THE RIGHT TO A HEALTHY ENVIRONMENT:

INTERNATIONAL AND NATIONAL LAW PERSPECTIVES

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DECLARATIONS

I, Bekele Tekle Mekete, do hereby declare that this is my original work and has not been submitted for a degree in any other University.

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This thesis is submitted with my approval as University Supervisor.

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CONTENTS

CHAPTER ONE

THE RIGHT TO A HEALTHY ENVIRONMENT: DEFINITION OF THE SCHEME OF THE STUDY

CHAPTER TWO

NEW DIMENSIONS OF HUMAN RIGHTS

CHAPTER THREE

INTERNATIONAL AND NATIONAL PERSPECTIVES OF THE RIGHT TO A HEALTHY ENVIRONMENT

CHAPTER FOUR

THE ROLE OF DISPUTE SETTLEMENT IN THE PROTECTION OF ENVIRONMENTAL RIGHTS - WITH REFERENCE TO INTERNATIONAL AND NATIONAL CASES

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

TO THE MEMORY OF

MUFEREJ FIDA HUSSEIN

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ABSTRACT

This study focuses on a new fundamental human right in the making, the right to a healthy environment. Encroaching environmental pollution problems called for the creation of a link between human rights protection and the protection of the environment. Attempts have been made to show the importance of this relationship.

Chapter One sets out the scheme of the study. The subject matter of the study, a healthy environment, is defined here. Statement of the problem, theoretical framework, literature review, objectives, scope and methodology of the study have been presented in this Chapter.

Chapter Two concentrates on the dimension of human rights and its determining criteria, with a view to classifying the right to a healthy environment as such. Historical and evolutionary development of human rights have been discussed in terms of "generations" of human rights. Three generations of human rights, first, second and third, have been identified as categories of human rights. The right to a healthy environment falls within the category of "third generation" human rights, whose subjects are mainly groups and peoples. Based on the criteria for determining a fundamental human right, this right is argued to be a theoretically valid human right.

The international and national perspectives of the right to a healthy environment have been dealt with in Chapter Three of the study. The examination and analysis of the existing international human rights conventions and national constitutions tend to show that environmental

rights are fundamental human rights of primordial importance.

Chapter Four deals with environmental dispute settlement. Using a comparative approach, some of the most important international and national environmental rights cases have been discussed.

Based on the findings of the study, Chapter Five contains the conclusions and recommendations. It is concluded that the right to a healthy environment is partly accepted as a fundamental human right, and partly lacking universal recognition. It is found that the existing international dispute settlement institutions discourage individual and group environmental rights litigations. Accordingly, appropriate recommendations are made to rectify the anomalies encountered in the course of the study.

ABBREVIATIONS

ACTS	African Centre for Technology Studies
AJIL	American Journal of International Law
AMCEN	African Ministerial Conference on the Environment
CFCs	Chlorofluorocarbons
ECA	Economic Commission for Africa [UN]
ECE	Economic Commission for Europe [UN]
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ELIU	Environmental Law and Institutions Unit
ELMU	Environmental Law and Machinery unit
EPL	Environmental Policy and Law
FAO	Food and Agricultural Organisation
GEMS	Global Environmental Monitoring System
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IGADD	Inter-Governmental Authority on Drought and Development
ILC	International Law Commission
ILO	International Labour Organisation
IUCN	International Union for the Conservation of Nature and Natural Resources
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
UN	United Nations

UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHCR	Office of the United Nations High Commissioner for Refugees
UNRIAA	United Nations Reports of International Arbitral Awards
UNSO	United Nations Sudano-Sahelian Office
WHO	World Health Organisation
WMO	World Metereological Organisation
WWF	World Wide Fund for Nature

TABLE OF CASES

TABLE OF CONVENTIONS AND INTERNATIONAL INSTRUMENTS

International Covenant on Civil and Political Rights (1966).

International Covenant on Economic, Social and Cultural Rights (1966).

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (1963).

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and the sub-soil thereof (1971).

United Nations Convention on the Law of the Sea (1982).

Universal Declaration of Human Rights (1948).

Vienna Convention on Civil Liability for Nuclear Damage (1963).

Vienna Convention on the Protection of the Ozone Layer (1985).

CHAPTER ONE

THE RIGHT TO A HEALTHY ENVIRONMENT: DEFINITION OF THE SCHEME OF THE STUDY

INTRODUCTION

1.1 A Healthy Environment Defined

The Encyclopaedia of Environmental Science defines environment as "the aggregate of all external conditions and influences affecting the life and development of an organism".[1] This is a general definition of the physical environment as applicable to all organisms. The focus of this study is, however, the human environment which has to include internal conditions affecting human life. The human environment can be defined as "the aggregate of all conditions and influences affecting the behaviour and development of humans as individuals and societies".[2] The effects of such conditions and influences result in a given environmental quality, either healthy or unhealthy. What, then, is a healthy environment?

