (which intensifies in Gaza). Official departments were, and still are unable to respond to all of it because they do not have enough funds to do so, although everybody knows the damages on drinking water, agricultural land human quality of life that those pools cause.
2. Complaints that have received positive responses from officials or municipalities did not require large funds to solve their violations.
3. The strike by municipalities' employees in the Palestinian areas created more environmental violations and made it harder to stop it. It created more piles of solid waste and trash in random residential locations.
4. Officials who did not respond to our communications did not show their reasons of not doing that.

## **Studies and awareness campaigns**

The commission has conducted a research study about negative consequences of environmental pollution on human life in Palestine. The study showed that Palestinian citizens suffer a great deal in the last ten years, due to the Israeli measures since 1967. The following are some of the main environmental violations and damages Israeli actions had led to:

- a. Israeli authorities issued licenses to stone factories all over residential areas in the West Bank, without supervision or monitoring. After a short period, those factories filled neighbourhoods with dust and harmful substances that created many breathing difficulties to those who were exposed to.

For example, in Beit Fajjar (near Bethlehem), dozens of such factories spread across the area. Medical records showed that 455 citizens in that town suffer from nasal problems, and 115 citizens have breathing difficulties.

- b. Laboratory studies showed that drinking water wells in the ground have a high level of pollution caused by Israeli settlements continuous dumping to their sewage waste into the Palestinian neighbouring lands.

The commission has conducted several activities to increase public awareness to the right for life and health. Examples of those activities are:

- a. Two meetings have been conducted to discuss the effects of satellite and power stations of mobile services on citizens' health. Interested citizens, experts, related organizations and mayors have attended it.

The first meeting was conducted on September 18 of 2006 in Bethlehem. Several speakers were invited to take part; Mr. Issa Qaraq' (legislative council member), Dr. Adnan Ellaham (director of radiology technology and science dep. at Jerusalem University and member of the consulting committee to the electromagnetic spaces project at the World Bank), Dr. Adnan Joudeh (representing Quality Environment Authority) and the general director of radiology dep. at Quality environment Authority.

- b. The commission participated in discussion workshops to finalize environment laws, and provided its own suggestions.
- c. The commission wrote to the prime minister; Ismael Haniyya regarding medical waste regulations and its comments on that.

## **Recommendations**

After several researches and field visits, the commission came up with the following recommendations:

- All laws and regulations related to environment safety have to be reviewed, in order to go ahead in issuing the standards and regulations according to international law and regulations.
- Environment related organizations, in all districts, need to be supported in conducting:
- researches about dealing with environmental damages, pollution levels measurement, solid waste management and reducing effects of harmful actions.
- Environmental education activities.
- Monitoring and recording data about environment violations.
- There is a need for a national fund to support activities that aim at protecting and maintaining healthy environment and increasing awareness in that regard.
- Preventive measures need to be taken; like paving dirty roads or finding alternative driving paths, away from dusty areas.
- Licensing stone factories need to be stopped and existing factories need to improve their environmental measures.
- Alternative places need to be found for waste dumping in Bethlehem area, according to quality environment standards.
- The Palestine Center for Cancer Studies in Bethlehem need to be supported to enable it from studying this phenomenon in that area.
- International community needs to demand Israel to stop its violations to Palestinian environment.

# Response of the Philippines Commission on Human Rights

Advisory Council of Jurists

Questionnaire on Human Rights and the Environment

## Part 1: The “Right to Environment” in your country

**Has a “right to environment” been recognized in your constitution or national legislation?**

YES.

### a. Constitution

1987 PHILIPPINE CONSTITUTION. Section 16, Article II (entitled “Declaration of Principles and State Policies”) provides that,

***“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.”***

This right unites with the right to health which is provided for in the preceding Section (15) of the same Article of the Constitution, to wit:

“The State shall protect and promote the right to health of the people and instil health consciousness among them.”

### b. National Legislations

PRESIDENTIAL DECREE NO. 1151, passed on June 6, 1977, entitled “*Philippine Environmental Policy*.” Section 3 states that,

“Right to a Healthy Environment. – In furtherance of these goals and policies, ***the Government recognizes the right of the people to a healthful environment***. It shall be the duty and responsibility of each individual to contribute to the preservation and enhancement of the Philippine environment.”

This Presidential Decree NO. 1151 paved the way for the passage of PRESIDENTIAL DECREE NO. 1152, otherwise known as “*The Philippine Environment Code*” on the same day, June 6, 1977.

NOTE: Copies of other pertinent provisions of the Constitution and the laws as well as the cases mentioned here will be sent through mail.

**Have your national courts recognized a “right to environment” as a component of other human rights? If so, please provide copies of some of the most significant decisions.**

YES.

A. OPOSA, et al. vs. FULGENCIO S. FACTORAN, JR. et al. (G.R. No. 101083, July 30, 1993)

This is a landmark case on the issue of the right to environment specifically on the protection of the rainforests. This case, wherein the Supreme Court held that the right to environment is both an “*inter-generational responsibility*” and “*inter-generational justice*,” provided the benchmark for all subsequent cases dealing with the environment.

*Synopsis:*

This is a case filed by several minors, represented by their parents, against the Department of Environment and Natural Resources to cancel existing timber license agreements in the country and to cease from issuing new ones. The petitioners claim that the refusal to cancel the timber license agreements contravened the Constitutional policy of the State to protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature, and that it was contrary as well to natural law and violative of their right to self-preservation and perpetuation. Moreover, the minor plaintiffs claim to represent their generation as well as generations yet unborn.

Finding for the petitioners, the Supreme Court made the following epic pronouncements:

“While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come – generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.”

B. HENARES, et al. vs. LAND TRANSPORTATION AND FRANCHISING REGULATORY BOARD (LTFRB) G.R. No. 158290, October 23, 2006

This petition focuses on one fundamental legal right of petitioners, their right to clean air. While the Supreme Court recognized the right of the petitioner, it however, ruled that the lack of legislation on the matter served as a restriction on the prayer to grant mandamus.

*Synopsis:*

Petitioners challenge the Supreme Court to issue a writ of mandamus commanding respondents Land Transportation Franchising and Regulatory Board (LTFRB) and the Department of Transportation and Communications (DOTC) to require public utility vehicles (PUVs) to use compressed natural gas (CNG) as alternative fuel in order to prevent the bane of air pollution and related environmental hazards.

Petitioners allege that the particulate matters (PM) – complex mixtures of dust, dirt, smoke, and liquid droplets, varying in sizes and compositions emitted into the air from various engine combustions – have caused detrimental effects on health, productivity, infrastructure and the overall quality of life.

The Supreme Court, taking cue from the earlier case of *Oposa*, ruled thus:

“In the same manner that we have associated the fundamental right to a balanced and healthful ecology with the twin concepts of "inter-generational responsibility" and "inter-generational justice" in *Oposa*, where we upheld the right of future Filipinos to prevent the destruction of the rainforests, so do we recognize, in this petition, the right of petitioners and the future generation to clean air. In *Oposa* we said that if the right to a balanced and healthful ecology is now explicitly found in the Constitution even if the right is "assumed to exist from the inception of humankind,... it is because of the well-founded fear of its framers [of the Constitution] that unless the rights to a balanced and

healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come.

It is the firm belief of this Court that in this case, it is timely to reaffirm the premium we have placed on the protection of the environment in the landmark case of *Oposa*. Yet, as serious as the statistics are on air pollution, with the present fuels deemed toxic as they are to the environment, as fatal as these pollutants are to the health of the citizens, and urgently requiring resort to drastic measures to reduce air pollutants emitted by motor vehicles, we must admit in particular that petitioners are unable to pinpoint the law that imposes an indubitable legal duty on respondents that will justify a grant of the writ of mandamus compelling the use of CNG for public utility vehicles. It appears to us that more properly, the legislature should provide first the specific statutory remedy to the complex environmental problems bared by herein petitioners before any judicial recourse by mandamus is taken.”

**Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.**

YES.

LAGUNA LAKE DEVELOPMENT AUTHORITY vs. COURT OF APPEALS, et al. (G.R. No. 110120, March 16, 1994)

Balancing between the responsibility of the city government to take care of its garbage and the right of the people living near the dumpsite to a pollution-free environment, the Supreme Court ruled that the right to health is a constitutionally enshrined right over which no impairment can be made. The Supreme Court further said that the Philippines is a party to international instruments which recognizes the right to health as a fundamental right.

*Synopsis:*

This case is a clash between the responsibility of the city government to dispose off the 350 tons of garbage it collects daily and the growing concern and sensitivity to a pollution-free environment of the residents of the place where the garbage are dumped everyday. Task Force Camarin Dumpsite filed a letter complaint with the petitioner seeking to stop operation of the open garbage dumpsite in their place due to its harmful effects on the health of the residents and the possibility of pollution of the water content of the surrounding area. The petitioner, after investigation and public hearing, issued a Cease and Desist Order against the city government. However, the city government was able to seek a temporary restraining order.

The Supreme Court reversed the lower court and permanently ordered the city government to stop garbage dumping operations in the area. On balancing the interest of the city government as against the individual citizens, the Court has the following to say:

“The immediate response to the demands of ‘the necessities of protecting vital public interests’ gives vitality to the statement on ecology embodied in the Declaration of Principles and State Policies of the 1987 Constitution. Article II, Section 16 which provides:

“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.”

