

# **Human Rights and the Environment**

**Proceedings of a Geneva Environment Network roundtable**

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## **Key questions concerning the human rights and environment debate**

### **An introduction**

*By Franz Xavier Perrez, Head of Section, Global Affairs, International Division, Swiss Agency for the Environment, Forests and Landscape*

Human rights became a focus of international law long before environmental concerns did. While the United Nations Charter of 1945 marked the beginning of modern international human rights law, the Stockholm Declaration of 1972 is generally seen as the starting point of the modern international framework for environmental protection.<sup>1</sup>

Despite their separate beginnings, human rights law and environmental law have an important element in common: they are both seen as a challenge to, or limitation on, the traditional understanding of state sovereignty as independence and autonomy.<sup>2</sup> However, while the traditional debate on sovereignty has conceived of human rights and environmental law as limitations on, or even as threats to, the State's freedom and independence, a more contemporary approach recognizes that protecting both human rights and the environment does not limit the State's sovereignty, but rather provides an expression of this sovereignty.<sup>3</sup> Moreover, from today's perspective, it seems obvious that human rights and the environment are inherently interlinked, as the life and the personal integrity of each human being depends on protecting the environment as the resource base for all life.

It is therefore not surprising that the international community is addressing the linkages between human rights and environmental rights. The relationship between the quality of the human environment and the enjoyment of basic human rights was first recognized by the UN General Assembly in the late 1960s.<sup>4</sup> In 1972, the United Nations Conference on the Human Environment (UNCED) made a direct link between the environment and the right to life.<sup>5</sup> Ten years later, the World Charter on Nature explicitly referred to the right of access to information and the right to participate in environmental decision-making.<sup>6</sup> And a decade after that, in 1992, the Rio Declaration acknowledged the right to a healthy and productive life in harmony with nature and the right of access to environmental information and of public participation in environmental decision-making.<sup>7</sup> Most recently, however, the 2002 World Summit on Sustainable Development in Johannesburg simply acknowledged the consideration being given to the possible relationship between environment and human rights.<sup>8</sup>

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<sup>1</sup> SANDS, *Principles of International Environmental Law*, 292ff (2003).

<sup>2</sup> See generally: FRANZ XAVIER PERREZ, *COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW* 46-64 (2000), W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866 (1990).

<sup>3</sup> PERREZ, *COOPERATIVE SOVEREIGNTY*, supra note 2, at 331-343.

<sup>4</sup> UNGA Resolution 2398 (XXII) (1968).

<sup>5</sup> *Declaration of the United Nations Conference on the Human Environment*, Preambular para. 1 and Principle 1, reprinted in: 11 I.L.M. 1416 (1972).

<sup>6</sup> World Charter for Nature, paras 15-16, 23, available at: <http://www.un.org/documents/ga/res/37/a37r007.htm>.

<sup>7</sup> *Rio Declaration on Environment and Development*, Principles 1 and 10, reprinted in: 31 I.L.M. 876 (1992).

<sup>8</sup> *Johannesburg Plan of Implementation*, § 169, available at: <http://www.johannesburgsummit.org>. For a short overview and discussion of the results of the WSSD, see generally: Franz Xavier Perrez, *The World Summit on Sustainable Development: Environment, Precaution and Trade - A Potential for Success and/or Failure*, in: 12 REVIEW OF EUROPEAN & INTERNATIONAL ENVIRONMENTAL LAW (RECIEL) 12-22 (2003).

The linkage between human rights and environmental concerns embrace at least three dimensions:

- The right to a healthy environment is a fundamental part of the right to life and to personal integrity.
- Environmental destruction can result in discrimination and racism.<sup>9</sup> Thus, socially and economically disadvantaged groups seem to live more often than other groups do in areas where environmental problems pose a real threat to human health.
- Procedural human rights such as access to information, access to justice and participation in political decision-making are often crucial for ensuring policies that respect environmental concerns.

However, while the linkage between human rights and environmental concerns seem to be obvious, the issue of linkages does raise a number of useful and legitimate questions:

- Would a focus on environmental rights as human rights not imply a shift of paradigm away from the recognition that the environment has its own value independent of its utility for humans and towards a purely anthropocentric approach to the environment?<sup>10</sup>
- What are the benefits from a human-rights perspective to adding environmental concerns to the traditional human rights concerns? Is there not a risk that the limited resources that are available for protecting basic human rights will become too widely dispersed?
- What are the benefits from an environment perspective? Do those concerned with international environmental policy-making have the time and resources to enter the human rights debate, or should they instead focus their resources on core environmental challenges?
- Are there benefits from an overall perspective, e.g. with regard to institutional or governance issues?

The Geneva Environment Network (GEN) organized a roundtable in March 2004 on Human Rights and the Environment to address these important questions and concerns. First, *Yves Lador* gave an overview of the concept of environmental human rights. He stressed that human rights cannot be protected unless the environment people live in is also protected, and that environmental rights can often be implemented properly only when human rights are respected. The two areas of human and environmental rights are inherently linked and should therefore be approached in a coherent and co-ordinated way.

Next, *Marc Pallemaerts* demonstrated through the example of the Aarhus Convention the “proceduralization” of environmental human rights. Proceduralizing environmental rights can enable substantive environmental rights to enter the human rights debate through the back door. *Philippe Sands* then provided an overview of how international courts have addressed environmental human rights. By addressing environmental concerns, these courts have had to balance environmental interests with competing interests.

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<sup>9</sup> Concerning environmental discrimination, see e.g: GÜNTHER BAECHLE, *VIOLENCE THROUGH ENVIRONMENTAL DISCRIMINATION* (1999); P. Mohai and B. Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921-32 (1992)

<sup>10</sup> Concerning different anthropocentric and non-anthropocentric environmental ethics, see generally: R. ELLIOT (ed.), *ENVIRONMENTAL ETHICS* (1995); Jens Petersen, *Anthropozentrik und Ökozentrik im Umweltrecht*, 83 ARSP 361 (1997).

*Jona Razzague* presented the results of case studies of how environmental human rights have been implemented at the national level in India, Bangladesh and Pakistan. In all three countries, the national courts have taken an active role in confirming that the right to life includes the right to a healthy environment. Finally, *Stefano Sensi* offered an overview of how the official human rights bodies have addressed environmental concerns and environmental human rights.

Following the presentations, the roundtable participants discussed how and whether the “proceduralization” of environmental human rights could offer the best opportunity for promoting the mutual supportiveness between environment and human rights policies. Focusing on substantive environmental human rights such as a right to a clean environment could hardly replace the adoption of clear and concrete environmental rights and standards. However, procedural human rights such as the access to information, access to justice and participation in decision-making can clearly facilitate and advance efforts for protecting the environment.

At the same time, effective environmental policies that prevent the deterioration of the natural resource base upon which people depend are a crucial precondition for assuring that we can benefit from our basic human rights. Linking environmental and human rights concerns may encourage increased public attention and facilitate pressure on governments to act. At the same time, although bringing environmental rights into the human rights context will not necessarily strengthen purely environmental concerns, it can ensure a better balance between environmental concerns and other interests such as social or economic rights.

## **The challenges of human environmental rights**

*By Yves Lador, Earthjustice Permanent Representative to the UN in Geneva<sup>11</sup>*

The link between human right and the environment was one of the hot issues at the Johannesburg World Summit on Sustainable Development (WSSD) in 2002. Discussions of this linkage have increasingly become a feature of colloquiums and seminars. Is this more than just a fashionable new trend? And has the issue become sufficiently serious to justify devoting time and energy to it?

I will answer these questions with three arguments:

1. The importance of linking human rights and environmental protection is confirmed by evidence in the field. The issue has not received the attention it deserves, but it can no longer be ignored.
2. The way institutions at the national and international levels are organized, with strong limitations on their territorial reach and mandates, helps to explain why the human rights – environment link has not been fully explored. This can no longer continue because this linkage challenges how today's societies are organized as well as the legitimacy of their authorities.
3. The human rights - environment link can no longer be treated as just an interesting, but marginal, question. It is becoming an issue in its own right. We are at a turning point today, and national authorities and international organizations are starting to consider the issue seriously.

### **Linking human rights and environment: reality knocks at the door**

To see how human rights and environmental protection are closely interconnected in the real world, we can consider the relevant example of the rural community of Rincon'i, in Paraguay, where 600 tons of expired pesticide-treated seeds containing a living, laboratory-produced organism had been dumped. As reported by the International Union of Food and Agriculture and related Workers (IUF):

Julio Chávez owns just over a hectare in Rincon'í, but he lives in Ybycuí, the nearest town. This may be the reason why he did a deal with a US citizen, Eric Lorenz, representing Delta & Pine Paraguay Inc, and the Company Manager, Agronomist Nery Rivas.

The first truck had rumbled into Rincon'í early in the morning, in late November 1998, loaded with sacks of cottonseed produced by the US-based Delta & Pine Land Co, and imported by Delta & Pine Paraguay Inc. It had a total of 1,000 22-kilo sacks, and some laborers had come along to unload them onto Chávez's land. The sacks were taken off the truck and placed in piles.

Neighbors were both surprised and curious, and asked Chávez what was going on. He said the sacks contained expired cottonseed (i.e. it was no longer viable) that was being going to be mixed into the soil as fertilizer.

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<sup>11</sup> The author is expressing his own views

More trucks came on the following day, and this time some people in the village helped to unload them for a small payment. Several men, women and even children worked for 12 hours with no protective clothing, and no one alerted them to the risks they were running. They could not even understand the warnings printed on the sacks because they were written in English.

The piles of seeds grew inexorably, and the place was already beginning to give off a nauseating smell. Inevitably, it then began to rain and the whole area was gripped by a damp, putrid odor. Those living closest to the scene were already complaining that the stench was giving them headaches, and at night it was so bad that they could not get off to sleep.

The days passed, and more and more trucks unloaded thousands more sacks of seed, but when the villagers noticed strange, painful scars like burns appearing on their hands and arms and elsewhere, those who had unloaded the sacks at the beginning decided that enough was enough.

More and more people in Rincon'í were now falling ill, and dozens were suffering from severe headaches, nausea, diarrhoea, general weakness, insomnia and vertigo. Only 150 meters from Julio Chávez's plot of land stood the Federico Bécker School which was attended by 262 pupils. To get there, children who lived in the northern and eastern parts of the catchment area had to use a route that went straight past the contaminated land. Their parents stopped sending their children to school because the buildings were close to what everyone now knew were the source of their ailments: the Delta & Pine seeds.<sup>12</sup>

This case illustrates all too clearly how environmental degradation can start with a violation of a human right, the right to know. The inability to have an ecologically healthy environment violates other rights as well, such as the right to health or to food and even has consequences for children who can no longer gain access to education.

We could consider many – too many – other examples.<sup>13</sup> We can hardly imagine an environmental issue not having a human rights dimension. Too often the lack of consideration for this dimension leads to particularly dramatic situations:

In 1984, nearly 400 Maya Achi Indians were tortured, raped and slaughtered by the Guatemalan army for resisting a World Bank-financed dam that ultimately flooded their homeland. During the same year, a Union Carbide chemical plant in India released a toxic cloud, killing more than 3,000 people and maiming hundreds of thousands. Two years later, in Chernobyl, Ukraine, a nuclear power plant disaster left more than 1.5 million people with radiation-related illnesses. Ranching interests murdered trade union leader Chico Mendes in 1988 because he spearheaded a campaign of rubber tappers to safeguard the Amazonian rainforest that is essential to the tappers' lives and livelihoods. In 1995, Nigeria's military regime executed Ogoni environmental activist Ken Saro-Wiwa for protecting his people's health and food resources for oil pollution by Shell and other oil corporations.

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<sup>12</sup> Carlos Amorin, *Las Semillas de la Muerte*, REL-UITA, Montevideo, 1999, (*Seeds of death*, UITA translation)

<sup>13</sup> Lyuba Zarsky, *Human Rights and the Environment, Conflict and Norms in a Globalizing World*, Earthscan, London, 2002,



(...) Whether it is chemical contamination in India, nuclear disaster in Ukraine or murder to protect natural resources in Nigeria and in Burma, it is impossible to distinguish the environmental implications from the violations of human rights.<sup>14</sup>

Although all of these terrible descriptions underline the urgency to consider this link, it must not be seen as limited to violations of people and degradations of the environment. This link is also intricately tied to issues that are at the heart of today's most important challenges, such as risk prevention and management.

### **Risks and changes in scale and nature**

Societies have always had to face threats and to live with risks. Today, however, risks have changed in both nature and in magnitude. As the French researcher François Ewald describes it, after the paradigm of the nineteenth century, where risk is approached on the basis of personal responsibility, and after the paradigm developed in the twentieth century, which is based on social solidarity, today's paradigm involves taking the precautionary approach to new uncertainties.<sup>15</sup>

Following the German sociologist Ulrich Beck's famous book on the "risk society"<sup>16</sup>, we can identify some of these changes in the nature and magnitude of risk.

Losses and damages caused by accidents or disasters can now become global and even irreversible. The Chernobyl disaster had an impact on a whole continent. It also has had a very long impact over time; estimates about the time needed to clean up the damaged nuclear plant extend up to a century. The debate is also very intense on how exposure to constant radiation, especially in food, can affect the health of people and especially of children. The fact that reports have been censored, that scientists have been prevented from continuing their research on such topics and that one has even been sent to jail in Belarus, indicates that this new dimension of risks and disasters in time and space is at the root of some of Europe's present very worrying violations of human rights.<sup>17</sup>

Many risks can illustrate how problems are changing in scale. Climate change is global and affects the whole biosphere. The contamination of crops or other plants by genetically modified organisms could become irreversible in some cases. The loss of biodiversity can be simultaneously both a local problem and a global one. The list could be continued and be very long.