A healthy environment is a standard required for the maintenance of the human quality of life. It may be defined as an environment capable of satisfying the vital needs

and wants of an individual or a society. The fulfilment of the condition of environmental quality is relative and may depend on the physical and psychological health or welfare of an individual or a society. It may also depend on the degree to which an individual's or a society's environment satisfies his or its needs.[3] If the quality of environment required to satisfy its needs is not sufficient, society will feel that its quality of life is threatened, and it will work towards averting the threat.

Problems associated with environmental degradation result from human activities undertaken in pursuit of certain objectives. These problems mainly result from development activities aimed at improving the quality of life in one environment, at the cost of a degraded quality of life in another. Environment and development have a vital mutual relationship. Discrepancies between the two must be corrected, in order to achieve sustainable development. Sustainability implies economic and social progress that provides satisfaction for both present and future generations, without destroying the world's finite natural resources and the ecosystem's carrying capacity.[4] Development activities have to be environmentally sound, if they are to guarantee improved human quality of life. A healthy environment is one of the basic elements in the

quality of life. A legal right to such an environment is emerging as a fundamental human right.

Environmental rights occupy an important place in the international and national legal arrangements for the protection of human rights. Along with other rights such as the right to development, the right to peace, and the right to life, the right to a healthy environment is categorized as a third-generation human right.[5] In the past, these rights were mere political or moral aspirations. However, mounting concerns about extreme situations of environmental degradation, have led to claims for their legal protection, in many cases. Accordingly, it is believed that these rights could be characterized as not merely political or moral, but also as juridical rights.[6] As a matter of fact, they are corollaries to the right to life.

1.2. A Preview of the Study

The study links up two aspects of international law and national law, namely, human rights law and environmental law. International human rights law is based on the principle of the duty of states to respect the human rights of their citizens. The international community has a right to protest if states fail to meet their obligations to

that end. There are rules, procedures and institutions for the implementation of human rights at both international and national levels.[7] What is sought here is to examine the right to a healthy environment within the framework of the existing laws.

Though the concept of human rights protection could be traced back to antiquity, its modern form was given impetus by the 18th century American and French Revolutions. Both revolutions declared fundamental rights and freedoms of citizens. France declared the "natural and imprescriplible rights of man".[8] The content of both declarations is similar, and their scope was national. The raison d'etre for the declarations was the clamour for greater freedom for mankind. It was believed that certain categories of rights should not be alienated from the human being, if his welfare was to be safeguarded.[9] The right to life, liberty and property were deemed to be such inalienable rights of man, and these formed the foundations of the Western notion of human rights. Many European countries followed the example of the US and France, in promulgating similar human rights instruments.

The universal recognition of human rights came with the creation of the United Nations (UN) in 1945. The UN

Charter set the protection of fundamental rights and freedoms as one of its main objects.[10] The Universal Declaration of Human Rights (1948) laid down the framework of international and national human rights instruments. The rights contained in the Universal Declaration were further elaborated in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of 1966.

The main reason for the adoption of the two human rights covenants had much to do with the then prevailing ideologies of capitalism and socialism. The capitalist countries favoured the Civil and Political Rights Covenant, while the socialist ones attached greater weight to the Economic and Social Covenant. The rights contained in the Civil and Political Rights Covenant are known as "first-generation" human rights, while those in the Economic and Social Covenant are known as "second-generation" human rights. However, there are certain rights which could be categorized as "third-generation" human rights, and which are stipulated in both covenants. These are group rights such as the rights of a people to self-determination, or a people's sovereignty over its natural resources. The dimension of these rights covers groups of peoples and nations, as

opposed to individual rights of the first and second generations.

The inclusion of these group rights in the human rights covenants paved the way for the new generation of human rights. These third-generation human rights can be exercised by individuals, groups, peoples and mankind as a whole. They usually deal with global concerns such as the entitlement to peace, to development, to equitable share in natural resources, to access to the common heritage of mankind, and to a healthy environment. Edith Brown Weiss observes, with regard to these rights, as follows:

> "These rights are intergenerational rights. They may be regarded as group rights in the sense that generations hold these rights as groups in relation to other generations, past, present and future. They exist regardless of the number and identity of individuals making up each generation".[11]

In her discussion of the theory of intergenerational equity, Weiss argued that environmental quality is a fundamental right of mankind. She further submitted that the right to equitable access to environmental and natural resources should be taken as a basic right of all generations.[12]

Over the past two decades, the relationship between environmental protection and human rights protection has

been enhanced by the many activities which have taken place in the wake of the Stockholm Conference on the Human Environment. The Conference played a vital role in the evolution of the concept of environmental rights, especially by equating the right to a healthy environment to the right to life.[13] A number of international conferences have declared the right to a healthy environment to be a human right. Environmental principles and guidelines have been set by states on several occasions. Furthermore, there are provisions recognising the right to a healthy environment, in a number of regional human rights instruments, as well as several national constitutions.[14]

From the foregoing discussion it is evident that the right to a healthy environment is a fundamental human right in the making.