As a constitutionally guaranteed right of every person, it carries the correlative duty of non-impairment. This is but in consonance with the declared policy of the state “to protect and promote the right to health of the people and instil health consciousness among them.” It is to be borne in mind that the Philippines is a party to the Universal Declaration on Human

Rights and the Alma Conference Declaration of 1978 which recognizes health as a fundamental human right.

Also, in the following cases, the Supreme Court granted the claim of the families of employees with the Employees' Compensation Commission and/or Workmen's Compensation Commission saying that exposure to harmful elements at the workplace and the pollution in the environment has directly caused or otherwise contributed to the decline of the health of the employee and his subsequent death:

- Anicia vda. De Galang vs. Workmen's Compensation Commission and Procter and Gamble, Inc., (G.R. No. L-42531, March 30, 1977)
- G.B. Francisco, Inc. vs. Workmen's Compensation Commission (G.R. No. L-42565, November 21, 1975)
- Angeles vda. De Sison vs. Workmen's Compensation Commission and Philippine National Railways (G.R. No. L-42817, November 29, 1978)
- Gloria D. Menez vs. Employees' Compensation Commission, Government Service Insurance System (G.R. No. L-48488, April 25, 1980)
- Bayani Dator vs. The Employees' Compensation Commission and The Government Service Insurance System (G.R. No. L-57416, January 30, 1982)
- Sylvia Panagui and Olivia Panagui vs. The Employees' Compensation Commission and The Government Service Insurance System (G.R. No. L-56259, March 18, 1983)
- Mariwasa Manufacturing, Inc. vs. Workmen's Compensation Commission and Octavio Vidanes, Jr. (G.R. No. L-40608, January 31, 1984)
- Emilia vda de Inguillo vs. Employees' Compensation Commission and Procter and Gamble, Inc. (G.R. No. L-51543, June 6, 1989)
- Employees' Compensation Commission and Government Service Insurance System vs. Court of Appeals and Lilia Arreola, G.R. No. 121545, November 14, 1996

**Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.**

YES.

VILLANUEVA vs. CASTAÑEDA, G.R. No. L-61311, September 21, 1987

Aside from the right to health, the Supreme Court also noted the right to public safety in this case.

*Synopsis:*

This involves the construction of stalls of vendors along a certain strip of land in San Fernando, Pampanga near creating a *talipapa* (small public market). The petitioners claim they have a right to remain in and conduct business in this area by virtue of a previous authorization granted to them by the municipal government. However, this authorization was superseded by another municipal ordinance declaring the land as part of public plaza. The Association of Concerned Citizens and Consumers of San Fernando filed a petition for the immediate implementation of Resolution No. 29, to restore the subject property "to its original and customary use as a public plaza."

The Supreme Court ruled against the petitioners saying,

"Since the occupation of the place in question in 1961 by the original 24 stallholders (whose number later ballooned to almost 200), it has deteriorated increasingly to the great prejudice of the community in general. The proliferation of stags therein, most of them makeshift and of flammable materials, has converted it into a veritable fire trap, which, added to the fact that it obstructs access to and from the public market itself, has seriously endangered public safety. The filthy condition of the *talipapa*, where fish and other wet items are sold, has aggravated health and sanitation problems, besides pervading the place with a foul odour that has spread into the surrounding areas. The

entire place is unsightly, to the dismay and embarrassment of the inhabitants, who want it converted into a showcase of the town of which they can all be proud. The vendors in the *talipapa* have also spilled into the street and obstruct the flow of traffic, thereby impairing the convenience of motorists and pedestrians alike. The regular stallholders in the public market, who pay substantial rentals to the municipality, are deprived of a sizable volume of business from prospective customers who are intercepted by the *talipapa* vendors before they can reach the market proper. On top of all these, the people are denied the proper use of the place as a public plaza, where they may spend their leisure in a relaxed and even beautiful environment and civic and other communal activities of the town can be held.”

SOCIAL JUSTICE SOCIETY, ET AL. V. ATIENZA, JR., GR No. 156052, March 7, 2007)

In this most recent case on environment, the Supreme Court recognized the delegated police power of local government units “to promote the order, safety, and health, morals, and general welfare of the society.”

**SYNOPSIS:**

Ordinance No. 8027, approved by Manila City Council on November 28, 2001 and effective December 28, 2001, reclassifies portions of Pandacan and Sta. Ana from industrial to commercial and directs the owners and operators of businesses disallowed under Section 1 to cease and desist from operating their businesses within six months from the ordinance’s effectiveness. Among the businesses in the area are the so-called Pandacan Terminals of Caltex, Petron, and Shell.

Ordinance No. 8027 was enacted by the City of Manila right after the Philippines, along with the rest of the world, witnessed the horror of that September 11, 2001 attack on the Twin Towers of the World Trade Center in New York City. The objective of the ordinance is to protect the residents of Manila from the catastrophic devastation that will surely occur in case of a terrorist attack on the Pandacan Terminals.

Subsequently, the petitioners filed with the High Court an original action for mandamus praying to compel Mayor Atienza to enforce said ordinance and to order the immediate removal of the terminals of the oil companies.

The Supreme Court granted the petition and ordered the immediate removal of the terminals of the said oil companies. The Court held that “there is nothing that legally hinders [Mayor Atienza] from enforcing Ordinance No. 8027.” Further, the Supreme Court said that,

“The Local Government Code imposes upon Atienza the duty, as city mayor, to ‘enforce all laws and ordinances relative to the governance of the city.’ One of these is Ordinance No. 8027. As the chief executive of the city, he has the duty to enforce Ordinance No. 8027 as long as it has not been repealed by the Sanggunian or annulled by the courts. He has no other choice. It is his ministerial duty to do so.

Ordinance No. 8027 was enacted right after the Philippines, along with the rest of the world, witnessed the horror of that September 11, 2001 attack on the Twin Towers of the World Trade Center in New York City. The objective of the ordinance is to protect the residents of Manila from the catastrophic devastation that will surely occur in case of a terrorist attack on the Pandacan Terminals. No reason exists why such a protective measure should be delayed.”

The Court described Ordinance No. 8027 as a measure enacted pursuant to the delegated police power of local government units “to promote the order, safety, and health, morals, and general welfare of the society.”

In some cases, the Supreme Court allowed the payment of just compensation to private persons whose properties were destroyed due to environmental hazards. (National Power Corporation vs. Pobre, G.R. No. 106804, August 12, 2004)

## Part 2: Issues Raised in the Terms of Reference

**How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?**

### **1. Right to Life according to the Commission on Human Rights**

The Commission on Human Rights defines the right to life in consonance with the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights as well as relevant international instruments. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.<sup>402</sup> The right to life is defined in its broadest sense to include, among others, the arbitrary taking of life, the abolition of death penalty, the right against torture and other cruel, inhuman and degrading punishment, the right against enforced disappearance, the right of unborn children, the right to water, the right to food, the right to livelihood, the right to health and such other rights as may be related to the right to life.

### **2. Right to Life according to the Constitution**

All previous Constitutions of the Philippines, including the first one ordained at Malolos in 1899, guarantee that "no person shall be deprived of life, liberty or property without due process of law."

This primary right of the people to enjoy life — life at its fullest, life in dignity and honour — is not only reiterated by the 1987 Charter but is in fact fortified by its other pro-life and pro-human rights provisions. Hence, the (1987) Constitution values the dignity of every human person and guarantees full respect for human rights (Article II, Section 11); expressly prohibits any form of torture (Article III, Section 12, paragraph 2) which is arguably a lesser penalty than death; emphasizes the individual right to life by giving protection to the life of the mother and the unborn from the moment of conception (Article II, Section 12) and establishes the people's rights to health (Article II, Section 15), a balanced ecology (Article II, Section 16) and education (Article II, Section 17).<sup>403</sup>

### **3. Right to Life according to the legal system/courts**

Life as understood under the due process clause of the Constitution (Article III, Section 1 – "No person shall be deprived of life, liberty or property without due process of law") connotes in the first place the integrity of the physical person. The meaning that it is not permissible for the government to deprive the individual of any part of his body, and this is true even if it be as punishment for crime. Accordingly, it will be unlawful to amputate his hands if he is thief or castrate him if he is a rapist or strike out his eyes for unjust vexation or cut off his tongue for objectionable remarks he may have made. Any measure that would even only endanger his health or subject him to unnecessary pain or to unreasonable physical exertion, would also be subject to challenge. Thus, in sustaining the law requiring the sterilization of incurable hereditary imbeciles, the U.S. Supreme Court observed in *Buck vs. Bell* (274 U.S. 200), that the operation only involved "a minimum pain, or none at all," and did not endanger the imbecile's life or health.