Besides a change of geographic scale, risks can also create big inequalities between territories.<sup>18</sup> All areas are not affected by risks in the same way. Researchers are accumulating evidence that poor areas are suffering from environmental disadvantages in a higher proportion than wealthier places. Social risks and environmental risks have a tendency to accumulate. This trend is aggravated when such an accumulation of risks or when accident differentiates territories in an irreversible way. In human rights terms, this environmental challenge is called "environmental justice." It was brought to light by the claim of the Afro-American community in the United States that dangerous industrial plants or wastes dumps

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<sup>14</sup> Jed Gerrer and Tyler Giannini, *Earthrights, Linking the Quests for Human Rights and Environmental Protection*, Earthrights International, Bangkok/Seattle/Washington, 1999,

<sup>15</sup> François Ewald, *Histoire de l'Etat-Providence: les origines de la solidarité*, Grasset, Paris, 1996

<sup>16</sup> Ulrich Beck, *Risk Society : towards a new modernity*, Sage, London, 1992

<sup>17</sup> Guillaume Grandazzi, Frédéric Lemarchand, *Les silences de Tchernobyl*, Autrement, Paris, 2004, et Wladimir Tchertkoff, *Controverses nucléaires*, documentaire, Suisse, 2003

<sup>18</sup> Valérie November, *Les territoires du risque*, Peter Lang, Berne, 2002,

were disproportionately located in their neighborhoods.<sup>19</sup> Such territorial differences are now being identified in other parts of the world and show several patterns of environmental discriminations, based, for example, on social situation, race or gender.<sup>20</sup>

Risks are also a good indicator that today's problems and challenges tie together human and non-human factors.<sup>21</sup> Natural disasters are rarely just natural. Our daily life relies on a mix of natural ecosystems, technical systems and social and political systems. We face phenomena where human and non-human dynamics are closely interrelated. The usual divisions between social, natural and technical sciences or between scientific and political institutions are now obstacles to a more comprehensive understanding of these dynamics and to having suitable tools to act on them. We are entering the twenty-first century with still too many tools, principles and habits of the nineteenth. The separation, and sometime the opposition, that has developed between environmental issues on the one hand and justice and human rights ones on the other is part of this problematic and handicapping heritage.

### **Institutional change**

All the threats mentioned above affect individuals directly. But individuals cannot rely just on their own direct access to the environment to foresee these threats. They need institutions to tell them what air they are breathing, or what water they can drink. The actions required for one's livelihood, which are individual ones by nature, can only come now from collective action. It is therefore a necessity for individuals to have access to information in order to take personal decisions and to be able to take their responsibilities. Thus the importance of the right to know and of an understanding of how decisions are made.

Science cannot be seen any more as the only source of responses to threats and risks. It is also a source that produces these threats. Therefore, its position in society and its legitimacy has changed. It cannot pretend to act like the only solution provider. Its relationship with political institutions and with citizens must acknowledge its new responsibilities.

In these changes, the relation between States and their citizens must also progress towards more trust, more transparency and more participation. States need to be helped by individuals in their task of fulfilling their mandate of protecting the lives of their citizens and inhabitants. The complexity of environmental matters obliges State authorities to rely also on citizens to share information on what is going on in the field and to build collective knowledge on environmental challenges. Such cooperation is also needed to implement national and international environmental law. More and more actors are beneficiaries of the preservation of the environment through laws and policies. They also bear some responsibilities in the development of an "enabling environment" for the State to fulfill its environmental task.

By contrast, on too many occasions it has been shown that when authorities are not fulfilling this very basic role in the field of environmental rights, the relationship of trust which is at the root of any "living together" can be lost, thereby increasing the feeling of insecurity and undermining the authorities' credibility and legitimacy.

Environmental rights issues are part of today's challenge for preserving the Rule of Law. Human rights are a necessity for implementing environmental laws and the same environmental laws contribute to the protection of human rights.

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<sup>19</sup> *Toxic Wastes and Race in the United States*, Commission for Racial Justice, United Church of Christ, New York, 1987,

<sup>20</sup> *Poor areas 'have more pollution'*, BBC News, 14 January, 2004,

<sup>21</sup> Bruno Latour, *Politiques de la nature : Comment faire entrer les sciences en démocratie*, La Découverte, Paris, 1999

Such a challenge for scientific, legal and political institutions is not new and dates back to the emergence of environmental issues. Earthjustice's<sup>22</sup> first and very well known case in 1971 concerned the preservation of Mineral King Valley, next to Sequoia National Park, in California, from being destroyed by a ski resort to be built by Disney. In this long case, the critical question of the "standing" of an environmental organization to sue went all the way up to the US Supreme Court. Although the Court did not accept all of the environmental organizations, the case eventually turned out to be an important victory for the "conservationists". In this fundamental human rights question of access to justice, it was time for the judiciary to consider how to meet the new environmental challenge. As Justice Blackmun wrote in his the dissenting opinion in this case<sup>23</sup>:

" The case poses (...) significant aspects of a wide, growing, and disturbing problem, that is, the Nations' and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts (...) do not prove to be entirely adequate of new issues?"<sup>24</sup>

### **Changes have started**

Changes have started and our exchange of views at the Geneva Environment Network roundtable provided a good picture of them. In his contribution, Mr. Stephano Sensi mentioned that the first action of the UN human rights bodies was taken by the Commission on Human Rights' expert body – the Sub-commission – in 1990, when it appointed a Special Rapporteur to do a study on human rights and the environment. The last Report of this Special Rapporteur, in 1994, included a Draft Declaration of Principles on Human Rights and the Environment. After receiving this Report from its Sub-commission, the Commission did not really act on this link until the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002.

If the UN Charter-based bodies have not progressed as much as was hoped, the most serious progress during the same period has come from the judiciary. As Philips Sands described it, even a Court such as the European Court of Human Rights, which has no provisions explicitly relating to environmental protection in the European Convention on Human Rights, has developed a modest but real jurisprudence, recognizing "environmental human rights". The most spectacular judicial developments have come from Asia, in countries like India, Pakistan and Bangladesh, where public interest procedures have brought the Supreme Courts of these countries to decide on cases relevant to environmental rights. As Joanna Razzaque underlined: "the recent trend of case law suggest that it is difficult to have a clear-cut division between human rights cases and environmental cases."

The judiciary has been left almost alone at the forefront of this issue for too long. But changes are coming also from the political and legislative side and we can mention just a few.

At the national level, some 110 countries have included in their constitutions some provisions making an obligation to the State to ensure a healthy environment to its citizens and granting rights to them.<sup>25</sup>

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<sup>23</sup> US Supreme Court ruling in *Sierra Club v. Morton* on April 19, 1972

<sup>24</sup> Tom Turner, *Wild by Law, The Sierra Club Legal Defense Fund and the Places it has Saved*, Sierra Club Legal Defense fund, San Francisco, 1990, 154 p.

<sup>25</sup> Earthjustice, *Issue Paper : Material for the 60<sup>th</sup> Session of the UN Commission on Human Rights*, San Francisco, 2004, 80 p

The most crucial development was the adoption in 1998 in the Danish city of Aarhus by the UN Economic Commission for Europe (UNECE) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (the so-called Aarhus Convention). Even if this Convention concentrates only on procedural rights and is limited to the UN European Region, its impact is much wider and concerns all continents. The Convention is open for accession by States who are outside the UNECE region. It also influences the agenda of other regional forums and international environmental discussions. The Aarhus Convention is an environmental law instrument, but its Compliance Committee can receive communications from the public and can very well be added to the list of conventional mechanisms supervising the implementation of human rights law. Marc Pallemarts described this very important instrument in his “proceduralization of environmental rights”.

The World Summit on Sustainable Development in 2002 has also played a crucial role. This was not immediately obvious in Johannesburg. Many delegations, both governmental and non-governmental, left the Summit with a feeling of disappointment concerning the very modest inclusion of the human rights – environment link in the Johannesburg Plan of Implementation. But this small paragraph has provided the basis on which the Commission on Human Rights has been able to start again the consideration of the link.

### **The Commission on human rights**

In its 2003 Session, the Commission adopted a resolution tabled by Costa Rica, as follow-up to the WSSD, requesting the Office of the High Commissioner of Human Rights (OHCHR) and the United Nations Environmental Programme (UNEP) to continue to coordinate their efforts in capacity-building activities for the judiciary. In addition, the resolution requested the Secretary-General to submit a report “on the consideration being given to the possible relationship between the environment and human rights and to transmit a copy of that report to the Commission on Sustainable Development.”<sup>26</sup>

Following this resolution and the role the Commission has played in overseeing human rights promotion and protection in relation to environmental questions and sustainable development, a Decision was tabled by Costa Rica, Switzerland and South Africa as a cross-regional initiative. It was adopted without a vote adopted on 21 April 2004.

The Decision asks the OHCHR and UNEP to coordinate their efforts in capacity building activities. This link between the two institutions is very important. The Decision also requests that the report of the OHCHR on the relationship between the environment and human rights as part of sustainable development, presented at the 2004 session, be updated for the 2005 Session.<sup>27</sup>

The Commission has also renewed for three years and for the third time the mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights. Ms. Fatma-Zohra Ouhachi-Vesely has now finished her term and the Chair of the Commission will nominate a new expert to fulfill this mandate of Special Rapporteur.<sup>28</sup>

The Commission has also introduced a new issue by adopting a decision urgently calling upon the Sub-Commission on the Promotion and Protection of Human Rights to prepare a report on the legal implications of the disappearance of States for environmental reasons,

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<sup>26</sup> E/CN.4/RES2003/71

<sup>27</sup> E/CN.4/DEC2004/119

<sup>28</sup> E/CN.4/RES2004/17

including the implications for the human rights of their residents, with particular reference to the rights of indigenous people.<sup>29</sup>

We can see that these steps are still very modest compared to the needs and challenges in the field of environmental rights described above. Nevertheless, the inclusion of the human rights implications of the disappearance of States for environmental reasons is a sign that the reality is knocking very strongly at the door of political institutions. The real challenge for them is now to develop the tools and mechanisms that will, at the end of the day, give the people of Rincon'i their basic rights, in particular the right to remedies and to rehabilitation, so that they can finally wake up one morning with their area cleaned-up, free from its poisonous threat and ecologically healthy.

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<sup>29</sup> E/CN.4/DEC2004/122

# **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**

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## **Substantive and procedural environmental rights**

While the well-known Principle 1 of the Stockholm Declaration has inspired many national constitutional provisions since the early 1970s recognizing the right to environment as a fundamental right under domestic law,<sup>30</sup> that right has not to date been transposed into a binding rule of international law of universal application.<sup>31</sup> In 1986, the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED), noting that the right to a healthy environment could not yet be considered "a well-established right under present international law",<sup>32</sup> proposing to fill this gap by including in a set of universal legal principles on environmental protection and sustainable development, which it drafted with a view to their eventual incorporation in a global, legally binding instrument, a provision stipulating that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being."<sup>33</sup>

This proposal was endorsed by the World Commission in its final report, in which it recommended the elaboration, within the framework of the United Nations, of a universal declaration and, subsequently, a world convention, codifying the general principles of international environmental law and including a human rights provision as proposed by the Expert Group. Such a convention, however, never saw the light of day.

The issue of the relationship between environment and human rights was again taken up by the United Nations during the preparatory process of the UN Conference on Environment and Development (UNCED). After some preliminary discussions in 1989, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, "affirming the inextricable relationship between human rights and the environment" and referring to "new trends in international law relating to the human rights dimension of environmental protection", decided in August 1990 to initiate a study on the subject and appointed a Special Rapporteur.<sup>34</sup> This decision was endorsed by the Commission on Human Rights and later by the General Assembly, which adopted an important resolution in December 1990 in which it urged the Commission to continue its study and to report to the UNCED Preparatory Committee. In this same Resolution 45/94, the General Assembly, apparently inspired by the language of the WCED proposal, also "recognize[d] that all individuals are entitled to live in

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<sup>30</sup> For an overview of such constitutional provisions, see, e.g., the report of the UN Commission on Human Rights, *Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, Annex III.

<sup>31</sup> For a more detailed discussion of this question, see M. Déjeant-Pons & M. Pallemmaerts, *Human Rights and the Environment*, Council of Europe Publishing, Strasbourg, 2002, 326 pp.

<sup>32</sup> Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1986, p.40.

<sup>33</sup> *Ibid.*, p. 38.

<sup>34</sup> Resolution 1990/7, 30 August 1990.

an environment adequate for their health and well-being."<sup>35</sup> This resolution, adopted without a vote, seemed to open the prospect of including similar language in the instrument on the "general rights and obligations of States in the field of the environment"<sup>36</sup> which was due to be adopted by UNCED two years later.

Notwithstanding the General Assembly resolution and the initiatives of the Commission on Human Rights and its Sub-Commission, whose Special Rapporteur submitted a preliminary report in August 1991, UNCED itself did not explicitly affirm the human right to a healthy environment. No provision of the Rio Declaration explicitly addresses human rights. The Declaration does, however, contain a few provisions which have some relevance to the issue. As we know, Principle 1 states that human beings are "entitled to a healthy and productive life in harmony with nature." Compared with Principle 1 of the Stockholm Declaration, the reference in Rio to a vague entitlement to live "in harmony with nature" tends to water down the human rights dimension of environmental protection.

While no progress was made at Rio with respect to the recognition of a substantive human right to a healthy environment, the Rio Declaration does recognize, in its Principle 10, the need for public access to environmental information, public participation in environmental decision-making and access to justice, which can be viewed as procedural rights deriving from this substantive right. Principle 10 initiated a global movement towards the further elaboration and affirmation, in both soft law and hard law, of procedural environmental rights – or should we rather say a movement towards *the proceduralization of environmental rights*, as a substitute for the firm recognition of the substantive human right to a healthy environment?

After Rio, the United Nations human rights bodies continued their work on the relationship between environment and human rights, but without any substantive results so far. In her 1994 final report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>37</sup> the UN Special Rapporteur expressed the hope that it would "help the United Nations to adopt (...) a set of norms consolidating the right to a satisfactory environment."<sup>38</sup> Ten years later, this still seems to be a distant prospect.

Indeed, at the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg, it proved impossible to move beyond a general clause in the Programme of Implementation affirming that "respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all."<sup>39</sup> An EU proposal to "acknowledge the importance of the interrelationship between human rights promotion and protection and environmental protection for sustainable development"<sup>40</sup> was watered down

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<sup>35</sup> UN General Assembly Resolution 45/94, 14 December 1990.