On the importance of this right, J.B. Ojwang observes that:

> "A clean and healthy environment is an essential component in the totality of social welfare. So important is it to personal well-being, that it may be equated to the various civil rights that often make headlines".[15]

Recent developments in international and national laws show that environmental protection is increasingly becoming

part of the package of human rights. This development is brought about by the increased threat of environmental degradation, exacerbated by the advancement of technology on the one hand, and underdevelopment on the other hand.[16] Both aspects of the problem will be discussed in connection with the concept of sustainable development in Chapter 2 of this study.

1.3 Statement of the Problem

In any organised society, individuals are entitled to certain rights, and also carry certain obligations. Among the variety of rights exercised by individuals and groups there are categories which often overlap. Human rights fall in this category, as a broad and ever-expanding area of law. Is a human right a moral, political or legal right? Can there be a demarcation line between these categories of rights? Where does the right to a healthy environment fit, in such a classification?

According to Jan Gorecki[17], human rights are primarily moral rights which are legal rights only secondarily. Moral and political rights can become legal rights upon their sanctioning by a positive law. Louis Henkin argues that human rights are not mere political aspirations or moral

assertions but, "increasingly, legal claims under some applicable law".[18] Human rights, therefore, can be based on moral, political or legal claims. But to be enforceable under the law, these rights have to be supported by a legally binding human rights instrument. For example, any right stipulated in the International Covenant on Civil and Political Rights is a legal right, regardless of its intrinsic characteristics. Whatever be their exact appearance, human rights are legal rights in the final analysis.

Furthermore, legal rights may not be permanently categorized under the same domain of the law. The same legal right can be traced in several domains of the law at the same time, or it may shift to a particular domain exclusively. For example, the right to a clean environment falls under the nuisance (tort) law, as well as under the human rights law. There is a possibility that such a right might exclusively become a human rights issue at times. Generally, many rights are emerging as fundamental human rights, and the list of human rights is expanding as a result. But, how far has the right to a healthy environment fared in the existing international and national laws?

In principle, the right to a clean and healthy environment has been recognized by the international community. However, there are no binding provisions effectively guaranteeing this right in the existing international human rights covenants. The first international instrument to mention such a right is the Declaration of the Stockholm Conference on the Human Environment (1972). It was declared that: "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself".[19] The declaration of the Stockholm Conference has no binding effect on the declarants, but it has influenced public opinion to a large extent.

In 1987, the World Commission on Environment and Development (WCED) came up with a similar proposal concerning environmental rights. The commission was assigned the task of drafting a global agenda for environmental protection and development for the 21st century and beyond. In its report, the WCED submitted a proposal of legal principles for environmental protection and sustainable development. The first principle proposed by the commission reads as follows:

> "All human beings have the fundamental right to an environment adequate for their health and well-being".[20]

A number of critical concepts of environmental protection are related to the above principle. Among these are concepts such as intergenerational equity, sustainable development, the right to information and access to judicial institutions, and the right to early warning systems[21], which were proposed by the WCED Legal Experts' Group.

In 1992, the United Nations Conference on Environment and Development (UNCED) was convened in Rio de Janeiro. Almost all principles proposed by the WCED Legal Experts' Group were adopted by the Rio Conference,[22] with the notable exception of the recommendations made in respect of the status of the right to a healthy environment. Principle 1 of the Declaration speaks of human beings merely as a centre of concern for sustainable development. As compared to the right to development which is provided for under Principles 3 and 4 of the Rio Declaration, the right to a healthy environment is not substantively addressed. In the circumstances, one gets the impression that development objectives may override environmental rights. In point in this regard is Principle 2 of the Declaration, which recognises the sovereignty of States as regards the manner of exploitation of their resources. It states as

follows:

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

The sovereign right of states to use their resources in whatever manner they think appropriate may encroach upon the human rights of their nationals. The protection envisaged under the Rio declaration is limited to problems associated with transboundary environmental pollution. Such a position fails to deal squarely with possible abuse of sovereignty by states within their own jurisdictions. Furthermore, declarations of principles by themselves are not legally binding upon the declarant states, and therefore cannot be invoked even in the case of transboundary pollution.