But the term according to our Supreme Court, should not be dwarfed into mere animal existence. In fact, the word should embrace the enjoyment by the individual of all the God-given faculties that can make his life worth living. Included in the guaranty therefore would be his right to give full rein to all his natural attributes, to expand the horizons of his mind, to widen the reach of his capabilities, to enhance those moral and spiritual values that can

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<sup>402</sup> Article 4, International Covenant on Civil and Political Rights cited in General Comment No. 6: The right to life, paragraph 1

<sup>403</sup> *People of the Philippines vs. Leo Echagaray*, G.R. No. 117472, February 7, 1997

make his life more meaningful and rewarding. The right of reproduction, for example, and the resultant savouring of joys of parenthood, are part of the life vouchsafed to the individual under due process of law.<sup>404</sup>

**Do your national courts recognize customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.**

YES.

Apart from the Constitution, domestic laws, domestic jurisprudence and writings of legal experts, the structure of the Philippine legal system considers international laws, international customs, general principles of international laws, international jurisprudence and writings of legal luminaries as sources of laws. In fact, under Article II, Section 2 of the 1987 Philippine Constitution, otherwise known as incorporation clause, it is explicitly stated that,

“The Philippines renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land**, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”

There are scant Supreme Court decisions dealing on the issue of applying customary laws in the Philippines, however, none of them dealt with the right to life.

**What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged either in public or private projects? Has the State been required:**

- **To take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?**
  - **To provide remedies where violations have occurred?**
- I. Apart from the Constitution, the State, in several domestic laws, is given the responsibility of protecting the individuals and the environment against violations by non-State actors including violations committed by transnational corporations.

The Department of Environment and Natural Resources is the lead national agency to look into environmental concerns of the country. In addition, special governmental agencies have been created to look into specific areas of concern like the Pollution Adjudication Board, the Laguna Lake Development Authority, the Land Transportation and Franchising Regulatory Board, the National Pollution Commission and the like. Further, the local government units have the power to issue ordinances for the protection of the environment and regulate the projects and activities of these non-State actors (transnational corporations).

Firstly, the grant of license to these transnational corporations lies with the State. In some Supreme Court decisions, licenses and/or registrations were withheld in instances where it was found that the corporation has violated the environment and has failed in protecting and caring for the same. (Ysmael vs. Deputy Executive Secretary, G.R. No. 79538, October 18, 1990)

Secondly, the State has the power to issue restraining orders and/or injunctions for non-State actors found violating the environmental code. In addition, closure of these corporations and payment of damages may also be ordered. (Pollution Adjudication Board, vs. Court of Appeals, G.R. No. 93891, March 11, 1991; Technology Developers. Inc. vs.

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<sup>404</sup> Constitutional Law by Justice Isagani Cruz, pp. 98-99

Court of Appeals, G.R. No. 94759, January 21, 1991; Republic vs. Marcopper, G.R. 137174, July 10, 2000; Laguna Lake Development Authority vs. Court of Appeals, G.R. Nos. 120865-71, December 7, 1995)

Thirdly, heads or officers of these corporations may likewise be found criminally liable for negligence in their operation and violations of environmental laws. (Mustang Lumber, Inc. vs. Court of Appeals, G.R. No. 104988, June 18, 1996; Loney vs. People, G.R. No. 152644, February 10, 2006)

In the case of Mustang Lumber, the Supreme Court boldly stated that, "The Government must not tire in its vigilance to protect the environment by prosecuting without fear or favour any person who dares to violate our laws for the utilization and protection of our forests."

Fourthly, the local government units may issue ordinances protecting the environment which may have the effect of regulating non-State actors. In some Supreme Court decisions, the constitutionality of these ordinances in so far as they were made in furtherance of the right to a healthful ecology was sustained. (Taño vs. Socrates, G.R. No. 110249, August 21, 1997; *Social Justice Society, Et Al. vs. Atienza, Jr.*, GR No. 156052, March 7, 2007)

Fifthly, the legislature can enact laws to regulate projects and activities of these industries in order to protect the environment and promote the health. Further, the legislature can enact laws protecting the environment. (Province of Rizal vs. Executive Secretary, G.R. No. 129546, December 13, 2005)

Sixthly, the judiciary is tasked to interpret laws and in doing so, takes into consideration the principles enunciated in the Constitution including the right to life and health. It can declare laws and ordinances as unconstitutional. Further, the judiciary has the power to punish violators of our laws and demand reparation for damages. (Macasiano vs. Diokno, G.R. No. 97764, August 10, 1992; Republic vs. Marcopper, G.R. 137174, July 10, 2000;)

Lastly, efforts towards education of the people on the area of environment is being conducted by the state agencies as well as non-governmental organizations.

- b. In cases of violations, the Supreme Court has documented, in its decisions, instances where licenses were not granted nor renewed to these non-State actors, punishments were meted out to them and even criminal prosecutions were allowed.

**Does your country have legislation or regulations imposing human rights obligations on non-State actors? Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?**

YES.

Republic Act No.	Title	Short Title
R.A. No. 7942	AN ACT INSTITUTING A NEW SYSTEM OF MINERAL RESOURCES EXPLORATION, DEVELOPMENT, UTILIZATION AND CONSERVATION.	Philippine Mining Act of 1995
R. A. No. 9367	AN ACT TO DIRECT THE USE OF BIOFUELS, ESTABLISHING FOR THIS PURPOSE THE BIOFUEL PROGRAM, APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES.	Biofuels Act of 2006
R.A. No. 9359	AN ACT ESTABLISHING A STANDBY FUND IN THE SUM OF EIGHT HUNDRED FIFTY MILLION PESOS (850,000,000.00) FOR THE CLEAN UP OF THE GUIMARAS OIL SPILL, FOR THE RELIEF OPERATIONS FOR THE VICTIMS OF THE	

	ERUPTION OF MAYON VOLCANO, AND FOR THE EMERGENCY REPATRIATION, EVACUATION AND RELIEF OF OVERSEAS FILIPINO WORKERS AND OTHER FILIPINO NATIONALS AND FOR OTHER PURPOSES.	
R.A. No. 7657	AN ACT TO AMEND REPUBLIC ACT NUMBERED SEVENTY-SIX HUNDRED THIRTY-SEVEN ENTITLED 'AN ACT APPROPRIATING THE SUM OF TEN BILLION PESOS FOR THE AID, RELEIF, RESETTLEMENT, REHABILITATION AND LIVELIHOOD SERVICES AS WELL AS INFRASTRUCTURE SUPPORT FOR THE VICTIMS OF THE ERUPTION OF MT. PINATUBO, CREATING THE MT. PINATUBO ASSISTANCE, RESETTLEMENT AND DEVELOPMENT COMMISSION, AND FOR OTHER PURPOSES.	
R.A. No. 7637	AN ACT APPROPRIATING THE SUM OF TEN BILLION PESOS FOR THE AID, RELEIF, RESETTLEMENT, REHABILITATION AND LIVELIHOOD SERVICES AS WELL AS INFRASTRUCTURE SUPPORT FOR THE VICTIMS OF THE ERUPTION OF MT. PINATUBO, CREATING THE MT. PINATUBO ASSISTANCE, RESETTLEMENT AND DEVELOPMENT COMMISSION, AND FOR OTHER PURPOSES.	
R.A. No. 9072	AN ACT TO MANAGE AND PROTECT CAVES AND CAVE RESOURCES AND FOR OTHER PURPOSES	National Caves and Case Resources Management and Protection Act.
R.A. No. 9106	AN ACT FOR THE ESTABLISHMENT AND MANAGEMENT OF SAGAY MARINE RESERVE, DEFINING ITS SCOPE COVERAGE, AND FOR OTHER PURPOSES.	Sagay Marine Reserve Law
R.A. No. 8550	AN ACT PROVIDING FOR THE DEVELOPMENT, MANAGEMENT AND CONSERVATION OF THE FISHERIES AND AQUATIC RESOURCES, INTEGRATING ALL LAWS PERTINENT THERETO, AND FOR OTHER PURPOSES.	The Philippine Fisheries Code of 1998
R.A. No. 7586	AN ACT PROVIDING FOR THE ESTABLISHMENT AND MANAGEMENT OF NATIONAL INTEGRATED PROTECTED AREAS SYSTEM, DEFINING ITS SCOPE AND COVERAGE, AND FOR OTHER PURPOSES.	National Integrated protected Areas System Act of 1992
Presidential Decree No. 705 May 19, 1975	REVISING PRESIDENTIAL DECREE NO. 389, OTHERWISE KNOWN AS THE FORESTRY REFORM CODE OF THE PHILIPPINES	Revised Forestry Code of the Philippines
R.A. No. 9003	AN ACT PROVIDING FOR AN ECOLOGICAL SOLID WASTE MANAGEMENT PROGRAM, CREATING THE NECESSARY INSTITUTIONAL MECHANISM AND INCENTIVES, DECLARING CERTAIN ACTS PROHIBITED AND PROVIDING PENALTIES, APPROPRIATING FUNDS THEREFOR, AND FOR OTHER PURPOSES.	Ecological Solid Waste Management Act of 2000