<sup>36</sup> UN General Assembly Resolution 44/228, 22 December 1989.

<sup>37</sup> *Human Rights and the Environment*, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9.

<sup>38</sup> *Ibid.*, para. 261.

<sup>39</sup> Plan of Implementation of the World Summit on Sustainable Development (PoI), paragraph 5. Cf. *ibid.*, paras 62(a) and 138.

<sup>40</sup> UN Doc. A/CONF.199/L.1, 26 June 2002, paragraph 152. Cf. EU Council Conclusions, 'From Monterrey to Johannesburg: Preparation for the World Summit on Sustainable Development', 30 May 2002, EU Council Doc. 8958/02 (Presse 147), p. 12, paragraph 6.5. The EU proposal was inspired by the conclusions of an expert meeting organised jointly by UNEP and the Office of the High Commissioner for Human Rights (OHCHR) at the request of the UN Commission on Human Rights (Decision 2001/111) in January 2002 and suggested that the WSSD "invite further consideration of these issues in the relevant fora, including by continued cooperation between UNEP and UNHCHR". See *Human Rights and the Environment*, Conclusions of a Joint OHCHR-UNEP Meeting of Experts on Human Rights and the Environment, Geneva (January 2002), UN Doc. HR/PUB/02/2.

into a clause merely "acknowledging the consideration being given to the *possible* relationship between environment and human rights, including the right to development".<sup>41</sup> In view of earlier normative pronouncements by the UN General Assembly and other UN bodies, this can hardly be viewed as progress.

Nevertheless, the Commission on Human Rights, at its first session following the WSSD, adopted a new resolution on the subject of "Human rights and the environment as part of sustainable development". It requested the Secretary-General to submit a report on this issue to its next session, while at the same time "noting" the entry into force of the Aarhus Convention and "encourag[ing] all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, *in particular principle 10*, in order to contribute, inter alia, to effective access to judicial and administrative proceedings".<sup>42</sup> The Secretary-General's report, submitted to the 60<sup>th</sup> session of the Commission,<sup>43</sup> only resulted in a procedural decision requesting the UN High Commissioner for Human Rights and the United Nations Environment Programme (UNEP) "to continue to coordinate their efforts in capacity-building activities" and deferring further consideration of "the relationship between the environment and human rights as part of sustainable development" to its next session in 2005.<sup>44</sup> While the universal debate on the scope and recognition of a substantive human right to a healthy environment has continued in various United Nations bodies and conferences ever since Stockholm, it still seems far from a successful conclusion.

### **Regional instruments in Africa, the Americas and Europe**

Developments at the regional level have been somewhat more promising. The rest of this paper will focus on the most comprehensive effort for the establishment of international legal standards in the field of environmental rights so far, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, negotiated within the framework of the UN Economic Commission for Europe (ECE). But it would be eurocentric to mention only that pan-European regional agreement, however important it is. It should be mentioned that, long before the Aarhus Convention was negotiated, there were already two regional legal instruments for the protection of human rights which contained a reference to the right to environment.

The African Charter of Human and Peoples' Rights, adopted in Algiers on 26 June 1981, provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." (art. 24) It should be noted that this provision does not actually recognize the right to environment as an *individual* human right, but rather as a collective right, vested in peoples. This, however, did not prevent the African Commission on Human and Peoples' Rights, in a recent case concerning the violation of this article in conjunction with other provisions of the African Charter, to interpret it as imposing obligations on states parties in respect of individuals as well as communities. In October 2001, the Commission held:

"The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or *the right to a healthy environment, as it is widely known, (...) imposes clear obligations upon a government. (...) The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to*

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<sup>41</sup> PoI, paragraph 169 (emphasis added).

<sup>42</sup> Resolution 2003/71, 25 April 2003, UN Doc. E/CN.4/2003/135, p. 260, 8<sup>th</sup> preambular para. & para. 6 (emphasis added).

<sup>43</sup> UN Doc. E/CN.4/2004/87, 6 February 2004.

<sup>44</sup> Decision 2004/119, 21 April 2004, UN Doc. E/CN.4/L.11/Add.7, p. 83.



development (Article 16(3)) already noted *obligate governments to desist from directly threatening the health and environment of their citizens.*"<sup>45</sup>

The relevant provision of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted in San Salvador on 17 November 1988,<sup>46</sup> for its part, is more straightforward in its formulation. Unlike the African Charter, it does explicitly recognize an individual right, as it stipulates that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services." (art. 11) The conceptual link this provision implicitly establishes between the right to a minimal environmental quality and that of access to basic public services appears strikingly relevant in this age of increasing privatization of common property resources and essential public services.

At the European level, the right to a healthy environment was first explicitly recognized in the operative provisions of an international legal instrument by the Aarhus Convention signed in 1998. However, it should be noted that, when the ECE decided to elaborate a legally binding international instrument on environmental rights after the Rio Conference, it chose to focus exclusively on the implementation of the procedural rights set out in Principle 10 of the Rio Declaration. Accordingly, the mandate of the working group established by the ECE Committee on Environmental Policy in January 1996 to prepare a draft convention on access to environmental information and public participation in environmental decision-making did not contain any reference to the substantive right to a healthy environment.<sup>47</sup> Nevertheless, negotiators eventually agreed to include both in the preamble and in the body of the draft convention provisions referring to this substantive right.

#### **Analysis of the Aarhus Convention: linking substantive and procedural rights**

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>48</sup> was signed by 35 member states of the ECE and by the European Community at the "Environment for Europe" ministerial conference in Aarhus on 25 June 1998. It entered into force on 30 October 2001, following ratification by 16 states. The Convention now has 27 contracting parties, most of them countries in transition from Central and Eastern Europe and Central Asia and the Caucasus. Although the Convention was negotiated in a pan-European forum, within the framework of a political process for environmental cooperation in Europe which includes all former Soviet republics in Europe and Asia, as well as the United States and Canada, it was not conceived as an exclusively European instrument, as it is open for accession by any member state of the United Nations "upon approval by the Meeting of the Parties." Thus far, however, no non-European state has expressed interest in becoming a party to the Aarhus Convention. The United States and Canada, though full members of ECE, elected not to participate in the negotiations and have stayed outside the Aarhus regime since its inception.<sup>49</sup> Ironically, the

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<sup>45</sup> African Commission on Human and Peoples' Rights, 30th Ordinary Session, Banjul, Gambia, 13-27 October 2001, Decision on Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Doc. ACHPR/COMM/A044/1, para. 52 (emphasis added).

<sup>46</sup> This Protocol entered into force in 1999 and is now binding on 13 states in Central and South America.

<sup>47</sup> UN Doc. ECE/CEP/18, 8 February 1996, Annex I.

<sup>48</sup> UN Doc. Sales No. E/F/R.98.II.E.27. The Convention text is available online in different languages at <http://www.unece.org/env/pp/treatytext.htm>.

<sup>49</sup> It should be noted, however, that both North American member states of the ECE did participate in the recent negotiations leading to the adoption of a Protocol on Pollutant Release and Transfer Registers, adopted and opened for signature at the 5<sup>th</sup> Ministerial Conference "Environment for Europe", in Kiev on 21 May 2004, although neither of them signed it. The text of the Kiev Protocol and

European Union and its member states, which like to position themselves as champions of environmental democracy in global fora, such as the WSSD, constituted a small minority of the contracting parties to the Aarhus Convention until the recent enlargement of the EU on 1 May 2004. It is only thanks to its new member states, most of which had already ratified the Convention prior to their accession to the EU, that about half the Union's member states are now contracting parties. A proposal for an EU Council decision that would enable the European Community itself to become a contracting party is currently under consideration.<sup>50</sup>

The preamble to the Aarhus Convention explicitly recalls Principle 1 of the Stockholm Declaration and United Nations General Assembly resolution 45/94. Paraphrasing language from the Stockholm Declaration's preamble, it "recogniz[es] that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself". It establishes a conceptual link between substantive and procedural environmental rights by stating that "citizens must have access to environmental information, be entitled to participate in decision-making and have access to justice in environmental matters" in order "to be able to assert" their right to live in an environment adequate to their health and well-being, as well as to "observe" their concomitant duty "to protect and improve the environment for the benefit of present and future generations". Art. 1 of the Convention, under the heading "Objective", then provides:

"In order to contribute to the protection of *the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."

The explicit recognition of the right to a healthy environment in the Aarhus Convention adds weight to its operative provisions for the implementation of the procedural rights of access to information, participation in decision-making and access to justice, by articulating the legal and philosophical underpinning of these rights. It indicates that they are not ends in themselves, but are meaningful precisely as means towards the end of protecting the individual's substantive right to live in a healthy environment. It does not, however, have immediate legal consequences, as the provisions of art. 1 do not, as such, impose on parties any specific obligations beyond those laid down in the other provisions of the Convention.<sup>51</sup> Indeed, the protection of the right to a healthy environment is presented as an *objective* to which the Aarhus Convention is intended to contribute, not as a substantive obligation distinct

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the list of signatories can be found on the Aarhus Convention website at <http://www.unece.org/env/pp/prtr.htm>.

<sup>50</sup> Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, Doc. COM(2003) 625 final, 24 October 2003.

<sup>51</sup> This was stressed by the United Kingdom in a declaration made upon signature of the Convention. According to this declaration, "[t]he United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention." While it is self-evident that the specific international obligations imposed on the contracting parties by the operative provisions of the Convention relate only to those procedural rights, this does not necessarily imply that, as the UK suggests, the provisions of the preamble and of art. 1 relating to the substantive right can be dismissed as merely expressing an "aspiration". This contradicts the very wording and title of art. 1, which refer to an "objective". In legal terms, an objective is clearly not the same as an aspiration. It can inform and guide the interpretation of the other provisions of the Convention.

from the specific obligations with respect to access to information, participation and access to justice which it imposes on its contracting parties. It is striking that the fundamental right to live in a healthy environment, at the very moment of its legal recognition, finds itself, as it were, immediately reduced to its procedural dimensions.

The Aarhus Convention is the first multilateral environmental agreement whose main purpose is to impose on its contracting parties obligations *towards their own citizens*. In this respect there is in fact a close affinity between the Convention and international human rights law. This affinity also appears from the Convention's provisions on compliance review, which, for the first time in international environmental law, opened up the possibility of establishing a review mechanism accessible not only to states, but also to individuals, through some form of individual recourse procedure.

By undertaking to guarantee a series of "citizens' rights in relation to the environment",<sup>52</sup> of a procedural nature, the European states signatory to the Convention wished to encourage what they described in their ministerial declaration as "responsible environmental citizenship", acknowledging that "an engaged, critically aware public is essential to a healthy democracy".<sup>53</sup> The full engagement of civil society in the environmental policy-making process with a view to increasing its democratic nature and legitimacy is clearly perceived as the main purpose of the Convention. In its preamble, the contracting parties state their belief "that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe". The ministerial declaration of the Aarhus Conference, by which the Convention was adopted, praised it as "a significant step forward both for the environment and for democracy".<sup>54</sup>

The aim is therefore to increase the openness and democratic legitimacy of government policies on environmental protection, and to develop a sense of responsibility among citizens by giving them the means to obtain information, to assert their interests by participating in the decision-making process, to monitor the decisions of public bodies and to take legal action to protect their environment. The "engaged, critically aware public" is seen as both an essential player and a partner in the formulation and implementation of environmental policies.

### **Overview of the procedural environmental rights guaranteed by the Aarhus Convention**

In practical terms, the Aarhus Convention requires its contracting parties, in response to requests from any member of the public, and without the latter having to state any particular interest, to make available information on the environment held by public authorities, subject to a limited number of exemptions that may be invoked on grounds of public interest. The Parties must also take steps to collect and disseminate a whole range of information on the condition of the environment and activities and measures likely to affect it. The provisions on public participation in decision-making processes require the Parties to implement procedures enabling members of the public to obtain information and to assert their interests where public authorities are considering whether to permit specific activities that may have a significant impact on the environment. Measures must also be taken to enable the public to participate in the preparation of plans and programmes relating to the environment, and in the preparation by public authorities of regulations and other generally applicable, legally binding rules that may have a significant impact on the environment. Lastly, the Convention guarantees access to review procedures in the event that public authorities fail to comply with their obligations in respect of access to information and participation in the decision-making

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<sup>52</sup> Declaration by the Environment Ministers of the region of the United Nations Economic Commission for Europe (UN/ECE), 4th Ministerial Conference "Environment for Europe", Aarhus, Denmark, 23-25 June 1998, para. 40.

<sup>53</sup> *Ibid.*, para. 42.

<sup>54</sup> *Ibid.*, para. 40.

process. The public must also have access to administrative and judicial procedures to be able to challenge acts and omissions by private individuals or public authorities that contravene national legal provisions on the environment. The Aarhus Convention enshrines a detailed series of environmental rights, the implementation of which is already having a considerable impact on national systems of environmental law and administrative practices in many countries.<sup>55</sup>

It could be argued that these rights simply give practical form, in the specific context of environmental policy, to the general principles of democracy and the rule of law already enshrined in other international instruments on the protection of human rights. On the other hand, the very emergence of specific rules of international environmental law concerning public participation in decision-making processes reflects broader issues relating to developments in democracy and citizenship in a changing world. As a popular target of citizen activism, environmental policy has become a testing ground for efforts to transcend traditional models of representative democracy.

Though the Convention focuses on decision-making processes within its states parties, at the national or sub-national level, it may also serve as a catalyst for the democratisation of supra-national and international decision-making processes, which are playing an increasingly significant role as a result of globalisation. In the European Union, for instance, supra-national institutions are responsible for much of the legislative process in respect of the environment, and even for some administrative and judicial decisions. By signing the Aarhus Convention, the European Community declared its willingness to apply the provisions of that Convention to its own institutions, thereby contributing to the ongoing debate over the latter's openness and democratic legitimacy. In October 2003, the European Commission submitted to the Council of the European Union and the European Parliament a proposal for implementing the Aarhus Convention in its own institutional framework<sup>56</sup> and a draft decision on its ratification by the European Community.<sup>57</sup>

Moreover, the implications of the Aarhus Convention may go beyond the European institutional framework, since the contracting parties have also undertaken to "promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment."<sup>58</sup> In the Lucca Declaration adopted at the first meeting of the parties to the Aarhus Convention, ministers "recognize[d] the need for guidance to the Parties on promoting the application of the principles of the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment and (...) therefore recommend[ed] that consideration be given to the possibility of developing guidelines on this topic."<sup>59</sup> Acting pursuant to this ministerial mandate, the Working Group of the Parties to the Convention, at its first meeting in

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<sup>55</sup> For a discussion of the Convention's impact on law and practice in East European and Central Asian countries, see T.R. Zaharchenko & G. Goldenman, "Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia", 4 *International Environmental Agreements* (2004) (forthcoming).