Urgent and effective measures should be taken to deal with current problems of environmental degradation. The extent of environmental destruction has reached a point where the survival of mankind is threatened. Environmental phenomena such as ozone layer depletion, global warming, desertification, depletion of marine resources, nuclear

weapon testing, and nuclear reactor accidents have been tackled in recent times mainly by means of treaty undertakings.[23] Sustainable use of natural resources has become an internationally accepted environmental principle. But its realisation does not seem to be within easy reach. States are urged to protect the environment in the interest of present and future generations, so as to avoid the potential hazards to mankind.[24]

The right to a healthy environment may be said to have fared well at regional levels, as compared to the position at the global level. In the European Continent, efforts have been made to extend the concepts of the right to life and health to environmental rights. Recommendations have been made and directives have been adopted on protection from radioactive substances, prevention of air pollution, noise abatement, control of alcoholism and drugs.[25] Furthermore, Article 8 of the European Convention on Human Rights, and especially its provision on the right to private and family life, has been invoked on several occasions of environmental hazards caused to individuals or groups.[26] In all cases brought before the European Court of Human Rights, the litigants prayed for the award of either compensation or injunction.

In Africa, the African Charter on Human and Peoples' Rights of 1981 provides for the right of peoples to "a generally satisfactory environment".[27] The African Charter is the first regional human rights instrument to address the right in question. However, there are certain technical and procedural problems regarding the implementation of this charter, and in particular in relation to the right to a healthy environment. In the first place, there is no special court system for the protection of human rights in the region. Secondly, it is not clear whether individuals are entitled to claim the right to a healthy environment. The Charter makes a clear distinction between human and peoples' rights. Environmental rights are provided for under Peoples' Rights. In the event of the creation of a court of human rights, who would be entitled to claim this right?

The mechanisms of dispute settlement in the regional human rights instruments do not entitle individuals to institute action before such organs directly. There is no global or regional forum where individuals are readily given locus standi. Even in the American Convention on Human Rights, where the right of individuals to a healthy environment is stipulated comprehensively, the role of individuals in seeking the enforcement of such a right is not clearly established.[28]

Given the present stand of international law, only states can invoke the environmental rights of their citizens. There have been cases where environmental rights of nationals formed part of state claims. Among these are: Trail Smelter Arbitration[29], Corfu Channel Case,[30] the Nuclear Test Cases[31] and the Chernobyl Accident Cases.[32] There have also been national decisions which dealt with the rights of individuals, groups, peoples and even generations yet unborn.[33] What can we learn from these international and national decisions? Do we need new dispute settlement mechanisms for environmental rights? Dispute resolution is one of the main problems to be dealt with in this study.

Environmental degradation problems are caused by human activities. Most of these activities are carried out by State agencies or other agencies sponsored by States. Despite widespread environmental awareness, States are still hesitant to accept fully and implement some of the most important principles of environmental law. Moreover, the existing substantive and procedural laws are not adequate to guarantee the right of individuals and groups to a healthy environment. Unless controlled in good time, the present rate of environmental degradation is bound to degenerate to the point of threatening the very survival of mankind.

In the wake of growing environmental crisis caused by the activities of States, and of other institutions sponsored by States, the need for special legal protection of the rights of individuals and groups of people is critical. In these circumstances, the following points could be taken as the summary of the statement of the problem:

1. There are no clear and adequate legal provisions in the existing international human rights law, for the protection of the right to a healthy environment. Therefore, it is necessary to secure the incorporation of such rights in human rights documents as fundamental rights.

2. In the light of the Stockholm Declaration on the Human Environment, and subsequent developments in the field of environmental protection at national, regional and global levels, the issue of environmental rights has been in contention for years. It is necessary to work towards a resolution of this contention, through a systematic analysis of the relevant issues.

3. The increasing encroachment of environmental degradation on humankind, by the advancement of technology on the one hand, and by underdevelopment on the other hand, should be checked, by resorting to the principles of sustainable development, and of global partnership, as advanced by the United Nations Conference on Environment and Development.[35] There must be an effective legal means to implement these principles and objectives at the national and international levels.

1.4. Objectives of and Justification for the Study

The objective of the research is to analyze existing international, regional and national laws in relation to the right to a healthy environment, and to indicate possible legal solutions to the existing problem. The legal basis of environmental rights will be explained. Recommendations will be made for the resolution of some of the difficulties found in the course of the study, difficulties which surround environmental rights and their mode of application.

As to the justification of the research, if the proposition be accepted that humankind is endangered by the environmental crisis, the need for legal protection of the right to a healthy environment becomes quite evident. Unfortunately, law tends to lag behind social change. The same is true of environmental law, which, despite the enlightened public opinion prevailing about environmental protection for more than two decades, failed to provide for binding provisions for the safeguard of environmental rights. Though states have recognized the need for environmental protection, they failed to bind themselves at the international level, in the cause of such protection. States have always given priority to their sovereignty over resources at the expense of environmental security.[34] There is no doubt as to the urgent need for effective environmental protection; but existing legal mechanisms do not measure up to the tasks involved.

1.5. Literature Review

Despite the abundance of literature on environmental law in general, relatively little has been written on the right to a healthy environment. Indeed, there are only limited materials which deal directly or indirectly with the issue of environmental rights. Some of these works are

reviewed below.