R.A. No. 3931	AN ACT CREATING THE NATIONAL WATER AND AIR POLLUTION CONTROL COMMISSION	
R.A. No. 8041	AN ACT TO ADDRESS THE NATIONAL WATER CRISIS AND FOR OTHER PURPOSES.	National Water Crisis Act of 1995
R.A. No. 9275	AN ACT PROVIDING FOR A COMPREHENSIVE WATER QUALITY MANAGEMENT AND FOR OTHER PURPOSES.	Philippine Clean Water Act of 2004
Presidential Decree No. 1067 December 31, 1976	A DECREE INSTITUTING A WATER CODE, THEREBY REVISING AND CONSOLIDATING THE LAWS GOVERNING THE OWNERSHIP, APPROPRIATION, UTILIZATION, EXPLOITATION, DEVELOPMENT, CONSERVATION AND PROTECTION OF WATER RESOURCES.	The Water Code of the Philippines
Presidential Decree No. 979	PROVIDING FOR THE REVISION OF PRESIDENTIAL DECREE NO. 600 GOVERNING MARINE POLLUTION	
Presidential Decree No. 825	PROVIDING PENALTY FOR IMPROPER DISPOSAL OF GARBAGE AND OTHER FORMS OF UNCLEANLINESS AND FOR OTHER PURPOSES.	
Presidential Decree No. 1152	PHILIPPINE ENVIRONMENT CODE	Philippine Environment Code Title - Air Quality Management
Presidential Decree No. 1151 June 6, 1977	PHILIPPINE ENVIRONMENTAL POLICY	Environmental protection
Presidential Decree No. 1586	ESTABLISHING AN ENVIRONMENTAL IMPACT STATEMENT SYSTEM, INCLUDING OTHER ENVIRONMENTAL MANAGEMENT RELATED MEASURES AND FOR OTHER PURPOSES.	
R.A. No. 06969	AN ACT TO CONTROL TOXIC SUBSTANCES AND HAZARDOUS AND NUCLEAR WASTES, PROVIDING PENALTIES FOR VIOLATIONS THEREOF, AND FOR OTHER PURPOSES.	Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990
Executive order No. 446 September 26, 1997	MANDATING THE PHASE-OUT OF LEADED GASOLINE AS ONE OF THE MEANS OF SOLVING AIR POLLUTION.	
R.A. No. 8749	AN ACT PROVIDING FOR A COMPREHENSIVE AIR POLLUTION CONTROL POLICY AND FOR OTHER PURPOSES.	Philippine Clean Air Act of 1999.
Presidential Decree No. 984	PROVIDING FOR THE REVISION OF REPUBLIC ACT NO. 3931, COMMONLY KNOWN AS THE POLLUTION CONTROL LAW, AND FOR OTHER PURPOSES.	National Pollution Control Decree of 1976.

**If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?**

## Part 3: Activities of Your Commission

**Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health? If so, please indicate how many complaints you have received, and please describe some of the most important cases, and the role of your Commission in resolving the complaints.**

The Regional Offices of the Commission on Human Rights have received some complaints on environmental harms. Notable complaints include that of the problem of toxic wastes within the Clark Air Base area when the United States Bases left the Philippines in 1992. This affected the water system in the area and caused health problems of the residents due to contaminations of drinking water by heavy metals such as mercury and nitrates. Another complaint referred to the various mining activities in Siocon and Subanon in Mindanao by transnational companies. However, this case only indirectly tackled the issue of environment and focused more on the rights of the indigenous peoples.

The Commission on Human Rights has conducted investigations over the said complaints, prepared the reports and referred the matter to the appropriate agencies for actions. With respect to the mining complaint, however, data were likewise used during the legislative investigation on the matter.

**Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.**

The Commission has done research on this matter only with respect to legislative investigations on environmental law violations. These researches formed as basis of the Commission's position on issues affecting the environment.

**Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.**

Awareness and education campaigns are being conducted by the Commission with respect to international human rights standards including economic, social and cultural rights. However, educational campaigns specifically dealing with the right to environment has not been done so far.

**Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the Commission and the outcome of the cases. Please provide copies of any submissions and court decisions.**

In one case, the Commission has intervened on the issue of the rights of indigenous peoples. The issue on environment, however, has been dealt with indirectly since the case involved ownership, exploitation and use of ancestral lands.

In *CRUZ vs. SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES* (G.R. No. L-135385, December 6, 2000), the Commission filed a Motion to Intervene and/or to Appear as *Amicus Curiae*.

The case revolved on the issue of the constitutionality of the Indigenous Peoples Rights Act (IPRA). Petitioners assail, among others, the constitutionality of certain provisions of the IPRA and its Implementing Rules on the ground that they amount to an unlawful deprivation of the State's ownership over lands of the public domain as well as minerals and other natural resources therein, in violation of the regalian doctrine embodied in Section 2, Article XII of the Constitution.

The CHR asserts that the IPRA Law is an expression of the principle of *parens patriae* and that the State has the responsibility to protect and guarantee the rights of those who are at a serious disadvantage like indigenous peoples.

Interesting in this case is the fact that it was dismissed due to an impasse among the Supreme Court Justices. The votes were equally divided (7 to 7) and the necessary majority was not obtained, the case was redeliberated upon. However, after redeliberation, the voting remained the same. Accordingly, pursuant to Rule 56, Section 7 of the Rules of Civil Procedure, the case was dismissed.

**Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.**

In the period when the complaints are filed with the Commission, these become part of the statistics on human rights violations as reported.

**Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health? If so, in what way?**

So far, the Commission has not done any collaborative work with any agency, whether international or domestic, on the issue of the environment.

**Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?**

No legislation on environment has yet been proposed by the Commission though it acted as resource person in instances of legislative investigations on environmental harms.

However, considering that the Congress will open soon, the Commission is looking into including environmental issues in its proposed legislative agenda for the 14th Congress.

**What jurisdiction does your Commission have over the activities of non-State actors? Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?**

The Commission, under the Constitution, may investigate, on its own or upon complaint any human rights violation including the rights to life, health and the environment. Further, it may conduct research, training and education on the said rights. Finally, it may monitor compliance with international instruments relating to the same.

## Part 4: Current Situation

**Are there currently environmental problems in your country that could affect the rights to life and health, but have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?**

Over the recent years, the Philippines has been battered by several natural calamities and environmental hazards such as the Guimaras Oil Spill, St. Bernard landslide in Guinsaugon, Leyte and typhoons Milenyo and Reming not mentioning the continuous degradation of our rainforests and mineral resources.

These environmental hazards, however, have not been squarely seen as a human rights issue. One obstacle is information dissemination to the people of the connection between the environment and the right to health.

**Would the articulation of specific right to the environment be valuable in addressing threats to human life and health in your country?**

**YES.**

Filipinos act and form opinion on the basis of information available to them. Media is a very powerful medium – the television, the radio, the newspaper and now the internet, contribute so much in shaping their mindset.

While the right to environment has taken a back seat over the years, it is slowly gaining recognition especially as of late when the media continue to tackle environmental issues not only domestically but also internationally. More importantly, the connection between environmental hazards and the rights to life and health are now being expounded.

The global environmental hazards that continue to happen as well as the impending threats have alarmed everyone. Awareness and concern for the environment has pleasantly increased even among Filipinos.

# Response of the National Human Rights Commission of the Republic of Korea

## Advisory Council of Jurists Questionnaire on Human Rights and the Environment

### Documentation

#### Constitutional Basis of the Right to Environment

Article 35 of the Korean Constitution (hereafter referred to as "Constitution") explicitly stipulates rights to environment.

##### *Article 35 of the Constitution*

- (1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.
- (2) The substance of the environmental right shall be determined by Act.
- (3) The State shall endeavour to ensure comfortable housing for all citizens through housing development policies and the like.

#### Constitutional provisions relating to:

- the right to an environment of a particular quality;

N/A

- obligations with respect to the environment;

N/A

- the right to life

The right to life is not explicitly stipulated in the Constitution within duties toward the environment. However, this lack of explicit stipulation does not mean that the right to life is not recognized as a fundamental right. The general view is that the right to life is recognized as a fundamental right based on Articles 12 (personal freedom) and 37 of the Constitution.

- the relevance of international law in the domestic jurisdiction.

Due to article 6, paragraph 1 of the Constitution, which states that "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea", international law has the same standing as domestic law. That is, international law is stipulated to be subordinate to the Constitution and to have the same status as statutes established by the legislature.

#### Relevant legislation referring to:

- a right to an environment of a particular quality;

N/A

- protections against environmental harms that affect human life or health

(Please provide the full name and citation for legislation and regulations)

- Framework Act on Environmental Policy; Natural Environment Conservation Act; Management of Drinking Water Act; Toxic Chemicals Control Act; Clean Air Conservation Act; Water Quality Conservation Act; Noise and Vibration Control Act; Wastes Control Act; Promotion of Installation of Waste Disposal Facilities and Assistance, Etc.; Evaluation of Environmental Effects; Pollution
- Right to Sunlight: Building Act Article 53, Enforcement Decree of the Building Act Article 86
- Housing Development Policy: Building Act Articles 7 & 8, Housing Site Development Promotion Act

#### NGO Reports

- reports by local, national or international non-governmental organizations on environmental harms that affect the rights to life and health in your country

N/A

## Part 1: The “Right to Environment” in Your Country

1. Has a “right to environment” been recognized in your constitution or national legislation?

The Constitution recognizes the right to environment in Articles 2 (The Rights and Duties of the People), and 35.