<sup>56</sup> Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, Doc. COM(2003) 622 final, 24 October 2003.

<sup>57</sup> Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, Doc. COM(2003) 625 final, 24 October 2003.

<sup>58</sup> Aarhus Convention, art. 3, para. 7.

<sup>59</sup> Lucca Declaration, adopted by the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Lucca, Italy, 21-23 October 2002, UN Doc. MP.PP/2002/CRP.1, 20 October 2002, para. 31.

November 2003, decided to establish an *ad hoc* expert group "to consider the scope, format and content of possible guidelines and the appropriate process for their development".<sup>60</sup> This group will have its first meeting in June 2004 and hopes to be able to submit the results of its work to the second meeting of the parties, which will be held in Almaty, Kazakhstan, in May 2005.<sup>61</sup>

### **Innovative provisions on compliance review**

Art. 15 of the Convention provides for the establishment of "arrangements" for reviewing compliance by parties which "shall allow for appropriate public involvement and *may include the option of consideration of communications from members of the public on matters related to this Convention*". Based on this provision, the first Meeting of the Parties to the Convention, in October 2002, adopted detailed provisions on a procedure for the review of compliance by a Compliance Committee composed of independent experts.<sup>62</sup> This procedure provides for the examination, by this Committee, of communications brought before it "by one or more members of the public concerning [a] Party's compliance with the Convention".<sup>63</sup> In addition, the Committee may also consider submissions by Parties as well as referrals by the Convention's Secretariat. Furthermore, under the same rules "the member of the public making a communication shall be entitled to participate in the discussions of the Committee with respect to that (...) communication."<sup>64</sup> Such provisions granting to individual citizens and NGOs the right to actually participate in the monitoring, by an international body, of state compliance with legal obligations is unprecedented in international environmental law. The Aarhus Convention's compliance mechanism is now entering the stage of practical application, as five communications from the public have been submitted to the Compliance Committee and will be considered by it in 2004.<sup>65</sup>

### **Conclusion**

In many respects, the Aarhus Convention is an innovative instrument, whose potential significance both for environmental protection and the promotion and protection of human rights, as is increasingly well-recognized, extends well beyond the limits of the ECE region. To quote Secretary-General Kofi Annan, the Convention constitutes "the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations."<sup>66</sup> While states outside the ECE region are reluctant to subscribe to its provisions wholesale – by making use of the possibility of acceding to it – the growing interest in strengthening procedural environmental rights in all regions of the world<sup>67</sup> unmistakably reflects the influence of this bold European venture in international environmental law-making.

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<sup>60</sup> Report of the first meeting of the Working Group of the Parties, UN Doc. MP.PP/WG.1/2003/2, 26 November 2003, p. 9, para. 47.

<sup>61</sup> Report of the second meeting of the Working Group of the Parties, Geneva, 3-4 May 2004.

<sup>62</sup> Decision I/7 (*Review of compliance*), adopted by the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Lucca, Italy, 23 October 2002.

<sup>63</sup> *Ibid.*, annex, para. 18.

<sup>64</sup> *Ibid.*, annex, para. 32.

<sup>65</sup> For further information on the Aarhus compliance mechanism and these pending cases, see the Convention's website at <http://www.unece.org/env/pp/compliance.htm>.

<sup>66</sup> Foreword to the *Implementation Guide to the Aarhus Convention*, United Nations, Geneva, 2000, UN Doc. Sales No. E.00.II.E.3.

<sup>67</sup> See generally C.E. Bruch & R. Czerbiniak, "Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation and Accountability in Environmental Matters", 32 *Environmental Law Reporter* (2002), pp. 10428-10453.

## Human rights and the environment

*By Philippe Sands, Professor of Law and Director of the PICT Centre for International Courts and Tribunals at University College London; and Barrister, Matrix Chambers<sup>68</sup>*

What are the practical consequences of recognising the link between international human rights law and the protection of the environment? The question may be addressed in the context of the distinction which has been drawn in international human rights law between economic and social rights, and civil and political rights. The nature and extent of economic and social rights determines the substantive rights to which individuals are entitled, including in particular the level below which environmental standards (for example in relation to pollution) must not fall if they are to be lawful. Civil and political rights, which are also substantive in nature and sometimes referred to as 'due process' rights, determine procedural and institutional rights (such as the right to information or access to judicial or administrative remedies).

International environmental law has progressed considerably in building upon existing civil and political rights and developing important new obligations, most notably in the 1998 Aarhus Convention which provides for rights of access to information, to participation in decision-making, and to access to justice. Whilst economic and social rights have traditionally been less well developed in practice, recent judicial decisions indicate that international courts and tribunals are increasingly willing to find violations of substantive environmental rights.

### **Economic and social rights**

Although the existence of economic and social rights under international law has been less widely accepted by elements of the international community, it is these rights which promise to allow human rights bodies to consider whether substantive environmental standards and conditions are being maintained at satisfactory levels. In the context of environmental issues those which appear to be most relevant include the entitlement to realisation of economic, social and cultural rights indispensable for dignity;<sup>2</sup> the right to a standard of living adequate for health and well-being;<sup>69</sup> the right to the highest attainable standard, of health (including improvement of all aspects of environmental and industrial hygiene);<sup>70</sup> the right of all peoples to freely dispose of their natural wealth and resources;<sup>71</sup> safe and healthy working conditions;<sup>72</sup> protection of children against social exploitation;<sup>73</sup> right to enjoy benefits of scientific progress and its applications;<sup>74</sup> and the right of peoples to self determination and pursuit of chosen economic and social development.<sup>75</sup> Environmental degradation could be linked to the violation of each of these rights.

However, only two regional human rights treaties expressly recognise environmental rights: the 1981 African Charter, which states that "all peoples shall have the right to a general

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<sup>68</sup> This contribution is taken from Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2<sup>nd</sup> edition, 2003).

<sup>69</sup> 1948 UNDHR, Art. 25; 1966 ICESCR, Art. 11(1).

<sup>70</sup> 1966 ICESCR, Art. 12(1) and (2)(b); 1961 ESC, Art. 11; 1981 African Charter, ACHPR, Art. 16(1); on the activities of the ESC Committee of Independent Experts see *infra*.

<sup>71</sup> 1966 ICESCR, Art. 1(2); 1966 ICCPR, Art. 1(2); 1981 African Charter, ACHPR, Art. 21.

<sup>72</sup> 1966 ICESCR, Art. 7(b); 1961 ESC, Art. 3.

<sup>73</sup> 1966 ICESCR, Art. 10(3); 1961 ESC, Art. 17.

<sup>74</sup> 1966 ICESCR, Art. 15(1)(b).

<sup>75</sup> 1981 African Charter, Art. 20(1).

satisfactory environment favourable to their development”<sup>76</sup> and the 1988 San Salvador Protocol to the 1969 ACHR, which provides in its Article 11 that “everyone shall have the right to live in a healthy environment and to have access to basic public services. The state parties shall promote the protection, preservation and improvement of the environment.”

The practical application of economic and social rights requires international and national courts and tribunals to determine the circumstances in which environmental standards have fallen below acceptable international levels. These standards are being developed, particularly at the regional level. They establish minimum standards of water and air quality which might provide a basis for arguing that standards have fallen below minimum acceptable levels and that an individual right of action to enforce these minimum standards might arise. However, in the absence of specific, binding international standards, it may be more difficult for such claims to succeed, unless the environmental conditions are so poor that blatant abuses will be considered to have occurred. An emerging practice on appropriate standards is reflected in recent international decisions, indicating a growing willingness to identify violations of ‘environmental’ rights.

The change which is occurring is particularly apparent in respect of the 1950 ECHR, which does not include express provisions on the environment. A 1976 decision of the European Commission illustrated the difficulty in making environmental claims. In *X. and Y. v. Federal Republic of Germany* the applicants were members of an environmental organisation which owned 2.5 acres of land for nature observation. They complained on environmental grounds about the use of adjacent marshlands for military purposes. The Commission rejected the application as incompatible *rationae materiae* with the ECHR on the grounds that “no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention and in particular by Arts. 2, 3 or 5 as invoked by the applicant.”<sup>77</sup>

An alternative approach has emerged, in the absence of rights being granted in relation to the environment, whereby victims bring claims on the basis that personal or property rights have been violated. A series of judgments by the European Court of Human Rights illustrates how such a claim might now be made, although it is apparent that each case must be taken on its own merits. In *Arrondelle v. United Kingdom*, Article 8 of the 1950 ECHR and Article 1 of the First Protocol to the ECHR provided the basis for a ‘friendly settlement’ between the parties in a complaint alleging nuisance due to the development of an airport and construction of a motorway adjacent to the applicant’s home.<sup>78</sup>

In *Powell and Rayner v. United Kingdom* the applicants alleged that the United Kingdom had violated the 1950 ECHR by allowing the operation of Heathrow Airport, under whose flight path they lived, to generate excessive levels of aircraft noise. The relevant parts of the case were based on Article 8 of the ECHR, which provides that, *inter alia*, “everyone has the right to respect for his private . . . life [and] his home ... and 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 the economic well-being of the country. . .”<sup>79</sup> The applicants maintained that excessive noise forced them to endure, without legal redress, unreasonable disturbance caused by aircraft flying in accordance with governmental regulations, in breach of Article 8 and the Article 13 right to an effective remedy under domestic law for alleged breaches of the Convention. The Court rejected their argument, noting that its task was to strike “a fair balance ... between the competing interests

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<sup>76</sup> 1981 African Charter, Art. 24.

<sup>77</sup> Application No. 7407/76, Decision of 13 May 1976 on the admissibility of the application, 15 DR 161.

<sup>78</sup> Application No. 7889/77, Report of 13 May 1983, 26 DR.

<sup>79</sup> *Eur Court HR, Powell and Rayner v. United Kingdom*, Judgment of 21 February 1990, Series A no. 172, 17, para. 37.

of the individual and the community as a whole.” In this case that balance had not been upset. While the quality of life of the applicants had been adversely affected, the Court recognised that large international airports, even in densely populated areas, and the increased use of jets, were necessary in the interests of a country’s economic well-being. Heathrow was a major artery for international trade and communication which employed several thousand people and generated substantial revenues. The United Kingdom government had taken significant measures to abate noise pollution, taking account of international standards, and had compensated nearby residents for disturbances resulting from aircraft noise. Moreover the government had, since 1949, proceeded on the basis that aircraft noise was better addressed by taking and enforcing specific regulatory measures than by applying the common law of nuisance. In the context of these considerations the Court concluded that it could not “substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the contracting states are to be recognised as enjoying a wide margin of appreciation.”<sup>80</sup>

Since *Powell and Rayner*, however, the European Court has shown itself to be more open to environmental claims, particularly in cases involving Article 8 claims to the effect that a correct balance has not been struck between individual and community interests. The leading decision is *Lopez-Ostra v Spain*.<sup>81</sup> Mrs Lopez-Ostra lived twelve metres from a plant treating liquid and solid wastes, which had been built on municipal land with the support of a state subsidy and had operated without a relevant license. The plant gave off fumes which caused a nuisance to Mrs Lopez-Ostra and her daughter and caused them to temporarily leave their home. Having failed in proceedings in Spain, she brought ECHR proceedings on the grounds that she was the victim of a violation of the right to respect for her home that made her private and family life impossible (Article 8), and the victim also of degrading treatment. The European Court found that the situation which was the result of the inaction of the state, having been prolonged by the municipality’s and the relevant authorities’ failure to act (para. 40). The Court said:

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. Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant’s rights [...] – [...] or in terms of an ‘interference by a public authority’ to be justified [...] the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. (para. 51)

The Court found that the plant caused nuisance and serious health problems to numerous local people, and that even if the local municipality had fulfilled its functions under Spanish law it had not taken the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life under Article 8 and had not offered redress for the nuisance suffered. In the circumstances, Spain had not succeeded in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.<sup>82</sup>

The judgment opened the door to further cases. In *Guerra and others v Italy* the applicants were citizens living near to a factory which produced fertilisers, released large quantities of inflammable gas and other toxic substances into the atmosphere, and which had (in 1976)

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<sup>80</sup> *Ibid.*, para. 44.

<sup>81</sup> Judgment of 9 December 1994.

<sup>82</sup> *Ibid.*, paras. 51-8. The Court awarded damages of 4 million pesetas plus costs.



been the source of an explosion releasing arsenic trioxide and causing 150 people to be hospitalised with acute arsenic poisoning. The applicants wanted information on the activities of the plant, and this was not made available to them until after production of fertilisers had ceased. The Court ruled that “direct effect of the toxic emissions on the applicants’ right to respect for their private and family life” made Article 8 applicable (para. 57), that Article 8 imposed ‘positive obligations’ on the State to ensure ‘effective respect for private or family life’ (para. 58), and that by allowing the applicants to wait for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, Italy had not fulfilled its obligations under Article 8 (para. 60).<sup>83</sup>

In *Hatton and others v United Kingdom*, the European Court revisited the issues raised in *Powell and Rayner*, although this time in the context of noise levels at Heathrow Airport arising from night flights between 4 am and 7 a.m. The Court found that the earlier decisions were not on point because they related to an increase in night noise.<sup>84</sup> Invoking the ‘positive obligations’ of the United Kingdom, the Court recognised the existence of a ‘certain margin of appreciation’ (as opposed to the ‘wide margin’ it had previously applied) (para. 96) and signalled a new approach taking into account the particular needs of environmental protection:

[I]n striking the required balance, States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. [...] It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.<sup>85</sup>

The Court noted that levels of noise during the relevant period had increased with the new scheme established in 1993, but that the Government did not appear to have carried out any research of its own as to the reality or extent of the economic interest in increasing night flights and there had been no attempt to quantify the aviation and economic benefits in monetary terms.<sup>86</sup> It also noted that whilst it was likely that night flights contribute to a certain extent to the national economy, their importance had never been assessed critically and only limited research had been carried out into the nature of sleep disturbance and prevention when the 1993 Scheme was put in place.<sup>87</sup> The Court concluded that there had been a violation of Article 8 because, in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants’ sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, the Government had not struck the right balance in weighing the interferences of the rights of the individuals against the unquantified economic interest of the country.<sup>88</sup>

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<sup>83</sup> Judgment of 19 February 1998, at paras. 57-8 and 60. the Court awarded 10 million lire to each applicant in damages. The Court found, however, that there was no violation of Article 10.