One of the most important works in relation to human rights and environment is the one by Paul Gormley,[36] which analyzed the issue of the right to a pure, healthful and decent environment, within the framework of the European Community and the UN system. This work deals with the manner in which the Council of Europe has attempted to deal with environmental issues within its area of operation. Gormley is of the opinion that the efforts of the Council of Europe in the field of the protection of the human environment can be seen as a precedent, in the implementation of the Stockholm Declaration and the UN's subsequent programmes in the field of environmental protection.[37]

Gormley emphasized the need for international co-operation in the taking of legal measures for the protection of the human environment. But his work did not address the element of national environmental protection, which is the most important factor in the implementation process for this right. Besides, his work which came soon after the Stockholm Conference, could not consider the recent environmental treaties and conventions entering into force subsequently.

McCormick[38] examines the environmental movement from a historical and political standpoint. He discusses the roots of this movement in the 19th and 20th centuries, and attempts to show the parallel developments that took place in Great Britain, the United States and elsewhere, in relation to the protection of the environment.[39] In his analysis, he attaches special importance to the Stockholm Conference, as a greatly influential event in contemporary environmental policy-making.[40]

McCormick discusses the fate of the global environment, and comes to the conclusion that a workable solution to the environmental crisis must be sought.[41] He does not, however, discuss the issue of environmental rights. His discussions do not proceed from a legal standpoint. But his clear presentation of the existing and potential environmental problems may help us in crystallising issues of legal significance.

Professor Edith Brown Weiss recently wrote a book on the new principle of human rights, "intergenerational equity", as a basis for a legal philosophy supportive of the protection of the interests of future generations. Apart from the report of WCED, Our Common Future, Weiss' book seems to be one of the first contributions dealing with the

human rights of the future generations. She emphasized the need for the protection of environmental resources, for present and future generations. In what she termed "planetary rights",[43] Weiss presented serious arguments in favour of the protection of group rights, as opposed to individual rights.[44] Group rights to a healthy environment are an aspect of the planetary rights dealt with in her work. On the relationship between human rights and environment, she wrote:

> [The] right to a decent environment has been put forward by some as a so-called third generation right. These rights belong neither to the individualistic tradition of first generation rights (civil and political) nor to the tradition of second generation (economic and social) [rights]. They are collective rights which are intended to acknowledge a continuing evolution of the human rights doctrine.[45]

Weiss noted that the right to a decent environment raises controversial issues. However, she did not go into the detail of the controversy, and concluded that the new theory of intergenerational equity can help to resolve the controversy, by specifying the minimum interests shared by all generations, including the right to a healthy environment.[46]

Weiss addressed the issue of the right to a healthy environment as an aspect of planetary rights, and enumerated the international treaties and national legislation that illustrated her case. In one of the appendices to the book, she set out extracts from national constitutions which contained provisions for environmental rights.[47] Her work is remarkable in many respects, particularly in its formulation of a theoretical framework which supports the present study. However, she did not discuss comprehensively the place of the right to a healthy environment, within the context of fundamental human rights.

Rose Hume Hall[48] presents the existing and potential environmental hazards to human life, from a medical standpoint. His work gives a hint as to the magnitude of ecological problems arising out of dangerous activities around the globe, and as to scientific means for curbing them.

Amedeo Postiglione,[49] in the light of the Stockholm Conference on the Human Environment, the establishment of UNEP in 1972 and of WCED in 1983, proposed the creation of a Universal Convention for Environment as a Human Right. Furthermore, he proposed the creation of a World Commission on the Environment as a Human Right, and of an International Court for the Environment.[50] The following passage is

taken from his forwarding note:

> Today, even the right of human beings to enjoy the "common services" of nature - air, surface water, the sea, vital ecological cycles of plants and animals - are being debated. An International Court for Environment is therefore needed. According to appropriate and recognized laws, a fundamental human right, such as the environment cannot be undefended at the international level.[51]

Nagendra Singh[52] refers to international humanitarian law as a basis for the right to environment. According to him, Articles 35 and 55 of the 1977 Protocol Additional to the Geneva Convention of 1949, have a critical role in the protection of the human environment during war. He argued that these provisions could be extended to peacetime environmental protection.

Antonio Cassese et al[53] have analyzed the methods of protection of human rights within the European Community. They treated the right to a healthy environment as a third-generation right, but indicated that it is in the process being included in the list of human rights recognized by the European Community.[54] Joseph Weiler,[55] however, argues that the right to environmental safety could not be guaranteed by the European Community, for practice had shown that the Community takes a partial stand when attacked for declining to accept group standing in environmental

cases. Cassese et al are of the opinion that locus standi must operate in the case of environmental rights, considering the fact that the rights of many people would be affected.[56] They further submitted that the European Community should enact laws providing for substantive rights, for the protection of the human environment.