2. Have your national courts recognized a “right to environment” as a component of other human rights? If so, please provide copies some of the most significant decisions.

As mentioned above, the Korean Constitution stipulates the right to environment as a human right, leaving the task of defining the specific content of the right up to the domestic court system. However, the Constitutional Court decided in 1977 that “the right to environment can only be recognized when the subject, object, content and method of exercise is established according to written provisions or related ordinances; thus a direct right [in the part of the plaintiff] to petition for the exclusion of disturbance cannot be acknowledged without a written provision which recognizes the right to environment as a legislative right (Constitutional Court Decision 96다56153, 1997.7.22.).” This decision does not actually deny the right to environment the status of a right; however it does view that a direct petition for violation rectification of the right to environment is not to be permitted, despite the fact that it is a right stipulated in the Constitution.

3. Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.

In the Constitution (2000헌마750), the relationship between the right to environment and the right to life is defined as the following: “...the right to environment functions in the constitution to ‘protect the prerequisites of fundamental rights’ such as the right to pursue happiness and the right to life, along with the dignity and value of the human being...” (refer to Appendix 2). Although not directly related, the following are the main cases which illustrate how considerations of the right to life affected decisions related to environmental harms: Busan High Court Decision 95카합5, 1995.5.18 (refer to Appendix 3), Constitutional Court Decision 2001헌바80, 2004.2.26 (refer to Appendix 4).

4. Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.

The scope of the right to environment comes from its definition: "The 'right to environment' as defined by the constitution is one of the innate fundamental rights necessary for a person to lead a humane life and thus maintain his/her human dignity. The term environment as used in this context encompasses **Cultural Environment**, which is the historical and cultural heritage of mankind, and the **Social Environment**, the social facilities necessary to conduct social activities." (italics added - Busan High Court Decision 95카합5, 1995.5.18, refer to Appendix 3)

Seoul District Court Decision 94카합6253, 1995.9.7 (refer to Appendix 4) is a case which shows how environmental harms have violated property rights. The decision states that "...independent from the use and management of the real estate itself, in the case that the living benefits that come from a healthy and pleasant environment be aggressively violated due to noise, vibration, and fumes, the court will deem this violation of living benefits as equivalent to a violation of real estate property rights. Hence, the court acknowledges, on the grounds of real estate property rights, the right [in the part of the plaintiff] to petition for the exclusion of disturbance."

Constitutional Court Decision 94카합6253, 1995.9.7 (refer to Appendix 5) is a case which shows how environmental harms have violated the right to pursue happiness. The decision stipulates that "the practice of the right to property needs to agree with public welfare," emphasizing the social continuity of property rights.

Constitutional Court Decision 98헌가1, 1998.12.24 (refer to Appendix 6) is a case which shows how environmental harms have violated the freedom of occupational choice. This decision demonstrates the rationale that bottled water companies could be subject to higher taxation due to the fact that they damage the environment, a public good, for their private capital gain.

## Part 2: Issues Raised in the Terms of Reference

1. How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?

The Korean Constitution does not specifically stipulate the right to life, but the grounds for the right can be found in Articles 10, 12 (par 1) and 37 (par 1), and the Court has acknowledged the right to life as a foundational right. Notably, although the court places priority on the right to life and the right to the person, Korea still permits the death penalty, and the Constitutional court is of the position that the right to life is subject to limitation in accordance with Article 24 par 2 of the Constitution. In other words, the right to life is not granted absolute standing. The National Human Rights Commission of Korea however, did acknowledge absolute standing of the right to life by recommending the abolition of the death penalty.

However, even though the Korean Court states that the right to life is subject to limitations, it still supports the view that the State has the duty to protect the right to life of the individual. To sum, the State has the duty, through action or lack thereof, to insure an individual's right to life. However, as the right to life is not recognized as a form of the right to profit, the State does not have the duty of protection to the degree that would warrant an individual to demand specific actions from the State.

2. Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.

In principle, international customary law is recognized as an origin of law in accordance with Article 6 paragraph 1 of the Constitution. However, as of now there are no priors in which international customary law has been used as a basis of decision, while there do exist

instances in which the court denied the use of international customary law as a basis of reparation claims. (Busan District Court decision 2000가합 7960 2007.2.22, Constitutional Court decision 2003헌바91 2005.3.31, Constitutional Court decision 2004헌마889 2004.12.14)

3. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in either public or private projects? Has the State been required:

- a. To take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?

N/A

- b. To provide remedies where violations have occurred?

N/A

4. Does your country have legislation or regulations imposing human rights obligations on non-State actors? Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?

N/A

5. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?

N/A

### Part 3: Activities of your Commission

1. Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health? If so, please indicate how many complaints you have received, and please describe some of the most important cases, and the role of your Commission in resolving the complaints.

The scope bestowed upon the Commission on investigating violation cases is limited to cases which violates Articles 10 or 22 of the constitution. Hence the Commission is not authorized to conduct investigations concerning complaints based on the right to environment, which is stipulated in Article 35. However, the Commission is able to express opinions or give recommendations regarding policies, laws, policies, institutions and practices related to right to life and/or health. There were a few cases that fall under this category, but the assertions made were based on appeals made against violations of the right to pursue happiness, as stipulated in Article 10 of the Constitution, rather than violations to environmental rights.

2. Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.

The Commission has not conducted any research directly studying the relationship between environmental harms and the right to life or health. Such research would likely have been done by the Ministry of Environment. However, the Commission has-in the process of establishing the NAP-undergone research towards an environmental security plan.

3. Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health? If so, please provide details of

these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.

N/A

4. Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the commission and the outcome of the cases. Please provide copies of any submissions and court decisions.

N/A

5. Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.

N/A

6. Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health? If so, in what way?

Should the Commission deem it necessary, a joint project with the private sector, government sector, and/or with the UN is possible; however this has not happened as of yet.

7. Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?

The Commission submitted to the government in 2006 the Recommendation Proposal on National Action Plans for the Promotion and Protection of Human Rights (NAP). Included in this document is the recommendation that a government policy to protect the environment should be established. The recommendation states that the "desirable direction of national policies [is to] seek to protect people's life and health and to expedite sustainable development" (NAP, p. 130). The document points out several issues which need to be addressed, such as atmospheric pollution; adequate usage of water resources; mental and physical damage caused by noise and vibration; need to decrease the emission of substances which cause global warming; environmental harms due to development and the threat it poses against the right to life and health; need for more education to enhance awareness that a clean environment is a basic right as well as being an obligation towards future generations; and the need to secure transparency.

The Commission thus recommended to the government the following core projects: 1) Pursue well-coordinated inter-departmental policies to improve the air condition, expand the scope of environmental substance control and introduce stricter standards; 2) Guarantee adequate use of water resources and commission an integrated organization to take charge of water control; 3) Minimize mental and physical damages caused by noise and vibration by revising the Framework Act of Environmental Policy and complementing the environmental standards under the Noise and Vibration Control Act; 4) Cope with climate changes appropriately and pursue environmental-friendly energy control policies by putting forward specific CO2 emission targets; 5) Reflect the results of an environmental impact assessment regarding state-led projects fully and improve the legal and institutional system to prevent any damage to the ecological system; 6) Provide accurate information to prevent any dispute and environmental issue related with government projects and guarantee the procedural rights of local residents who are affected by such development projects; 7) Strengthen education that the right to a clean environment is a basic right of human being and also constitute an obligation for the protection of the rights of future generations.

8. What jurisdiction does your Commission have over the activities of non-state actors? Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?

The Commission does not exercise direct jurisdiction over the activities of non-governmental actors. The Commission is authorized to conduct direct investigations of governmental actors and non-governmental actors in cases where there has been a violation of people's civil and political rights (in the case of the former) or where discriminatory actions have taken place (in the case of the latter). As the authority of the Commission to improve policies, laws, policies, institutions and practices comes from making recommendations to government institutions, the Commission may make a recommendation to the government to change the relevant law or policy in response to an action of a non-state actor. In terms of human rights education, the Commission may conduct human rights education programs to the civil society. However, such educational programs on rights to the environment to non-governmental actors have not yet taken place.

#### Part 4: Current Situation

1. Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If so, what obstacles exist to addressing the human rights consequences of these environmental problems?

N/A

2. Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?

# Response of the National Human Rights Commission of Thailand

Advisory Council of Jurists  
Questionnaire on Human Rights and the Environment

## Documentation

Please send the following documentation to the APF Secretariat by email or by mail:

### Constitutional provisions relating to:

1. the right to an environment of a particular quality;
2. obligations with respect to the environment;
3. the right to life
4. the relevance of international law in the domestic jurisdiction.

Answer:

The Constitution B.E. 2540 (1997) was abrogated by the coup d'état on 19 September 2006. At present, the new Constitution is in the drafting process, which requires public referendum by September 2007. The first draft Constitution was now completed and is being in the process of public hearings. The draft mentioned the right related to environment as follows:

Section 4 The human dignity, right and liberty of people shall be protected as provided by the Constitution, traditions of a democratic regime of government with the King as Head of the State, and international obligations to which Thailand is party.

Section 32 A person shall enjoy the right and liberty in his or her life and person.

...