<sup>84</sup> Judgment of 2 October 2001, para. 94.

<sup>85</sup> *Ibid.*, para. 97.

<sup>86</sup> *Ibid.*, paras. 98 and 100-1.

<sup>87</sup> *Ibid.*, paras. 102-3.

<sup>88</sup> *Ibid.*, para. 106. See also the Separate Opinion of Judge Costa (‘having regard to the Court’s case-law on the right to a healthy environment ... maintaining night flights at that level meant that the applicants had to pay too high a price for an economic well-being, of which the real benefit, moreover, is not apparent from the facts of the case. Unless, of course, it is felt that the case-law goes too far and overprotects a person’s right to a sound environment. I do not think so. Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their

The judgment was appealed to the Grand Chamber of the European Court, where it was overturned by a Judgment of 8 July 2003. By a majority of 12 votes to 5 the Grand Chamber ruled that the UK authorities had not overstepped their wide margin of appreciation and had struck a fair balance between the right of the individuals affected to respect for their private life and home, and the conflicting interests of others and of the community as a whole, and that there had been no fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

The European Court has also been willing to recognise the need for environmental protection measures even where they might limit the enjoyment of private property rights.<sup>89</sup> In *Fredin v. Sweden* it recognised “that in today’s society the protection of the environment is an increasingly important consideration”, and held that on the facts the interference with a private property right to achieve environmental objectives was not inappropriate or disproportionate in the context of Article 1 of the First Protocol to the 1950 ECHR.<sup>90</sup> In *Pine Valley Development Ltd. and Others v. Ireland* the European Court recognised that an interference with the right to peaceful enjoyment of property which was in conformity with planning legislation and was “designed to protect the environment” was “clearly a legitimate aim ‘in accordance with the general interest’ for the purposes of” the second paragraph of Article 1 of the First Protocol to the 1950 ECHR.<sup>91</sup> Moreover, the interference, in the form of a decision by the Irish Supreme Court, which was intended to prevent building in an area zoned for further agricultural development so as to preserve a green belt, had to be regarded as “a proper way - if not the only way - of achieving that aim” and could not be considered as a disproportionate measure giving rise to a violation of Article 1 of the First Protocol.<sup>92</sup>

The Inter-American Commission on Human Rights has shown itself equally willing to find a violation of ‘environmental’ rights, but predating the European Court in its approach. In the *Yanomami* Case the Commission concluded that the ecological destruction of Yanomami lands in Brazil had caused violations of the right to life, health and food under the American Declaration of the Rights and Duties of Man.<sup>93</sup> In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Inter-American Court for Human Rights found that the grant of a logging concession violated the property rights (Article 21 IACHR) of an indigenous community, adopting an approach that is analogous to that taken by the European Court.<sup>94</sup>

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influence on people’s lives. Our Court’s case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment. I would find it regrettable if the constructive efforts made by our Court were to suffer a setback.’

<sup>89</sup> Cf. The approach taken by various ICSID and NAFTA arbitral tribunals in relation to expropriation cases.

<sup>90</sup> *Eur Court HR*, Judgment of 18 February 1991, Series A no. 192, p. 14, para. 48; see also *Eur Court HR*, *Oerlemans v. Netherlands*, judgment of 27 November 1991, Series A, no. 219.

<sup>91</sup> *Eur Court HR*, Judgment of 29 November 1991, Series A, no. 222, paras. 54 and 57. Cf. *Matos y Silva v Portugal*, Judgment of 16 September 1996 (finding a violation of Article 1 of Protocol 1 where there had been no formal or de facto expropriation, since the measures to create a nature reserve for animals had serious and harmful effects that hindered the applicants’ enjoyment of their property right for more than thirteen years, creating uncertainty as to what would become of the possessions and as to the question of compensation, and upsetting the balance between the requirements of the general interest and the protection of property rights).

<sup>92</sup> Para. 59.

<sup>93</sup> Case no. 7615 of 5 March 1985, Ann. Rep. of the Inter-American Commission on Human Rights, OAS doc. OAE/Ser.L/V/II.66, doc. 10 rev 1, 24 (1985), cited in *Human Rights and the Environment*, *supra*.

<sup>94</sup> Judgment of 31 August 2001.

## Civil and political rights

Civil and political rights are equally capable of creating practical and enforceable obligations in relation to environmental and related matters. Civil and political rights and obligations are established by several environmental treaties and other international instruments at the global and regional levels. Civil and political rights which are relevant to environmental protection include the right to life;<sup>95</sup> prohibition against cruel, inhuman or degrading treatment,<sup>96</sup> the right to equal protection against discrimination;<sup>97</sup> the right to an effective remedy by competent national tribunals for acts violating fundamental rights;<sup>98</sup> freedom of expression<sup>99</sup> and the right to receive information;<sup>100</sup> the right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations;<sup>101</sup> the right to protection against arbitrary interference with privacy and home;<sup>102</sup> prohibition against arbitrary deprivation of property;<sup>103</sup> and the right to take part in the conduct of public affairs.<sup>104</sup>

Many of the principles set out in the 1992 Rio Declaration and the 1972 Stockholm Declaration, which reflect state practice at the global and regional level, will be familiar to human rights lawyers who have worked on civil and political rights. One of the central themes at UNCED was the recognition that individuals will need to participate fully to ensure the implementation of UNCED and Agenda 21. In supporting the participation of all concerned citizens at the relevant level the Rio Declaration supports the right of access to environmental information;<sup>105</sup> the right to participate in decisions which affect their environment;<sup>106</sup> the right of effective access to judicial and administrative proceedings, including redress and remedy;<sup>107</sup> a right to development to meet environmental needs;<sup>108</sup> and the rights flowing from the recognition of the need to ensure the full participation of women, youth and indigenous peoples and other communities.<sup>109</sup> The case law of the European Court and the adoption of instruments such as the 1998 Aarhus Convention (see [text of Marc Pallemaerts]) indicate that this approach is likely to become increasingly important in the coming period, particularly as efforts to focus on the enforcement of environmental standards are stepped up.

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<sup>95</sup> 1966 ICCPR, Art. 6(1); 1950 ECHR, Art. 2(1); 1969 ACHR, Art. 4(1); 1981 African Charter, Art. 4.

<sup>96</sup> 1966 ICCPR, Art. 7; 1950 ECHR, Art. 3; 1969 ACHR, Art. 5; 1981 African Charter, Art. 5.

<sup>97</sup> 1948 UNDHR, Art. 7; 1966 ICCPR, Art. 3; 1969 ACHR, Art. 24; 1981 African Charter, Art. 3(2); see H. Smets, 'Le principe de non discrimination en Matière de protection de l'environnement', 2000 *Rev. Eur. Droit de l'Env.* 1.

<sup>98</sup> 1948 UNDHR, Art. 8; 1950 ECHR, Art. 13; 1969 ACHR, Art. 25; 1981 African Charter, Art. 7(1) and 26.

<sup>99</sup> See e.g. *Bladet Tromsø and Stensaas v Norway*, ECtHR, Judgment of 20 May 1999 (newspapers' freedom under Article of the 1950 ECHR to publish environmental information –consequences of seal-hunting - of local, national and international interest).

<sup>100</sup> 1981 African Charter, Art. 9(1); see further Chapter 17, especially 616-20. Note that in *Guerra and others v. Italy*, the European Court did not find a violation of Art. 10 ECHR, *supra*. note [x] and accompanying text.

<sup>101</sup> 1948 UNDHR, Art. 10; 1966 ICCPR, Art. 14(1); 1950 ECHR, Art. 6(1); see further Chapter 6.

<sup>102</sup> 1948 UNDHR, Art. 12; 1966 ICCPR, Art. 17; 1950 ECHR, Art. 8(1) (see *Powell and Rayner*, *supra* n. 297; 1969 ACHR, Art. 11).

<sup>103</sup> 1948 UNDHR, Art. 17; 1950 ECHR, First Protocol, Art. 1; 1969 ACHR, Art. 21; 1981 African Charter, Art. 14.

<sup>104</sup> 1966 ICCPR, Art. 25; 1969 ACHR, Art. 23; 1981 African Charter, Art. 13.

<sup>105</sup> Principle 10.

<sup>106</sup> Principle 10.

<sup>107</sup> *Ibid.*

<sup>108</sup> Principle 3.

<sup>109</sup> Principles 20, 21 and 22; on participation of women, under UNGA res. 47/191 (1992) representation on the High Level of Advisory Board requires that 'due account should ... be given to gender balance' (para. 29).

## **Conclusions**

Over the past decade, environmental considerations have been integrated into human rights discourse and, to a lesser extent, the definition and application of international humanitarian rules governing methods and means of armed conflict.

In relation to human rights, notwithstanding the fact that most human rights treaties do not expressly refer to environmental considerations, practise under those conventions recognises that a failure to adequately protection the environment may give rise to individual human rights, particularly in relation to rights associated with the enjoyment of a person's home and property. Equally, practise recognises that the collective interest of a community in taking steps to protect the environment may justify reasonable interference with property or other rights. In both aspects the principal need is to ensure that balance is found between individual and collective rights. In the very recent past, human rights procedures may also have begun to define the content of participatory rights in the environmental domain: the non-compliance mechanism established under the 1998 Aarhus Convention represents an innovative step.

# Environmental Human Rights in South Asia: Towards stronger participatory mechanisms<sup>110</sup>

By Jona Razzaque, Staff lawyer, Foundation for International Environmental Law and Development (FIELD)

## Introduction

The 1998 Aarhus Convention reflected an increased concern by the international community with transparency and accountability in the environmental decision-making process. In order to achieve the overarching agenda of sustainable development, assigned by the Millennium Declaration (2000), the 2003 Commission on Human Rights Declaration (2003/71) emphasises the need for proper implementation of Principle 10 of Rio Declaration. To strengthen environmental human rights, not only is there a need to have a liberal judiciary, strong environmental legislation and explicit constitutional provisions, there should be public access to decision making and to information.

With this view in mind, this presentation explores issues related to environmental human rights in three countries of South Asia: India, Pakistan and Bangladesh. It examines the constitutional aspects and trends of public-interest litigation which relate to environmental human rights, and explores participatory rights and access to environmental information in the region. There have been many academic articles written on the substantive environmental human rights in South Asia. There is no qualm that the judiciary plays a greater role in applying environmental rights and in allowing wider access to persons and organisations acting in the public interest. This paper asks whether only the judiciary's active role is sufficient to reach sustainable and effective environmental decisions. Would a separate environmental forum be adequate? What is the role people play in the decision-making process? What is the nature of access to environmental information in these countries?

The right to life, a fundamental constitutional right, has been extended to include the right to a healthy environment in all these three South Asian countries. In India, the state has a duty to protect and preserve the environment. This is part of the directive principle of state policy and not a fundamental right.<sup>111</sup> The right to life has been applied in a diversified manner in India to incorporate the right to a healthy environment. It includes, e.g., the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood.<sup>112</sup> The Supreme Court of India interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment.<sup>113</sup> The Supreme Court made several decisions which indicate a new trend of the Supreme Court to accommodate novel remedies; although, in some case, these remedies seem to encroach on the domain of the executive.<sup>114</sup> However, the nature and extent of this right are not similar to the self-executory

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<sup>110</sup> Presented at the Roundtable on Human Rights and the Environment (Geneva, 12 March 2004), organised by Geneva Environment Network. More information in [www.environmenthouse.ch](http://www.environmenthouse.ch).

<sup>111</sup> Article 48A and article 51A (g) impose responsibility on every citizen to protect, safeguard and improve the environment. See: the Constitution (Forty Second Amendment) Act 1976.

<sup>112</sup> *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480; *M.C. Mehta v. Union of India* (1998) 9 SCC 589; *Kirloskar Bros. Ltd v. ESI Corporation* (1996) 2 SCC 682.

<sup>113</sup> *Subhash Kumar v. State of Bihar* (AIR 1991 SC 420/ 1991 (1) SCC 598: 'Right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.'

<sup>114</sup> *M.C. 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.

and actionable right to a sound and healthy environment prescribed in the Constitution of the Philippines or South Africa.<sup>115</sup>

In Bangladesh, the Constitution does not explicitly provide for the right to a healthy environment. Articles 31 and 32 together incorporate the fundamental 'right to life'.<sup>116</sup> The Supreme Court highlighted that a constitutional 'right to life' does extend to include a right to a safe and healthy environment<sup>117</sup> and includes anything that affects life, public health and safety.<sup>118</sup> In Pakistan, the right to life is guaranteed by Article 9, and the Supreme Court in *Shehla Zia's* case<sup>119</sup> decided that the right to life includes the right to live in an unpolluted environment. Furthermore, in several human rights cases, the Supreme Court emphasised that the right to life would include an 'adequate level of living',<sup>120</sup> and 'quality of life'.<sup>121</sup> The judiciary of Pakistan firmly established the right to safe and unpolluted drinking water as part of the right to life.<sup>122</sup>

The judiciary in these three countries is also active in applying various internationally recognised environmental principles such as the polluter pays principle<sup>123</sup> and the precautionary principle.<sup>124</sup> In India, these principles were applied as part of customary international law. In doing so, they are creating a precedent that can be criticised by many as epistolary jurisdiction of the court. The judiciary is making their choice by a process of value judgments that are influenced by their assessment of what is best for the community.<sup>125</sup> While applying these principles, the judiciary of these three countries assumed them as part of achieving the overarching agenda of sustainable development.<sup>126</sup> Their decision could be

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<sup>115</sup> For Philippines, see *Minors Oposa v. Sec. of the Department of Environment*, 33 ILM 173 (1994).