Kopper and Ladeur[57] raised the possibility of introducing environmental substantive law within the framework of the European Community's legal system. Whether or not the European Community (now the European Union) should adopt fundamental rights to environmental protection, as a constitutional matter, was one of the questions raised by Kopper and Ladeur. According to them, the incorporation of environmental rights in European national constitutions is a necessary condition for the realization of the fundamental rights and freedoms declared by the European Parliament, which contain the right to environment and to consumer protection.[58] Article 24(1) of the declaration treats the preservation, protection and improvement of the quality of the environment, as an integral part of community policy. Kopper and Ladeur urged the European Community to consider environmental protection as a human right at the regional level.

George Shepherd and Mark Anikpo[59] dealt with African peoples' rights to economic development as a third-generation human right. The right to development which is a third-generation right, is in many respects related to environmental rights. Shepherd[60] discussed the importance of environmental rights to the economic and social well-being of African peoples. In his discussion of third-generation rights in Africa, he quotes the Swedish jurist, Peter Nobel, as follows:

> The catalogue of these "all people's" rights includes the equality of all peoples and principles of non-domination, the right to free themselves from colonial or other oppression, the right to dispose of their wealth and natural resources which shall be exercised in the exclusive interest of the people, the right to social and economic development, the right to national and international peace ... and the right to a satisfactory environment.[61]

Shepherd submits that these rights are not simply populist aspirations, for there has emerged a radical legal process for their recognition and implementation under international law. In spite of his failure to discuss the right to a healthy environment, his discussion of third-generation rights in the African context is helpful by its indication of a new approach to human rights.

Anikpo[62] analyses the regional efforts made by African States to provide the political support necessary for the success of measures taken to achieve goals of development and self-reliance as contemplated in the Lagos Plan of Action.[63] His careful analysis of human rights and self-reliance in Africa shows that the new tendency of uplifting collective rights rather than individual rights is gaining a momentum on the continent. One of the group rights envisaged is the right to a satisfactory environment.

J.B. Ojwang[64] made a comprehensive analysis of environmental rights with particular reference to the constitutional arrangement for environmental protection. After assessing the right to a healthy environment under different international, regional and national legal instruments, he gives his observation as follows:

> A constitutional right is thus created for the ordinary citizen to act in pursuit of a healthful environment which is conducive to sustainable development, alongside the various public initiatives in place. Such a commendable approach to legislation ought to be adopted in other countries as well, including Kenya ....[65]

In one of his previous works on environmental law,[66] Ojwang indicated that some constitutions have failed to provide suitably for the right to environmental protection. He suggests that such rights must be clearly provided for

in national constitutions, and they must be enforceable under the legal process.

P.M. Gachoka[67] wrote on the impact of technological advancement on the protection of human rights. He emphasized the encroachment of technology upon human rights and singled out instances of environmental destruction, such as acid rain, ozone layer depletion, greenhouse effect and global warming, as crucial ones.[68] He also made some remarkable recommendations on ways of guaranteeing the right to a decent environment,[69] such as providing for locus standi in respect of cases of environmental damage. But his treatment of the status of the right to a healthy environment, under the existing international law, falls short of showing some of the recent developments.

The lines of argument presented in the foregoing literature will serve as a reference point in the development of the present study.

1.6. Theoretical Framework

Two domains of international law are taken as the bases of this study, namely, international human rights law and international environmental law. The theoretical

foundation of the present study falls within the ambit of these two disciplinary areas. The right to a healthy environment, as a fundamental human right, is emerging as a new concept in legal theory. This concept is advanced by recent environmental treaties which exhibit an anthropocentric approach to issues of environmental protection.[70] The intrinsic value of the environment is revealed by treaties such as the Convention for the Conservation of Antarctic Living Resources (1980), the World Heritage Convention (1972), the Berne Convention on the Conservation of European Wildlife and the Natural Habitat (1979), the Convention on International Trade in Endangered species of Wild Fauna and Flora (1973) and several marine pollution agreements.[71] The interests protected by these treaties are inseparable from the protection of human rights in their wider application. The concept of the right to a healthy environment for individuals, groups and mankind as a whole, including present and future generations, is the foundation of human survival and well-being.

The integration of human rights claims with claims for a healthy environment, within the existing legal regime, is an essential condition for the accommodation of the competing interests of present and future generations.[72]

Basically, environmental rights are collective rights rather than individual rights. On this account, they pose uncertainty as to the procedural means of their enforcement. Though not unknown, group actions for the enforcement of environmental rights, when they have been initiated, have on several occasions been unsuccessful. The main obstacles to the success of such rights have been procedural, rather than substantive.