In case of the infringement of rights and liberty as indicated, the affected person, the public prosecutor or his/her representative can sue in the court in order to cease or abolish the act of infringement, and to indicate appropriate means as remedial measures.

Section 59 A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organization before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions which will be taken into consideration of such matter.

As for the social, economic, political and cultural planning, the appropriation of immovable property, the city planning, the demarcation of land use, and the issuance of regulations which may significantly affect people's interest, the State shall organize the public hearing procedure prior to the implementation.

Section 65 Persons so assembling to be a community, a local community or traditional local community shall have the right to preserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, preservation and exploitation of natural resources and the environment in a balanced and sustainable fashion.

Section 65 The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated, the public hearing procedure of people whose interest is affected is implemented, and opinions of an independent organization consisting of representatives from private environmental organizations and from higher education institutions providing studies in the environmental field are obtained prior to the operation of such project or activity.

The right of community to sue a State agency, State enterprise, local government organization or other State authority which is a juristic person to enforce its compliance with this provision shall be protected.

**Relevant legislation referring to:**

- 1. a right to an environment of a particular quality;**
- 2. protections against environmental harms that affect human life or health**

**(Please provide the full name and citation for legislation and regulations)**

Answer:

There are a number of legislation and regulations with the objective to conserve and enhance the quality of environment, which in effect protect people's life and health. For example,

The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992)

The National Environmental Quality Act B.E. 2535 is instrumental to the environment protection in Thailand. The law relates to the designation of pollution control areas, the establishment of pollution control standards from sources, the categorization of pollution control source as controlled emissions, the effluence or waste disposal, the establishment of the **Pollution Control Committee** to formulate policy and plan, the co-ordination for remedies of pollution problems and the prescription of possible pollution prevention measures chaired by the Permanent Secretary of Ministry of Science, Technology and Environment (MOSTE). As a result of the Act, the criteria, methods and conditions of pollution management were stipulated with the Penal Provisions in case of violation or refusing to comply. Up to now, MOSTE has issued several Ministerial Notification, Ministerial Regulation and National Environmental Board (NEB) Notification such as Motor Vehicle Noise Emission Standards, Black Smoke and Carbon Monoxide (CO) Emission from Motor Vehicle Standards, Hydrocarbon Emission from Motorcycle Standards, standards to control the effluence from some types and some sizes of buildings, Notifications to categorize type of buildings as pollution sources to control the waste water discharge to public water resources and environment, including the Coastal Water Quality Standard and Surface Water Quality Standard.

The Factories Act B.E. 2535 (1992)

The Act authorized the Pollution Control Department (PCD) to establish standards and criteria to control the factory operations; especially the standards and methods to control the disposal of waste, pollution or any contaminants caused from factory operation that impact the environment. Under the Factory Act, the Ministry of Industry (MOI) can also issue the Ministerial Regulation about the disposal of solid waste and garbage, to forbid wastewater discharge and emission from factories, and the guideline for having treatment facility, and also to establish noise level not exceed the EPA standard.

The Hazardous Substances Act B.E. 2535 (1992)

The Act describes hazardous substance control criteria for import, production, transportation, consumption, disposal and export not to influence and danger to human, animals, plants, properties or environment. The Ministry of Industry (MOI) categorizes the hazardous substances into 4 types for use to control correctly and appropriately and formulates Hazardous Substances Information Center to coordinate with other government agencies in part of hazardous substances information and stipulation of the criteria and methods to register hazardous substances.

There are also other legislations which are concerned with environmental protection such as

1. The Industrial Estate Authority of Thailand Act B.E. 2522 (1979)
2. The Land Transportation Act B.E. 2522 (1979)
3. The Industrial Products Standards B.E. 2511 (1968)
4. The Petrol Act B.E. 2521 (1978)
5. The Land Traffic Act B.E. 2535 (1992)
6. The Highway Act B.E. 2535 (1992)
7. The Building Control Act B.E. 2522(1979) and B.E. 2535 (1992)
8. The Energy Conservation Promotion Act B.E. 2535(1992) and

In addition, **the National Health Act B.E. 2550 (2007)** stipulates that a person shall have the right to live in the environment and surroundings which are conducive to health, and a person shall have a duty in co-operation with State agencies for the environment and surroundings as such.

### **NGO Reports**

- 1. reports by local, national or international non-governmental organisations on environmental harms that affect the rights to life and health in your country**

Answer:

There are a number of reports on environmental harms conducted by government agencies, NGOs, academic institutions and the Commission, most of which are in Thai. Some English papers may be obtained from the website of the Pollution Control Department of the Ministry of Natural Resources and Environment at <http://www.pcd.go.th>

## Part 1: The “Right to Environment” in Your Country

- 1. Has a “right to environment” been recognized in your constitution or national legislation?**

Answer:

Yes. In Thailand, the right to live in safe environment is recognised in the National Health Act, which stipulates that that a person shall have the right to live in the environment and surroundings which are conducive to health. Similarly to the Constitution B.E. 2540 (1997), the draft Constitution also stipulates that the traditional community shall have the right to participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced and sustainable fashion. (See details in the Documentation Part 1)

- 2. Have your national courts recognized a “right to environment” as a component of other human rights? If so, please provide copies some of the most significant decisions.**

Answer:

Similar to the 1997 Constitution, Section 27 of the draft Constitution stipulates that rights and liberties recognized by the Constitution shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws. Consequently, the right of community related to the environment (See the draft Constitutional provisions above) shall be recognised by the Courts.

In a Supreme Court's ruling of case in 1997, concerning the complaints against the new airport construction, a part of the ruling referred that rights and duties in the preservation and exploitation of natural resources and environment are recognised by the 1997 Constitution. A person shall have 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 such as flood, traffic congestion, air pollution, heat discharged from buildings.

**3. Have your national courts recognized that environmental harms have violated the rights to life or health? If so, please provide copies of some of the most significant decisions.**

Answer:

In addition to the aspect of safe environment (see answer to question 2), the 1997 Constitution and the draft Constitution recognised the right to environment in relation with the community right. This is because Thailand is an agricultural country and located in a tropical forest area, the environment and natural resources are intertwined and essential to people's livelihood. There are a good number of exemplary cases of ethnic and rural communities with well-established traditional practices for sustainable livelihoods and natural resource management in the country. It can be said that people's life, especially those living in the upcountry, are based on the sustainable use of abundant natural resources of the tropical forest environment. The depletion of the natural resources and environment, therefore, inevitably affects people's basic rights in various respects, especially the right to life. In this sense, the Court will also make decisions in accordance with provisions as stipulated in the former 1997 Constitution and also in the draft Constitution. Furthermore, since the Thai legal system is based on the civil law tradition, the courts will recognise the rights as stipulated by a number of legislations which protect the right to life and health, such as the National Health Act.

**4. Have your national courts recognized that environmental harms have violated human rights other than the rights to life and health? If so, please provide copies of some of the most significant decisions.**

Answer:

See answers to questions 1-3 above.

## Part 2: Issues Raised in the Terms of Reference

**1. How has the right to life been interpreted by various actors (e.g. your Commission, the Courts) in your country? What positive obligations have been placed on the State to protect this right?**

Answer:

The Commission broadly interpreted the right to life, which includes livelihood, ways of living, and living with human dignity.

As for the courts, the interpretation and their rulings will be based on the written law, such as Section 32 of the draft Constitution, which is similar to Section 31 of the 1997 Constitution, stipulates that a person shall enjoy the right and liberty in his or her life and person. In addition, Section 27 of the draft Constitution stipulates that rights and liberties recognized by the Constitution shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws.

As for the positive obligation, in the part of Directive Principles of Fundamental State Policies in the 1997 Constitution, a number of measures are indicated to ensure the fair trial in the judicial process and to increase people's quality of life. For example, the State shall

- a. ensure the compliance with the law,
  - b. protect the rights and liberties of a person ,
  - c. provide efficient administration of justice,
  - d. protect and develop children and the youth and promote the equality between women and men,
  - e. provide and promote standard and efficient public health service,
  - f. promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of the environment in accordance with the persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life,
  - g. implement fair distributions of incomes.
- 2. Do your national courts recognise customary international law as a source of law to be complied with? Include any cases that refer to rules of customary law as establishing the scope of the right to life.**

Answer:

In addition to Answer to Question 3 in Part 1, previous Constitutions did not specifically mention the relevance of international law in the national judicial process. Traditionally, the Thai legal system subscribes to dualistic system, whereby international obligations can be applicable by courts and administrative authorities only through any transformation into domestic statutes. For example, Section 32 of the 1997 Constitution as well as the draft Constitution stipulates that a torture, brutal act, or punishment by a cruel or inhumane means shall not be permitted.

Nevertheless, Section 4 of the draft Constitution now stipulates that the human dignity, right and liberty of the people shall be protected as provided by the Constitution, traditions of a democratic regime of government with the King as Head of the State, and international obligations of which Thailand is party. If the draft Constitution passes the public referendum in September, the international obligations related to human rights will be automatically applicable to domestic judicial process.