For South Africa, see section 24 of the Constitution of the Republic of South Africa (Act 108 of 1996)

<sup>116</sup> Article 31 states that every citizen has the right to protection from 'action detrimental to the life liberty, body, reputation, or property'. Article 32 states: 'No person shall be deprived of life or personal liberty save in accordance with law'. If these rights are taken away, compensation must be paid.

<sup>117</sup> *M. Farooque v. Secretary, Ministry of Communication, Government of Bangladesh and 12 Others (Unreported)*: Breach of statutory duties to mitigate air and noise pollution caused by motor vehicles in Dhaka city.

<sup>118</sup> (1996) 48 Dhaka Law Reports, at 438: Right to life includes 'the enjoyment of pollution free water and air, improvement of public health...'

<sup>119</sup> *Shehla Zia v. WAPDA*, PLD 1994 SC 693 at pg.712.

<sup>120</sup> *The Employees of the Pakistan Law Commission v. Ministry of Works* 1994 SCMR 1548;

<sup>121</sup> *Amanullah Khan v. Chairman, Medical Research Council* 1995 SCMR 202. See also, *Pakistan Chest Foundation v. Government of Pakistan* (1997) CLC 1379.

<sup>122</sup> *West Pakistan Salt Miners Labour Union v. The Director, Industries and Mineral Development, Lahore* (1994) SCMR 2061.

<sup>123</sup> In India: *H-Acid case* (AIR 1987 SC 1086), *Vellore Citizen's Welfare Forum* AIR 1996 SC 2715: (1996) 5 SCC 647; *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC at 414. There is yet no application of this principle in the case laws of Pakistan and Bangladesh.

<sup>124</sup> In India: *Taj Trapezium Case* (1997) 2 SCC 353; *Vellore Citizen's Welfare Forum* (1996) 5 SCC 647; *Indian Council for Enviro Legal Action v. Union of India* (1996) 3 SCC at 247; *S. Jagannath v. Union of India and Others* (1997) 2 SCC 87; *Suo Motu Proceedings in Re: Delhi Transport Department* (1998) 9 SCC 250. In Bangladesh: *Mohiuddin Farooque v. Bangladesh (Radioactive Milk case)* WP No. 92 of 1996. In Pakistan: *Shehla Zia v. WAPDA* PLD 1994 SC 693; *Salt Miners Case* (1994) SCMR 2061.

<sup>125</sup> Judge Weeramantry, Closing address, Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, Sri Lanka, (4-6 July, 1997).

<sup>126</sup> The judiciary followed basic elements of implementing sustainable development, such as, sustainable and equitable utilisation of natural resources, integration of environmental protection and economic development, and the right to development. In India: *Vellore Citizen Welfare Forum case* AIR 1996 SC 2715; (1996) 5 SCC 647. In Bangladesh: *Bangladesh Environmental Lawyers Association (BELA) v. Ministry of Energy and Mineral Resources* (writ petition, filed on 17 November 1998). In Pakistan: *Shehla Zia v. Pakistan* (PLD 1994 SC 693 at 710-711).

influenced by the fact that sustainable development itself is a huge concept that can be defined in any way possible.

### **Trends followed in recent environmental human rights cases**

The recent trend of case law suggests that it is difficult to have a clear-cut division between human rights cases and environmental cases.<sup>127</sup> Moving away from the sectoral litigations of the 80's, the 90's categories of public interest litigations (PILs) became more sophisticated and dealt with complex areas of waste management, biodiversity, water management and relationship between labour rights and environmental rights. In Bangladesh and Pakistan, the PILs dealt with general aspects of environment, such as air or water pollution or challenging big development projects as well as waste management and urban pollution. The recent trend of PIL shows that the latter two countries primarily deal with human rights-related issues and concentrate on further exploring the fundamental right to life. In several cases, the human right to environment has been used as an individual right, i.e. to put pressure on the government, and also as a collective right for collective enforcement. The decisions of the judges are strongly guided by their attitude towards human rights. Some of the recent issues in Bangladesh which interlink human rights and environmental concerns are eco-tourism,<sup>128</sup> shrimp farming,<sup>129</sup> and bilateral issue of river linking project of India.<sup>130</sup> It will be interesting to follow the progress of these issues.

### **Separate environmental forums**

The need for a separate environmental forum lies in the fact that the framework environmental legislations in these countries have enforcement mechanisms, which are rarely used.<sup>131</sup> With the complexity of the environmental cases, the tendency of the public is to use the facilities of the higher courts. Thus, the process of the PILs becomes lengthy and expensive.<sup>132</sup> In addition to the increase in the number of the cases, there are other factors contributing to the sluggishness of the system. Inadequate numbers of judges and support staff, outdated facilities, lack of information technology, inordinate delays, frequent adjournments and lack of co-operation between judges and lawyers in the quick disposal of cases, are to name but a few.<sup>133</sup> The possibility of a specialist chamber or tribunal seemed to

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<sup>127</sup> J. Razzaque, 'Human Rights and the Environment in South Asia' (2002) *Journal of Environmental Policy and Law*, vol. 32/2, 99-111.

<sup>128</sup> Ongoing issue related to the Government's decision to acquire land for tourism dislocating tribal people. Example on similar issue can be found in India, where guided by the positive obligations contained in article 48A and 51A(g), the court ordered adequate compensation and rehabilitation of the evictees. See: *Kirloskar Bros. Ltd v. ESI Corporation* (1996) 2SCC 682.

<sup>129</sup> *Khushi Kabir and others v. Government of Bangladesh* [W.P. No. 3091 of 2000]. '....shrimp cultivation will cause irreparable ecological and environmental damage to the community and to the livelihoods of the inhabitants of the said area.' See: *S. Jagannath v. Union of India* (1997) 2 SCC 87 on similar issue. The Indian court held that: '... there must be a compulsory environmental impact assessment which would consider intergenerational equity and rehabilitation cost.'

<sup>130</sup> India has been planning a river-linking project which would interlink major rivers with canals and construct reservoirs and embankments by 2016 to store water in monsoon for use in farming in the dry season. It is feared that the withdrawal of water would have serious repercussions on the climate, ecology, geomorphology, bio-diversity, wetlands and navigational activities in Bangladesh and would adversely affect more than 100 million people. <http://www.guardian.co.uk/international/story/0,3604,1004769,00.html>

<sup>131</sup> For example, in Bangladesh, the Directorate of Environment, has identified some 903 polluting companies in 1989. However, the Directorate has managed to bring action only against a handful of companies. M. Ullah, *Environmental Politics in Bangladesh* (CFSD, Dhaka, 1999) at 153-161.

<sup>132</sup> For example, PILs related to encroachment of river and public park are still pending before the court See: J. Razzaque, 'Country Report: Bangladesh' YbIEL (Vol.9) 1998 and (Vol.10) 1999.

<sup>133</sup> ASK Report, June 1995; Bangladesh Observer Nov.13, 1995; Holiday, Apr.6, 1998.

be a solution to resolve an environmental dispute more efficiently and to deal with environmental cases which are complex and technical by nature. There are separate environmental forums in India,<sup>134</sup> Pakistan and Bangladesh available to bring the environmental cases with an aim to reduce pressure and backlog on the formal courts.<sup>135</sup> The Green Bench in all three countries play a more inquisitorial role. It has relaxed the rule of standing, established strict liability in environmental cases and brought *suo motu* actions.<sup>136</sup> It is expected that separate environmental forums would bring in expertise from other professions, such as the architects or surveyors, and there would be sensible practice in the legal aid and cost order.

### **Public participation in the environmental decision-making process**

Public participation is another area which potentially enhances public trust of government decision making, and thus reduces litigation or challenging actions, and serves to co-ordinate and reconciles various environmental strategies.<sup>137</sup> In all these three countries, both formal informal procedures are followed in public participation in law and policy making.<sup>138</sup> Participation in implementation and enforcement includes common law rights to initiate criminal or civil proceedings,<sup>139</sup> citizen petitions where the citizens are given the right to petition for agency action, and judicial review. The public's access to national courts through PIL, as a member of the environment protection agencies or participate in environmental inquiries – all of these fall under public participation in the decision making.<sup>140</sup> Though recent legislation in India, Pakistan and Bangladesh mentions the public participation, the specific implementation is left largely to the discretion of the relative governmental agencies. Interested members of the public may not be presented with opportunities to offer the type of input that they believe would be truly meaningful.

In addition, legislation related to environmental impact assessment (EIA)<sup>141</sup> contains provisions for complaints from the public.<sup>142</sup> Some foreign assistance programmes also show

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<sup>134</sup> The importance a separate environment court were emphasised by judges in *Indian Council for Enviro- Legal action v. Union of India* (1996) 3 SCC 212 and *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.)* 1999 SOL Case No. 53.<[www.supremecourtonline.com](http://www.supremecourtonline.com)>

<sup>135</sup> In India: the Green Bench is already functioning in Calcutta, Madhya Pradesh and some other High Courts. Also, separate tribunals under the 1995 National Environment Tribunal Act and the 1997 National Environment Appellate Authority Act are up and running. In Bangladesh: the newly established environment court has just started to function under the Environment Court Act 2000. In Pakistan: From 1992, the Supreme Court of Pakistan has appointed a judge who hears public interest cases in the field of environment. The 1997 Pakistan Environment Act offers separate provisions for environmental tribunals.

<sup>136</sup> J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer: Aspen, Netherlands, 2004) at chapter 8, 373-401.

<sup>137</sup> W.M. Tabb, 'Environmental Impact Assessment in the European Community: Shaping International Norms' (1999) *Tulane Law Review*, vol.73:923 at 953.

<sup>138</sup> Formal procedures such as participation in lawmaking include participation in the form of public consultation and citizen initiatives in the policy making; and informal methods such as writing or calling elected officials, attending public hearings, commenting on agency rules, or lobbying on specific legislation.

<sup>139</sup> Common law claims for nuisance, tort, trespass, or strict liability provides for important method for citizens to enforce general standards.

<sup>140</sup> P. Leelakrishnan, 'Public Participation in the Decision Making' in P. Leelakrishnan (ed.) *Law and Environment* (Eastern Book Company, Lucknow, 1992) at 162.

<sup>141</sup> In India: 1986 Indian Environment Protection Act and 1992 Rules; 1951 Industries (Development and Regulation) Act; 1993 Environmental Clearance Notification. In Bangladesh: 1995 Environment Conservation Act and 1997 Rules. In Pakistan: 1997 Environment Protection Act.

<sup>142</sup> In India: Section 19(b) of 1986 Environment Protection Act; 1997 National Environment Appellate Authority Act. In Bangladesh: 1995 National Environment Management Action Programme



increased public participation in EIAs.<sup>143</sup> The methodology followed in these EIAs involves direct involvement of community leaders to gather basic data about the affected community and face-to-face surveys with community members and non-governmental organisations working in the neighbourhood of the project. Amendments in legislation in these three countries show that the government is interested in promoting citizen's participation in the implementation of its national conservation strategy and environmental action plan, and assist in the monitoring of environmental policies and actions. This initiative would also strengthen partnership and collaboration between government agencies, the private sector and civil society leading to the effective implementation of the government's environmental agenda.<sup>144</sup>

### **Access to information in environmental matters**

Adequate access to environmental information strengthens participatory mechanisms. Provisions related to access to environmental information in these three countries could be found in constitutional provisions, framework environmental legislation,<sup>145</sup> and through the industry reporting mechanism. However, there is no general duty of the state to collect or disseminate environmental information. The earlier sectoral environmental legislation of India, Pakistan and Bangladesh hardly provides any provision on the access to environmental information. All these three countries have an Official Secrecy Act<sup>146</sup> to deal with access to information. Only recent legislations mention provisions relating to access to information in environmental matters.<sup>147</sup> It is important to examine whether the state publishes periodic reports on the 'state of the environment' and information related to other environmental indicators. Some recent cases show the court's increasing willingness to extend the citizen's access to official environmental information and the importance of active participation in local decision making process.<sup>148</sup>

### **Concluding remarks**

Although the above discussion touched upon several issues, it is important to flag two areas which require urgent attention. First, the rules on access to environmental information in these three countries are very restricted. Successful implementation of the right to environmental information depends on a corresponding duty of government agencies or companies to report regularly on their activities involving releases and transfers of hazardous substances. Under the three framework laws of the three countries, the government agencies have a duty to produce annual environmental statements. However, the polluting companies do not have any

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(NEMAP); Section 17 of 1927 Forest Act; Section 8 of 1995 Environment Conservation Act; Rule 5 of 1997 Environment Conservation Rules; In Pakistan: Section 4 (2) of 1997 Environment Protection Act.

<sup>143</sup> Examples of EIAs in Asian Development Bank (ADB) funded projects can be found in J Razzaque, *ibid.*, at chapter 8, 406-419.

<sup>144</sup> M. Haque, 'National Environmental Management Action Program (NEMAP) in Bangladesh' in Quddus et al (eds) *Environment and Sustainable Agriculture in Rural Development* (BARD, Bangladesh, 1996), at 192. 'Two Advisory Boards Constitute for local government, environment' <<http://www.breorder.com/story/S00DD/SDB27/SDB27260.htm>>

<sup>145</sup> In India: Section 20 of 1986 Environment Protection Act. In Bangladesh: Rule 15 of the 1997 Environment Conservation Rules. In Pakistan, section 6 and section 12(3) of the 1997 Environment Protection Act. The 1997 Freedom of Information Ordinance of Pakistan does not deal with environmental information.

<sup>146</sup> 1923 Official Secrets Act (with necessary amendments in each country) deals with access to official information in these three countries. The emphasis of this Act is to restrict access rather than opening it.