As component parts of third-generation human rights, environmental rights are heading for unquestionable universal acceptance and recognition. This is evidenced by UN Declarations and resolutions over the last two decades. Based on the Stockholm Declaration of the UN Conference on the Human Environment,[73] the Rio Declaration on Environment and Development,[74] the Declaration on Social Progress and Development,[75] the Universal Declaration on the Eradication of Hunger and Malnutrition,[76] the Declaration on the Right to Development,[77] the Declaration of the Principles of International Cultural Co-operation,[78] and the Vienna Declaration and Programme of Action of the World Conference on Human Rights,[79] third-generation human rights are theoretically valid claims. Although these rights may be regarded as going to fill gaps in international human rights law, they have their own characteristics which

ought to be treated as an extension of the existing rights.

Despite certain controversial views as to the legal status of third-generation rights, they do have, in certain respects, a good foundation in traditional, well-established rights. The right of nations to self-determination, apparently a third-generation right, is recognised in the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). This right had earlier been expressly recognized by the UN General Assembly resolution on self-determination, of 12 December 1958, and in its Declaration on the Granting of Independence to the Colonial Countries and Peoples,[80] of 14 December 1960.

Following the adoption of the two human rights covenants, the International Conference on Human Rights,[81] held in Tehran in 1968, adopted a collectivistic approach to human rights. The Tehran Proclamation focuses on the group, as the main victim of denials of human rights. The same view is also reflected in the Universal Declaration of the Rights of Peoples, adopted at Algiers in 1976.[82] The Algiers Declaration makes specific reference to the right of every people "to the conservation, protection and improvement

of its environment",[83] as a fundamental human right. This is the general trend since the Stockholm Declaration.

The right to a healthy environment may indeed be said to be the most important right in the category of third-generation human rights. It is no less important than the right to life. The recognition of this fact may lead us to the theoretical assumption that the right to a healthy environment is inherent in all generations of human rights. However, its recognition as a human right is a recent development, necessitated by the increasingly alarming proportions of environmental degradation taking place all around us.

In response to the problem of environmental pollution, states have resorted to the establishment of detailed and firm environmental policies and guidelines, for the conduct of public and private activities.[84] Many of the more recent national constitutions have accorded recognition and protection to certain fundamental rights, both of a positive and negative kind. The negative rights are those rights which protect the individual or the group from interference, damage or infringement of important interests.[85] They usually protect individuals from actions of the state. The classical fundamental rights such as the right to life,

freedom of speech and of conscience are some of the examples of negative rights. On the other hand, there are positive rights which require the state, or third parties, to take affirmative action to promote individual or group interests.[86] The rights in this category tend to be social rights, such as the right to work, to education, to human dignity, etc.

Environmental rights easily fall into either of the two categories. Such rights, as the practice of states shows, could be provided for in constitutions, as fundamental rights, or as policy declarations. There are also cases where environmental rights are provided for in special environmental legislation.[87] A number of national health enactments provide for the protection of citizens against environmental pollution.[88] Besides, some environmental statutes have been conceived with a significant degree of comprehensiveness, so as to incorporate the protection of human rights.

It is thus evident that environmental rights can appear as legal rights in the context of different domains of law. The general theoretical framework of this study is, therefore, co-extensive with the scheme of recognised legal structures. The specific area of investigation is, however,

the nexus between the protection of the environment, on the one hand, and human rights, under national and international laws, on the other.

1.7. The Scope of the Study and Hypotheses

The present study pays special attention to two main points: firstly, to determine to what extent the right to a healthy environment is accepted at different levels of legal systems; and secondly, to evaluate the suitability of existing dispute-settlement mechanisms in the course of enforcement of such a right. These two aspects of the investigation, it is expected, will enable us to identify any specific problems that hinder the realisation by individuals and groups of the right to a healthy environment.

The foregoing account raises the following hypotheses:

(a) Given the recent trends in the development of environmental law, there is a growing recognition nationally and internationally of a legal right to a healthy environment as a fundamental human right; and (b) the existing international dispute settlement institutions are ineffective in resolving environmental rights issues, and

there exists the need to establish new mechanisms for the task.

This study will rely on human rights documents which have a bearing on the right to a healthy environment. Consideration will be accorded to selected international and national environmental rights cases. Appropriate recommendations will be formulated, on the basis of the facts established, and the analytical perspectives developed.

1.8. Methodology of the Study

Depending on the kind of research to be undertaken, a researcher may use different methodologies. One may use either primary sources, such as field observation, questionnaires and interviews, or secondary sources, that is, mainly published materials which can be found in libraries. Use of combined sources and methods is also a common practice.

Given the nature of this study, the sources of information are basically library materials. Legal books, journals, booklets and newspapers have been used as a basis for developing the argument. International treaties,

national constitutions and legislation, and decisions of international and national judicial institutions have been used as a basis for the submissions presented in this work. All the materials used in the study are available in different libraries in Nairobi, particularly at the United Nations Environment Programme (UNEP) Library at Gigiri.