- 3. What obligations does the State have in your country to protect individuals against violations of their rights by non-State actors engaged in either public or private projects? Has the State been required:**
- a. **To take steps to prevent potential harms, for instance, by regulating industry, or by providing the public with information about threats to their life or health?**
  - b. **To provide remedies where violations have occurred?**

Answer:

Concerning environmental issues, there are a number of laws and regulations which require non-State actors such as factory owners or industrialists to abide by environmental standards. For example, the Factory Act B.E. 2535 authorized state agencies to cease factory operation which cause serious harm, damages, or troubles to persons, properties in areas close to it or the factory which gives the adverse impacts to the environment. The industrial entrepreneurs cannot continue their operation until such time that they have remedial measures to improve the factory to comply with the standards set up by the laws concerned. In addition, a regulation issued in accordance with the Hazardous Substance Act B.E. 2535 set up license application procedures, principles of production location, storing, importing and exporting, and possession of hazardous substances under the responsible state agency. In case of violation, the

hazardous substances will be seized by the Court's order and delivered to the responsible state agency for destruction or other forms of management which deem appropriate.

In addition, the 1997 Constitution, Section 56 stipulates that any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impact on the quality of the environment have been studied and evaluated and opinions of an independent organization. In the new draft Constitution, it adds up that such project or activity requires conducting the health impacts assessment (HIA) and cannot be implemented prior to the public hearing procedure.

In sum, the State has responsibility and authority to prevent harms or damages which are caused by non-State actors as prescribed by the Constitution and laws concerned.

**4. Does your country have legislation or regulations imposing human rights obligations on non-State actors? Have your national courts found that non-State actors have obligations to protect the rights to life and health against environmental harms arising from their activities?**

Answer:

Yes. (See details in Part of Documentation.) As far as the information is available, there is no courts' ruling directly involved with human rights obligations on non-State actors related to the rights to life and health against environmental harms. The courts issued rulings as they applied and interpreted the legislation related to safe environment and health without direct linkages to human rights.

**5. If your country is facing environmental threats to human life or health caused by activities occurring outside your country, what steps have been taken to address these problems? Have your national courts imposed any obligations on the State to protect against harms to human rights that originate outside the State?**

Answer: There are two aspects which should be considered when dealing with transboundary environmental problem.

First, in terms of international relations and administration, the Thai government preferred to deal with it in a cordial manner such as the case of haze caused by Indonesia some years ago with impacts on other ASEAN countries. The issue has been discussed, among others, within the framework of cooperation on environment to address the problem. They issued a statement to enhance co-operation to manage natural resources and control transboundary pollution within ASEAN region as "one eco-system". In addition, they expressed concerns over the increasing periodicity and worsening impact of the haze in the region and agreed to prevent and control the haze problem.

Second, in terms of obligations of State, it is necessary to consider Thailand's obligations related to environmental conservation, which varied with treaties to which Thailand is party. For example, Thailand is party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989. In its ratification instrument, Thailand defines the "area under the national jurisdiction of states" as any land, marine area or airspace within which a State exercises administrative and regulation responsibility in accordance with international law in regard to the protection of human health or the environment. In this case, the Thai government's responsibility will be based on territoriality or spatiality principle, excluding some other aspects in accordance with "jurisdiction of states" such as nationality principle, preventive principle, universality principle or treaty principle. Subsequently, the State is unable to act against any environmental threats which do not occur within the State's responsibility of the defined jurisdiction,

In addition, in the same vein of other international obligations, it requires that they must be transformed into domestic statutes for the application of national courts.

## Part 3: Activities of your Commission

- 1. Has your Commission received complaints from individuals or groups claiming that environmental harms, including harms caused by non-State actors, have affected their right to life or health? If so, please indicate how many complaints you have received, and please describe some of the most important cases, and the role of your Commission in resolving the complaints.**

Answer:

Under Section 22 of the National Human Rights Act, the Commission has authority to examine the commission or the omission of acts which violate human rights committed by both State and non-State actors.

Since 2002, the NHRC received approximate 160 cases concerning the right to environment, some of the cases are as follows:

### **Case 1: Harms caused by State actor**

A group of locals filed a complaint to the NHRC that the local administration dumped waste close to their living area. They claimed that they were afraid that after a long period of dumping, the fluid from the waste might flow into the local river, where they use for everyday life. The locals also claimed about the bad smell of the dumping and asked the NHRC to be a moderator between state agency and the community.

At present, the case is still under investigation.

### **Case 2: Harms caused by Non-State actor**

A group of locals in the Tak province, a northern province of Thailand, filed a complaint to the NHRC claiming that orange farming by big companies which belonged to influential businessmen caused many environmental problems. This includes trespassing common public land, damaging water system and creating agrochemical overflow.

Later, the government appointed 6 working teams to find out solutions including health and environmental impacts from the operation of orange farm. At present, the NHRC works closely with local NGOs in monitoring their works and gives recommendations, when any outcome might impact the locals.

- 2. Has your Commission conducted research on the connection between environmental harms and the rights to life or health? If so, please provide the results of this research.**

Answer:

The mandate of the National Human Rights Commission for the promotion and protection of the right to environment may be seen as connected to three other categories of rights. These included right to life, right to health and community right.

There are two Sub-Commissions: the Sub- Commission on Land and Forest Management and the Sub-Commission on Water and Mineral Resources which deal directly with environmental issues. During the years, they conducted many researches, for example, the three dwellings of rivers project.

For several years now, Thailand is facing water shortage problem. Some of the main reasons included the expansion of the major cities and the higher demand on dry-season crops growing. When water shortage happens in the water basin areas, some of the water gates were ordered close. The closure affects villagers in many ways.

This is because, normally, the delta part of the river is the most fertile part of the river since clay and mud are collected around the area. When closed, the water changes its way and affects the fertility and destroys ecosystem around it. Therefore, the fishery community who depends their living on it was forced to change their livelihood or was forced to move away.

The two Sub-Commissions conducted researches on the matter and later, gave recommendations to the government, at both local and policy level.

**3. Has your Commission undertaken awareness and education campaigns relating to environmental harms affecting the rights to life or health? If so, please provide details of these campaigns, identify the individuals or groups who have been trained and estimate how many people have been trained.**

Answer:

Yes. Under the responsibility of the two Sub-Commissions related to right to environment i.e. the Sub- Commission on Land and Forest Management and the Sub-Commission on Water and Mineral Resources, a great number of seminars were held with the objectives to raise awareness on people's right to environment and to build up a stronger network among parties concerned, particularly local communities.

For example, the seminar on water resource management of the lower Khong River was held in 2005 with approximate 50 attendees from the government sector, NGOs and locals. Starting from 2002, the Burmese, Thai, Laos and Chinese governments agreed to burst the River Khong islets to change the river way in order for better transportation. When 21 islets were destroyed, a number of locals gathered to protest, claiming that the project affected their way of living. They claimed that should all the islets were destroyed, they would not be able to do fishery as used to because water would change ways. The Sub-Commission held a seminar with objectives to discuss the problem with the full recognition and realization of the right to environment within communities. The seminar will provide as much time as possible for discussion. Participants were asked to divide into groups according to their problems or rights which were violated, and to discuss the solution among themselves. The Seminar also served as bridge where parties concerned can come for the open discussion and people can expand their networks to protect their own community right and their ways of living.

**4. Has your Commission intervened in court proceedings on the issue of the environment and the rights to life and health? If so, please provide details of the cases, the role of the commission and the outcome of the cases. Please provide copies of any submissions and court decisions.**

Answer:

Section 22 of the National Human Rights Act does not authorize the NHRC to intervene in court proceedings. It said that the Commission shall have the duties to examine and propose remedial measures for the commission or the omission of acts which violate human rights and which is not a matter being litigated in the Court or that upon which the Court has already given final order or judgement.

**5. Has your Commission addressed the effect of environmental harms on the rights to life and health in its annual reports or in any other reports? If so, please provide a copy of the relevant sections.**

Answer:

In its latest annual report in Thai (2004), the number of complaints received by the NHRC was categorized into areas. The statistics showed that 6.5 per cent of cases were related to the right to environment and health. The NHRC expressed its concern that the right to environment in Thailand is outstanding in terms that the problem has impacts on local communities collectively, such as the denial to get access to water or forest when the State initiated projects or announced the land for conservation. The NHRC also addressed the effects of environmental

harms on the rights to life and health in other reports on specific issues (in Thai), which has been produced consistently. These reports were normally prepared in collaboration with academic institutes, NGOs and local communities.

**6. Does your Commission work in collaboration with civil society, including the private sector, government or U.N. agencies or multilateral donors, such as the World Bank, on the issue of environmental harms affecting the rights to life and health? If so, in what way?**

Answer:

The NHRC normally works through a three-pronged approach, which requires the collaboration between the NHRC, the academic institutions and civil society groups. The Sub-Commissions appointed by the NHRC, including the Sub-Commission on Land and Forest Management and the Sub-Commission on Water and Mineral Resources, comprise a number of academics and civil society members.

**7. Has your Commission proposed legislation or regulations relating to environmental harms that affect the rights to life and health, or helped to develop a national policy?**

Answer:

In 2004, the NHRC gave recommendations to the government concerning the problem of shortage of water in the eastern part of Thailand. At the time, there was an immense problem of water shortage in the region, especially in Rayong province. Part of the problem was caused by the Eastern Seaboard, the country's biggest industrial zone, where water resources was highly on demand.