<sup>147</sup> In India: 1994 Environment (Protection) Rules; 1974 Water (Prevention and Control of Pollution) Act. In Bangladesh: 1997 Bangladesh Conservation Rules; 1927 Forest Act; 1920 Agricultural and Sanitary Improvement Act; 1952 Embankment and Drainage Act; 1950 Fish Act. In Pakistan: 1997 Environment Protection Act.

<sup>148</sup> A. Rosencranz, et al., (ed.) *Environmental Law and Policy in India* (OUP, India, 2001) at 144-149.

such obligations. There are very few opportunities for interested parties to obtain information, to be given notice, to be given a hearing before decisions are made, and to appeal certain kinds of decisions to a review board. For these three countries, there is no specific legislation guaranteeing access to information and public consultation. There is no strong institutional support mechanism to ensure that information is actually accessible. Moreover, public agencies have limited power to possess, update, collect or disseminate environmental information. It is possible to ensure access to information through a public register containing environmental data. The publication of the official data or informal reports can help the public to gather environmental information. However, accessibility of information can only result in effective participation if legal and institutional mechanisms are in place to allow this participation. Along with a public consultation rights and public inquiries, traditional remedies, such as criminal sanctions, class action, and judicial review could be initiated to improve the public involvement.

Secondly, sporadic examples of public participation in the decision making can be found in various environmental action plans, programs, activities and policy making in these three countries. The framework laws provide an outline of such access to information and public participation in decision making. However, the restricted access to public hearing and consultation and the lack of elaborate criteria makes these less effective. The public does not have a true opportunity to take part in the decision-making process, and thus unable to influence the outcome. It rests on the environmental agencies to formulate the guidelines for an effective mechanism.<sup>149</sup> Public involvement and consultation in the decision making should not be a hollow promise. There should be a proper implementation procedure through EIA and an overall coherent environmental policy guaranteeing timely and effective participation in the decision making process.

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<sup>149</sup> The guidelines may follow the formula set out in the 1998 Aarhus Convention. See: J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' YbIEL (1997) Vol. 8 at 86.

## **Human rights and the environment: the perspective of the human rights bodies**

*by Stefano Sensi, Office of the High Commissioner for Human Rights*

Today, we have listened to thought-provoking presentations touching upon several aspects of the interconnectedness between the human rights and the environmental fields. In my presentation, I would like to give you a brief overview of the consideration being given to this issue by the United Nations human rights bodies.

My presentation will be divided into two parts. In the first part, I will focus on the so-called Charter-based bodies – the Commission on Human Rights and its subsidiary organ, the Sub-Commission on the Promotion and Protection of Human Rights, and I will analyse the extent to which these organs have recognised the relationship between the goal of environmental protection and the enjoyment of human rights. In the second part, I will turn my attention to the so-called “special procedures” and provide you with selected examples of the work carried out by some of the Special Rapporteurs and Independent Experts of the Commission and the Sub-Commission in the area of human rights and the environment.

As many of you know, the UN Commission on Human Rights – established in 1946 by the Economic and Social Council – is the main UN organ in charge of promoting and protecting human rights. The Commission provides overall policy guidance, studies human rights problems, develops and codifies new international norms and monitors the observance of human rights around the world. It is made up of 53 Member States elected for three-year terms and meets once a year in Geneva for a six-week period.

The Sub-Commission on the Promotion and Protection of Human Rights – formerly known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities – is a subsidiary body of the Commission. It consists of 26 experts who serve in their personal capacity, and not as State representatives. The main functions of the Sub-Commission – which is commonly referred to as the “think tank” of the Commission – is to undertake studies, particularly on the development of legal rules, and make recommendations to the Commission on Human Rights. The Sub-Commission meets annually in August for a three-week session in Geneva.

In the last decade, the Commission on Human Rights and its Sub-Commission have on several occasions reaffirmed and emphasised the linkage between human rights and the environment. It has also dealt with other related issues, such as the relationship between human rights and the illicit movement and dumping of toxic and dangerous products and wastes.

In August 1990, the (then) Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Ms. Fatma Zohra Ksentini with the task of undertaking a study on human rights and the environment.<sup>150</sup> The Special Rapporteur produced a preliminary report in 1991 and two progress reports in 1992 and 1993. In 1994, upon the request of the Sub-Commission, Ms. Ksentini submitted her final report to the Sub-Commission.<sup>151</sup>

In this report, the Special Rapporteur noted that normative developments at the international, regional and domestic levels since the adoption of the 1972 Stockholm declaration had led to the recognition of a right to a satisfactory environment as a human right, and strengthened the interconnectedness between human rights and environmental protection. Ms. Ksentini noted in particular that environmental degradation and pollution affect negatively the enjoyment of a

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<sup>150</sup> E/CN.4/Sub.2/1990/7.

<sup>151</sup> E/CN.4/Sub.2/1994/9.

series of human rights, including the right to life, health, an adequate standard of living and so on. Conversely, she also noted that human rights violations may in turn cause damage to the environment.

The report included in Annex I a draft *Declaration of Principles on Human Rights and the Environment*, which represents an early example of an international text addressing comprehensively the linkage between human rights and the environment. The Principles describe the environmental dimension of established human rights and aim at tailoring existing human rights standards to the goal of environmental protection. Part IV of the draft Declaration includes reference to the duties of individuals, States, international organisations and transnational corporations in the field of environmental protection.

In this context, it is interesting to note that last year the Sub-Commission adopted the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, which states that transnational corporations shall provide a safe and healthy working environment and reaffirms the obligations of transnational corporations and other business to carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment, as well as in accordance with relevant international agreements, principles, and standards relating to the preservation of the environment and the protection and promotion of human rights.

The Special Rapporteur recommended that the human rights bodies incorporate environmental concerns into their activities, with a view to clarifying further the environmental dimension of the human rights under their responsibility. She also recommended the appointment of a Special Rapporteur on human rights and the environment to the Commission on Human Rights and proposed the organisation of a seminar – to be held under the auspices of the then Centre for Human Rights (now Office of the High Commissioner for Human Rights) – to formulate recommendations on the way in which environmental rights could be incorporated into the activities of human rights bodies. Finally, the Special Rapporteur recommended that the *Draft Principles on Human Rights and the Environment* be used as a basis for the adoption of a set of legal norms consolidating the right to a clean and healthy environment.

The Sub-Commission expressed appreciation to the Special Rapporteur for her report and invited the Commission on Human Rights to pay particular attention to the conclusions and recommendations contained in the report. In particular, the Sub-Commission recommended that the Commission appoint a Special Rapporteur on human rights and the environment with a mandate to: (a) receive communications on environmental problems affecting the full enjoyment of human rights; and (b) seek comments on the draft principles annexed to the final report of the Sub-Commission's special rapporteur.<sup>152</sup>

At its fifty-first session, in 1995, the Commission on Human Rights took note of the final report of Ms. Ksentini and of the recommendations addressed to it by the Sub-Commission. Instead of following up immediately on the recommendations of the Special Rapporteur and the Sub-Commission – and in particular on the suggestion of appointing a new Special Rapporteur on human rights and the environment – the Commission requested the Secretary-General to submit a report containing the views of Governments, specialised agencies and NGOs on the issues raised by the Special Rapporteur in her report.

Also in 1995, the Commission on Human Rights adopted its first resolution specifically concerning the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.<sup>153</sup> In this resolution, the Commission reaffirmed that the illicit dumping of toxic and dangerous products and wastes constitutes a

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<sup>152</sup> Sub-Commission on Human Rights resolution 1994/27.

<sup>153</sup> Commission on Human Rights resolution 1995/81.

serious threat to the human rights to life and health of every individual. It decided to appoint a new Special Rapporteur for a three-year period with a mandate to examine the human rights aspects of this issue. Ms. Ksentini was appointed to this new position. At its fifty-fourth session, in 1998, the Commission condemned the increasing rate of dumping of toxic and dangerous products and wastes in developing countries, and decided to renew the mandate of the Special Rapporteur for a further three-year period.<sup>154</sup>

In 2000, the open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights noted that the mandate of the Special Rapporteur on toxic waste was due to be renewed in 2001, and recommended that the Commission be prepared to convert this mandate into that of Special Rapporteur on human rights and the environment.<sup>155</sup>

The Commission decided not to follow up on the Working Group's recommendation and restricted itself to renewing the mandate of Ms. Fatma Zohra Ksentini (now Ms. Ouhachi-Vesely) for a further period of three years.<sup>156</sup> In any case, the recommendation of the Working Group reflected a growing understanding that the full enjoyment of human rights requires addressing a broad range of environmental concerns – including, but not limited to, problems related to the illicit movement and dumping of toxic and dangerous substances and wastes.

The organisation of the World Summit on Sustainable Development (WSSD)<sup>157</sup> gave new impetus to initiatives aimed at clarifying the interrelations between the protection of the environment and the enjoyment of human rights. In April 2001, the Commission on Human Rights – noting the forthcoming WSSD meeting to be organised in Johannesburg for September 2002 – decided to invite the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Environment Programme (UNEP) to consider the organisation of a joint seminar to review and assess progress achieved since the 1992 UN Conference on Environment and Development (UNCED) in promoting and protecting human rights in relation to environmental questions and in the framework of Agenda 21.<sup>158</sup>

Pursuant to this decision, OHCHR and UNEP convened a joint seminar on human rights and the environment in Geneva on 16 January 2002. Several Governments, UN agencies and NGO representatives participated in the joint seminar, and a wide range of recommendations were elaborated. This seminar was preceded by a two-day preparatory meeting of experts on human rights and the environment. The purpose of the expert meeting was to facilitate the work of the seminar by providing an expert assessment and review of progress achieved since UNCED at the international, regional and national level.

According to the experts, developments during the last decade indicated the close connection between the protection of human rights and the preservation of the natural environment in the context of sustainable development. The experts noted – I quote – that “the linkage of human rights and environmental concerns is reflected in developments relating to procedural and substantive rights, in the activities of international organisations, and in the drafting and application of national constitutions.” They acknowledged in particular the role played by the Commission on Human Rights and its Sub-Commission – particularly through their Special Rapporteurs – in promoting understanding on the interconnections between human rights and environmental protection.

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<sup>154</sup> Commission on Human Rights resolution 1998/12.

<sup>155</sup> E/CN.4/2000/112.

<sup>156</sup> Commission on Human Rights resolution 2001/35.

<sup>157</sup> General Assembly resolution 55/199.

<sup>158</sup> Commission on Human Rights decision 2001/111.

At its 58<sup>th</sup> session, the Commission on Human Rights adopted a new resolution on human rights and the environment,<sup>159</sup> in which it welcomed the holding of the preparatory expert meeting and of the seminar on human rights and the environment and decided to continue its consideration of this question at its fifty-ninth session, taking into account the relevant outcomes agreed at the WSSD and the reports of those special procedures of the Commission that were asked to participate in and contribute to the World Summit.

The World Summit on Sustainable Development, however, did not expressly recognised the link between human rights and the environment. The Plan of Implementation only acknowledged that the “respect for human rights and fundamental freedoms, including the right to development (...) are essential for achieving sustainable development and ensuring that sustainable development benefits all”.<sup>160</sup> Nonetheless, in her intervention, the then High Commissioner for Human Rights, Mrs. Mary Robinson, stressed – I quote – that in the decade after UNCED “there has been continuous progress in bringing together the human and environmental dimensions within the concept of sustainable development” and identified the prime goal for the immediate future as the achievement of a “deeper understanding of the links between human rights and environmental protection”.<sup>161</sup>

Last year, the Commission on Human Rights adopted a new resolution entitled “Human Rights and the Environment as part of sustainable development”,<sup>162</sup> which represents without doubt the most comprehensive document ever adopted by the Commission on this topic. In this resolution, the Commission took stock of developments relating to procedural and substantive rights at the international and regional levels and:

- Reaffirmed the importance of peace, security, good governance and respect for human rights and fundamental freedoms for the achievement of sustainable development (operative paragraph 1);
- Restated that environmental damage can have potentially negative effects on the enjoyment of some human rights (operative paragraph 2);
- Encouraged efforts towards the implementation of the principles of the Rio Declaration, and in particular principle 10, in order to contribute to effective access to judicial and administrative proceedings, including redress and remedy (operative paragraph 6);
- Welcomed actions taken by States, such as legal measures and public awareness activities, that promote and protect human rights and that also assist in the promotion of environmental protection and sustainable development (operative paragraph 9);
- Called upon States to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development (operative paragraph 4); and
- Stressed that States should take into account the negative effects that environmental degradation may have on disadvantaged members of society when developing their environmental policies (operative paragraph 5).

The Commission also requested the Secretary-General to submit to it at its sixtieth session a report on the consideration being given to the possible relationship between the environment and human rights, taking into account the contributions that concerned international organisations and bodies have made.

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<sup>159</sup> Commission on Human Rights resolution 2002/75.

<sup>160</sup> A/CONF.199/20, para. 5.

<sup>161</sup> <http://www.unhchr.ch/hurricane/hurricane.nsf/0/3F3D1953010D3007C1256C25004D956B?opendocument>

<sup>162</sup> Commission on Human Rights resolution 2003/71.

Let me now give you some examples of the work carried out by the so-called human rights “special procedures” in examining and advancing understanding on the inextricable link between the enjoyment of human rights and the protection of environmental media.

For those of you who are not familiar with this terminology, the expression “special procedures” is used to indicate those mechanisms established by the Commission on Human Rights to be constantly engaged on an issue of concern throughout the year. These mandates have been entrusted to groups of individuals, called *working groups*, or individuals designated as *Special Rapporteurs*, *Special Representatives* or *Independent Experts*. In general terms, their mandates are to examine, monitor and publicly report on either the human rights situation in a specific country or territory (known as country mandates) or on human rights violations worldwide – known as thematic mechanisms or mandates. I will now try to highlight some examples of the work carried out by the special procedures on the issue of the links between human rights and the environment.