Not only the entrepreneurs in the industrial zone were affected by the shortage of water but also the villagers with majority of farmers were. However, when the government short-term solution was to divert water from the province's rivers to the reservoirs, the environmental impact assessment (EIA) was not planned to be conducted. The NHRC's investigation found that at the stage, the water diversion was not necessary and might cause more negative impacts to farmers and vast agricultural areas. The NHRC then also asked the project to be prolonged; and if the measure is undertaken, villagers and all stake holders should have a chance to participate in the decision making process.

**8. What jurisdiction does your Commission have over the activities of non-State actors? Has your Commission undertaken any activities to address environmental harms caused by non-State actors that are affecting the rights to life or health?**

Answer:

The National Human Rights Act authorised the NHRC to investigate human rights violations committed by State and non-State actors. In accordance with Section 32, the NHRC can summon a person, juristic or private agency concerned to give statements or to deliver objects, documents or other related evidence at the date, time and place as specified.

As stated above that the NHRC received about 160 cases related to environmental issues, especially on industrial development and many of which caused by non-State actors. In addition to investigation and recommendations given to parties concerned, the NHRC in collaboration with academic institutes such as Thailand Environment Institute conducts researches to support the prevention and protection of villagers' rights, and disseminate the results in order to increase social awareness on the issues.

## Part 4: Current Situation

**a. Are there currently environmental problems in your country that could affect the rights to life and health, but that have not been addressed as human rights issues? If**

**so, what obstacles exist to addressing the human rights consequences of these environmental problems?**

Answer:

Yes. To the NHRC's experience of a number of cases, the public and private projects are undertaken without due consideration of affected people, especially their right to get information and participants into the decision-making process despite its guarantee by the Constitution and legislations concerned. The major obstacles is the lack or ineffectiveness of law enforcement, and the government's policies which usually give more emphasis on economic growth without due consideration of impacts on environment, natural resources depletion and the impacts on local people's livelihood.

Among others, there are some major discrepancies within the system which needs to be addressed including:

1. the lack of appropriate environmental education that incorporates aspects of local people's knowledge/wisdom
2. the lack of knowledge, either from inadequate research or from inaccessibility of existing knowledge due to inadequate database system
3. the existing approach to assessing and solving environmental problems is fragmented with lack of coordination between concerned agencies and lack of consultation with local people
4. the decision-making processes and environmental management implementation are not transparent and are monopolised by influential people such as politicians and business entrepreneurs, excluding other such as members of local communities.

**b. Would the articulation of a specific right to the environment be valuable in addressing threats to human life and health in your country?**

Answer:

To articulate a specific right to environment can be useful to the works of the Commission, as well as the promotion and protection of human rights in general. However, it is important to have a clear definition and interrelatedness with other aspects of rights apart from the right to life and safe environment. The right to environment should also be considered in conjunction with environmental and natural resource management both at local, national and international levels. This includes the right to get access to information and public participation in the decision-making process, international co-operation and assistance.

## PART 4 - ANNEXURES

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## Annex 1 - Human Rights and the Environment in International Environmental Instruments<sup>405</sup>

1972	<p><b>UN Conference on the Human Environment Declaration – The Stockholm Declaration</b> Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.</p>
1977	<p><b>Protocol 1 Additional to the Geneva Conventions of 1949 Article 35.3 and 55.</b> 35. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. 55. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.</p>
1981	<p><b>African Banjul Charter on Human and Peoples Rights.</b> Article 24: <b>All peoples</b> shall have the right to a generally satisfactory environment suitable favourable to their development.</p>
1983	<p><b>World Commission on Environment and Development and Report: Proposed Legal Principles for Environmental Protection and Sustainable Development</b> Principle 1: All human beings have the fundamental right to an environment adequate for their health and well-being.</p>
1988	<p><b>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights – Protocol of San Salvador.</b> Article 11 <b>Everyone</b> shall have the right to live in a healthy environment and to have access to basic public services. The parties shall promote the protection and preservation of same.</p>
1989	<p><b>European Charter on the Environment and Health</b> Every individual is entitled to information and consultation on the state of the environment.</p>
	<p><b>International Summit on the Protection of the Global Atmosphere - Hague Declaration on the Environment</b> The right to live is the rights from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world.</p>
	<p><b>The Convention on the Rights of the Child (New York, November 20, 1989)</b> Article 24. Consideration of the dangers and risks of environmental pollution to health and disease. Provision of information and education on hygiene and environmental sanitation.</p>
1990	<p><b>EU Directive on Freedom of Access to Information on the Environment.</b> Access to information that relates to the state of the environment; activities or measures adversely affecting or likely so to affect the environment; (Art 2(a)).</p>
	<p><b>The Bangkok Declaration, adopted 16 October 1990</b> Reference to right to information and consultation on environmental issues.</p>
	<p><b>UNGA Resolution 45/94</b> Declares that all persons have the right to live in an environment which is adequate to ensure their health and welfare.</p>
1991	<p><b>Arab Declaration on Environment and Development and Future Perspectives of September 1991</b></p>

<sup>405</sup> The table is not intended to be exhaustive, but rather to give an indication of the types of issues and instruments considered, and the manner in which they have incorporated different human rights related issues.

	Reference to right of individuals and NGOs to acquire information about environmental issues.
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1992	<b>Rio Conference on Environment and Development, (also known as Earth Summit 1992). The Rio Declaration</b> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.
	<b>UN Framework Convention on Climate Change</b> Article 4(1)(i) and Article 6. The latter provides for the promotion and facilitation of public access to information and public participation.
	<b>Protocols- International Conventions on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and Civil Liability for Oil Pollution Damage</b> Provision of remedies for those who suffer harm from oil pollution damage.
	<b>Convention on Biological Diversity</b> Article 14(1)(a): public participation in environmental impact assessment procedures.
1994	<b>UN Commission for Human Rights (Ksentini) Report and Draft Principles On Human Rights And The Environment . Draft Principles on</b> All persons have the right to a secure, healthy and ecologically sound environment, (Art 2).
	<b>International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, June 17, 1994)</b> Public participation.
1996	<b>International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, May 3, 1996).</b> Remedy for those injured by damage.
1996	<b>ICJ. Legality of the Threat or Use of Nuclear Weapons Advisory Opinion.</b> The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
1997	<b>IAEA Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.</b> Information available to members of the public.
	<b>RIO +5</b> UNGA special session: 'the achievement of sustainable development requires the integration of its economic, environmental and social components'.
	<b>UN Convention on the Law of the Non-navigational Uses of International Watercourses (New York, May 21, 1997)</b> Remedies for persons who suffered or are under a serious threat of suffering significant transboundary harm. Freedom from discrimination in this respect.
	<b>Institute of International Law</b> All human beings have the right to live in a healthy environment.
	<b>Joint Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage (21 May 1963) and the Paris Convention on Third Party Liability in the Field of Nuclear Energy (29 July 1960) Remedies for those injured as a result of nuclear incidents.</b>
1997	<b>ICJ. Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 92. Judge Weeramantry separate opinion.</b> 'The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments'.
1998	<b>Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (September 10, 1998).</b> Article 15(2) public has 'appropriate' access to information on chemical handling and accident management.

1999	<p><b>Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: the Aarhus Convention</b>  The preamble refers to the right of every person “to live in an environment adequate to his or her health and well-being”.  The text provides detailed procedural rights regarding access to information.</p>
	<p><b>UNESCO International Seminar on the Right to the Environment. Declaration on the Right to the Environment, (Bizkaia Declaration):</b>  Article 1: the right of everyone, individually or in association with others, to enjoy a healthy and ecologically balanced environment.  Article 2: the duty of everyone to protect the environment and to foster environmental protection at both national and international levels.</p>
2001	<p><b>Treaty for the Establishment of the East African Community</b>  Article 111 proclaims that “a clean and healthy environment is a prerequisite for sustainable development.”</p>
	<p><b>Convention on Persistent Organic Pollutants (Stockholm, May 22, 2001)</b>  Article 10(1) of the  The treaty provides that each Party shall, within its capabilities, provide information, education and participation.</p>
	<p><b>Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2001</b>  Access to environmental information, public participation in environmental decision-making and access to justice regarding the aforementioned and or environmental law in general.</p>
2002	<p><b>World Summit on Sustainable Development, (Also known as WSSD, Earth Summit 2002, Rio +10)</b>  Johannesburg Declaration: ... assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection.  Para 18: [recognising] the indivisibility of human dignity ... resolved to ... access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity.</p>
	<p><b>OHCHR/UNEP Expert Seminar on Environment and Development</b>  Organised to review and assess progress since the United Nations Conference on Environment and Development 1983, recommended supporting the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law.</p>
2005	<p><b>National Constitutions</b>  109 of 193 national constitutions recognize the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm.  Of these:  - 56 Constitutions explicitly recognize the right to a clean and healthy environment,  - 97 Constitutions make it the duty of the national government to prevent harm to the environment.  - 56 Constitutions recognise a responsibility of citizens or residents to protect the environment,  - 14 Constitutions prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm.  - 20 Constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury.  - 16 Constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.”</p>