In his statement at the WSSD, and throughout the course of his mandate, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living – Mr. Miloon Kothari – stressed that from a human rights perspective the issue of housing cannot be separated from a range of other issues related to sustainable development, including land, access to potable water and sanitation, safe and healthy environment, and poverty.<sup>163</sup> In particular, the Special Rapporteur affirmed – I quote – that “the right to adequate housing needs to be recognised as a crucial entitlement on the road to achieving sustainable development including environmental security. This recognition is essential since the realisation of the right to adequate housing loses its meaning unless processes are put into place to ensure that people and communities can live in an environment that is free from pollution of air, water and the food chain.”

In his preliminary report to the Commission on Human Rights, in 2003, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, affirmed that the right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, and healthy occupational and environmental conditions. The Special Rapporteur also noted that health facilities, goods and services – including the underlying determinants of health – should be accessible to all, especially the most vulnerable or marginalised sections of the population, without discrimination.<sup>164</sup>

The second report to the Commission of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, focused on the impact of large-scale or major development projects on the human rights and fundamental freedoms of indigenous peoples and communities. He stressed that the principal human rights effects of these projects for indigenous peoples relate to – inter alia – destruction and pollution of the traditional environment, loss of traditional territories and land, eviction, and depletion of resources necessary for physical and cultural survival.<sup>165</sup>

The Special Rapporteur on the human rights of migrants, Ms. Gabriela Rodríguez Pizarro, has identified environmental degradation among the reasons why people leave their countries in

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<sup>163</sup> Statement of Mr. Miloon Kothari, Special Rapporteur on adequate housing, at the World Summit on Sustainable Development (Johannesburg, 30 August 2002) – available at <http://www.unhcr.ch/housing/>

<sup>164</sup> E/CN.4/2003/58.

<sup>165</sup> E/CN.4/2003/90.

search of conditions of survival or well-being that do not exist in their places of origin.<sup>166</sup> In the same fashion, the representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, has included in the definition of internally displaced persons those individuals who have been forced to flee their homes suddenly or unexpectedly in large numbers as a result of natural disasters as well as those relocated by development projects or by economic and environmental causes.<sup>167</sup>

The Independent Experts on human rights and extreme poverty, Ms. Anne-Marie Lizin, and on the right to development, Mr. Arjun Sengupta, have on several occasions stressed the links between poverty and environmental degradation, with special reference to the cause-and-effect relationship between environmental degradation and the violation of specific human rights, such as the right to a healthy environment, to food and water and to housing.

In conclusion, let me point out that these are only but a few examples of the attention devoted by the “special procedures” to the issue of the interconnectedness between human rights and environmental protection. These examples show that within the human rights community there is a growing recognition of the fact that (a) environmental protection represents a precondition to the enjoyment of internationally recognised human rights, and (b) certain human rights – such as the right of association and assembly or the right of access to information – are essential tools for achieving environmental protection. They also show that human rights are universal, indivisible, interdependent and interrelated, and thus that environmental degradation or pollution may affect negatively the enjoyment of several universally-protected rights.

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<sup>166</sup> E/CN.4/2000/82.

<sup>167</sup> A/50/558.



**Decision 2004/119 Science and environment**

At its 57th meeting, on 21 April 2004, the Commission on Human Rights, recalling its resolution 2003/71 of 25 April 2003, decided, without a vote, to request the United Nations High Commissioner for Human Rights and to invite the United Nations Environment Programme, within their respective mandates and approved work programmes and budgets, to continue to coordinate their efforts in capacity-building activities, in cooperation with other relevant bodies and organizations, and to request the Secretary-General to update the report on the consideration being given to the relationship between the environment and human rights as part of sustainable development and to continue to consider this question at its sixty-first session under agenda item 17, entitled “Promotion and protection of human rights: (d) Science and environment”.

**Decision 2004/122 Human rights implications, particularly for indigenous people, of the disappearance of States for environmental reasons**

At its 57th meeting, on 21 April 2004, the Commission on Human Rights decided, without a vote, urgently to call upon the Sub-Commission on the Promotion and Protection of Human Rights to prepare a report on the legal implications of the disappearance of States for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous people.

**Resolution 2004/17 Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights**

*The Commission on Human Rights,*

*Guided* by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the Vienna Declaration and Programme of Action, particularly on the question of the human rights of everyone to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work,

*Recalling* its earlier resolutions on the subject, in particular, resolution 2003/20 of 22 April 2003,

*Taking into consideration* the Declaration and Plan of Implementation adopted by the World Summit on Sustainable Development held in Johannesburg, South Africa, in September 2002,

*Welcoming* the entry into force of the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (“the Rotterdam Convention”) as a key instrument providing States with a major tool to reduce the risks associated with pesticide use,

*Affirming* that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work, particularly of individual developing countries that do not have the technologies to process them,

*Noting* that the Stockholm Convention on Persistent Organic Pollutants has the potential to address serious issues of concern, especially for developing countries,

*Reaffirming* that the international community must treat all human rights in a fair and equal manner, on the same footing and with the same emphasis,

*Reiterating* that all human rights are universal, indivisible, interdependent and interrelated,

*Reaffirming* General Assembly resolution 50/174 of 22 December 1995 on strengthening of United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity,

*Mindful* of the call by the World Conference on Human Rights on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and wastes and to cooperate in the prevention of illicit dumping,

*Aware* of the increasing rate of illicit movement and dumping by transnational corporations and other enterprises from industrialized countries of hazardous and other wastes in developing countries that do not have the national capacity to deal with them in an environmentally sound manner,

*Aware also* that many developing countries do not have the national capacities and technologies to process such wastes in order to eradicate or diminish their adverse effects on human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health, and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work,

1. *Takes note* of the report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (E/CN.4/2004/46 and Add.1 and Add.1/Corr.1 and Add.2 and 3);

2. *Appreciates* the efforts made by the Special Rapporteur in carrying out her mandate in the face of very limited financial resources;

3. *Categorically condemns* the illicit dumping of toxic and dangerous products and wastes in developing countries;

4. *Reaffirms* that illicit traffic in and dumping of toxic and dangerous products and wastes constitute a serious threat to human rights, including the right to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work;

5. *Urges* all Governments to take appropriate legislative and other measures, in line with their international obligations, to prevent the illegal international trafficking in toxic and hazardous products and wastes, the transfer of toxic and hazardous products and wastes through fraudulent waste-recycling programmes, and the transfer of polluting industries, industrial activities and technologies, which generate hazardous wastes, from developed to developing countries;

6. *Invites* the United Nations Environment Programme, the secretariats for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Pesticides in International Trade, the Commission on Sustainable Development, the International Register of Potentially Toxic Chemicals, the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization and regional organizations to continue to intensify their coordination and international cooperation and technical assistance on environmentally sound management of toxic chemicals and hazardous wastes, including the question of their transboundary movement;

7. *Requests* the Governments of developed countries, together with international financial institutions, to provide financial assistance to African countries for the implementation of the Programme of Action adopted at the First Continental Conference for Africa on the Environmentally Sound Management of Unwanted Stocks of Hazardous Wastes and Their Prevention, held in Rabat, from 8 to 12 January 2001;

8. *Expresses its appreciation* to the relevant United Nations bodies, in particular the United Nations Environment Programme and the secretariat for the Basel Convention, for the support extended to the Special Rapporteur and urges them and the international community to continue to give her the necessary support to enable her to discharge her mandate;

9. *Urges* the international community and the relevant United Nations bodies, in particular the United Nations Environment Programme and the secretariat for the Basel Convention, to continue to give appropriate support to developing countries, upon their request, in their efforts to implement the provisions of existing international and regional instruments controlling the transboundary movement and dumping of toxic and dangerous products and wastes in order to protect and promote human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work;

10. *Urges* all Governments to ban the export of toxic and dangerous products, substances, chemicals, pesticides and persistent organic pollutants that are banned or severely restricted in their own countries;

11. *Calls upon* countries that have not done so to consider ratifying the Rotterdam Convention;

12. *Urges* States to strengthen the role of national environmental protection agencies and non-governmental organizations, local communities and associations, trade unions, workers and victims, and provide them with the legal and financial means to take necessary action;

13. *Urges* human rights bodies to be more systematic in addressing violations of rights associated with the practices of multinational companies, toxic waste and other environmental problems;

14. *Decides* to extend the mandate of the Special Rapporteur for a further three years;

15. *Urges* the Special Rapporteur to continue to undertake, in consultation with the relevant United Nations bodies, organizations and the secretariats of relevant international conventions, a global, multidisciplinary and comprehensive study of existing problems and new trends of and solutions to illicit traffic in and dumping of toxic and dangerous products and wastes, in particular in developing countries, with a view to making concrete recommendations and proposals on adequate measures to control, reduce and eradicate these phenomena;

16. *Invites* the Special Rapporteur, in accordance with her/his mandate, to include in her/his report to the Commission at its sixty-first session comprehensive information on:

(a) Persons killed, maimed or otherwise injured in developing countries through the illicit movement and dumping of toxic and dangerous products and wastes;

(b) The question of the impunity of the perpetrators of these heinous crimes, including racially motivated discriminatory practices, and to recommend measures to bring them to an end;

(c) The question of rehabilitation of and assistance to victims;

(d) The scope of national legislation in relation to transboundary movement and dumping of toxic and dangerous products and wastes;

(e) The question of fraudulent waste-recycling programmes, the transfer of polluting industries, industrial activities and technologies from the developed to developing countries and their new trends, including e-waste and dismantling of ships, ambiguities in international instruments that allow illegal movement and dumping of toxic and dangerous products and wastes, and any gaps in the effectiveness of the international regulatory mechanisms;

17. *Encourages* the Special Rapporteur, in accordance with her/his mandate and with the support and assistance of the Office of the United Nations High Commissioner for Human Rights, to continue to provide Governments with an appropriate opportunity to respond to allegations transmitted to her/him and reflected in her/his report, and to have their observations reflected in her/his report to the Commission;

18. *Reiterates its call* to the Secretary-General to continue to make all necessary resources available for the Special Rapporteur to carry out her/his mandate successfully and, in particular:

(a) To provide her/him with adequate financial and human resources, including administrative support;

(b) To provide her/him with the necessary specialized expertise to enable her to carry out her mandate fully;

(c) To facilitate her/him consultations with specialized institutions and agencies, in particular with the United Nations Environment Programme and the World Health Organization, with a view to improving the provision by such institutions and agencies of technical assistance to Governments which request it and appropriate assistance to victims;

19. *Decides* to continue consideration of this question at its sixty-first session, under the same agenda item;

20. *Recommends* the following draft decision to the Economic and Social Council for adoption:

“The Economic and Social Council, taking note of Commission on Human Rights resolution 2004/17 of 16 April 2004, endorses the decision of the Commission to extend the mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights for a further three years.”

## **Roundtable on Human Rights and the Environment**

Friday, 12 March 2004, 9h00 - 12h30  
**International Environment House, Room 3**

The link between human rights and the environment has been recognized ever since the 1972 Stockholm Declaration declared that “ 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...” More recently, the 2002 World Summit on Sustainable Development recognized the link between human dignity and access to basic requirements. The 2003 session of the Commission on Human Rights adopted a resolution on “Human Rights and the Environment as part of Sustainable Development”; the Commission will consider the issue again at its forthcoming session (15 March –23 April 2004).

A political consensus that human rights and the environment are closely related clearly exists – but how have 30 years of high-level declarations been translated into reality? Today’s roundtable will examine the progress to date on human environmental rights and the legal, political and practical results of this debate.

### **Programme**

9.00 Coffee/tea

9:30 Welcoming remarks by Mr. Frits Schlingemann, Director, United Nations Environment Programme, Regional Office for Europe

9:45 Introductory remarks by the moderator, Franz Perrez, Swiss Agency for the Environment, Forests and Landscape

Presentations by the panelists:

- The concept of environmental human rights in law and practice, by Yves Lador
- Proceduralizing environmental rights – the example of the UNECE Aarhus Convention, by Marc Pallemmaerts
- International courts and environmental human rights, by Philippe Sands QC
- Environmental Human Rights in South Asia, by Jona Razzaque, FIELD
- Human rights and the environment – the perspective of the human rights bodies, by Stefano Sensi

11:30 Discussion with panelists and participants

12:30 Wrap-up by the moderator

### Biographies

**Franz Xaver Perrez** is an official at the Swiss Agency for the Environment, Forests and Landscape where he serves as Head of Section, Global Affairs, International Division. He was formerly legal advisor in the WTO Division of the State Secretariat for Economic Affairs and legal counsel to the Department of Public International Law in the Swiss Department of Foreign Affairs. Mr. Perrez has published in the fields of international environmental law, WTO law and sovereignty.

**Yves Lador** is Earthjustice Permanent Representative to the United Nations in Geneva. He works also as a consultant for international NGOs, mainly in the field of human rights and environment.

**Marc Pallemarts** is chairman of the Meeting of the Parties to the Aarhus Convention and Professor of environmental law, Vrije Universiteit Brussel & Université Libre de Bruxelles; Senior Research Fellow, Institute for European Studies, Vrije Universiteit Brussel. Co-author of the book *Human Rights and the Environment*, published in 2002 by the Council of Europe. President of the Brussels-based think-tank ECOSPHERE (European Centre on Sustainable Policies for Human and Environmental Rights).

**Philippe Sands QC** is Professor of Law and Director of the PICT Centre for International Courts and Tribunals at University College London. His main publications include *Principles of International Environmental Law* (2nd edition, Cambridge Univ Press, 2003) and *Bowett's Law of International Institutions*. As a practicing barrister at Matrix Chambers in London he has acted as counsel in several international cases involving the precautionary principle.

**Jona Razzaque** is a barrister and staff lawyer at the Foundation for International Environmental Law and Development (FIELD). She is also a member of IUCN CEL committee on Environmental Law and Human Rights. Her research interest includes access to environmental justice in South Asia and she recently published a book on 'Public Interest Environmental Litigation in India, Pakistan and Bangladesh.' She previously worked as a consultant in the joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002).

**Stefano Sensi** is a Human Rights Officer at the Office of the High Commissioner for Human Rights (OHCHR). His responsibilities include the mandate on human rights and the environment. Mr. Sensi has worked at the European Occupational Health and Safety Law Research Centre at the University of Salford (Manchester, U.K.), where he carried out research and lectured on Environmental Law and Health and Safety Law.