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CHAPTER TWO

2. NEW DIMENSIONS OF HUMAN RIGHTS

2.1. What Are Human Rights?

To begin with, there are no universally accepted definitions of the term "human rights". The reason for this may be attributed to the fact that the protection of human rights is an ever-widening area of both international and municipal law, and on this account it does not lend itself to a neat demarcation of categories of rights. Though there are many definitions, there is no consensus as to what exactly human rights should be.[1] Definitions of human rights may differ according to the socio-economic conditions under which the defining scholars live. Moreover, there is controversy as to the status of human rights in the system of law. Many states regard human rights as a matter for the domestic jurisdiction, as opposed to the international jurisdiction, while others think otherwise.[2]

There is, however, a common element to the varying views on human rights: the liberal tradition of western democracy has considerably influenced the world public

opinion, and emerged as the dominant philosophical and theoretical foundation of the present international human rights law. The Western Libertarian philosophy of human rights is the refined heritage of "Greek philosophy, Roman Law, the Judaeo-Christian tradition, the Humanism of Reformation and the Age of Reason".[3] This was manifested by the American and French Declarations of Rights of 1776 and 1789, respectively.

Both Declarations proclaimed certain rights as inalienable rights of man, without stating any reason why they are so. The French Declaration of the rights of man and the citizens reads in part as follows:

> "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberte; la propriete, la surete et la resistance a l'oppression".[4]

The imprescriptibility of these rights was probably influenced by the natural law theory which presupposed the existence of "conditions and principles of practical right-mindedness of good and proper order among men",[5] thereby acknowledging the existence of natural rights.

The American Declaration of Independence of 1776 adds "pursuit of happiness" to the list of these imprescriptible

rights. The second sentence of the opening paragraph of the Declaration reads:

> "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty and the pursuit of happiness".

The expressions "natural", "imprescriptible", and "unalienable", used in these Declarations earned the scorn of some prominent scholars such as Jeremy Bentham, to whom these rights were sheer "rhetorical nonsense".[6] Some other scholars, particularly those who were advocates of state sovereignty, often condemned the idea of inalienable rights as a "diversionary illusion".[7] However, most of the human rights concepts of the American and the French Declarations are included in the 1948 Universal Declaration of Human Rights, and in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights of 1966. But as to the definition and nature of human rights, there is still no unanimity. Let us see one of the definitions of human rights by Dowrick:

> "[H]uman Rights should be defined as those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrate on the humanity of man, on man as a human being, a member of humankind: which would be in essence an ethical theory".[8]

What kinds of claims are envisaged? Are they legal or moral claims? Dowrick argues and submits that human rights are moral claims in essence, for they were built upon the ethical and political doctrine of the eighteenth century. He also submits that these ethical and political rights have been transformed into legal rights, as a result of their sanctioning by international treaties, such as the two covenants of human rights?

Louis Henkin also state that human rights are of a transcendental nature. He is of the opinion that they are "not merely aspirations, or moral assertions but, increasingly, legal claims under some applicable law".[10] The transformation of moral rights to legal rights is effected by the inclusion of the former in legal documents.

In the contemporary practice of norm-making any right may become a legal right, so long as it is included in a binding treaty signed by contracting parties. Mere declarations or resolutions of a non-binding nature cannot constitute enforceable rights. For instance, the 1948 Universal Declaration of Human Rights was a UN General Assembly resolution adopted by a two-thirds majority in favour, but it was not binding upon the declarants, for they

did not intend to be committed to that extent. Every transformation of a moral or a political right must be effected by its sanctioning in a binding legal instrument.[11] Rubin[12] holds common opinion with Dowrick and Henkin about the nature of human rights i.e. as to whether they are legal rights or not. Therefore, human rights are primarily moral rights which have undergone a legal transformation, especially under international law.

The list of human rights is expanding even as these rights undergo transformation form moral to legal rights. New rights, some of them fundamental, are emerging. Can any legal claim be a human right?

In assessing any claimed right as a human right, there are certain criteria to be observed. First of all there is a distinction between fundamental human rights and "other human rights".[13] Fundamental rights are said to be the real "hard core" rights, they represent rights which lie at the foundation of shared international values, emanating from a real consensus.[14] Freedom from slavery and genocide could be considered as examples of such rights. "Other human rights" represent nascent and disputed rights such as the right to a healthy environment and other collective

rights.[15] Before going into details of newly emerging rights, it is necessary to look at the criteria relating to human rights.

Several writers have set out different criteria for the identification of human rights from other rights. In his discussion on human needs and human rights, Winslade[16] argues that human rights have to meet the vital needs of man. He describes vital needs as needs "whose satisfaction would be in the interest of, and would be wanted and desired, by nearly all intelligent and rational persons under ordinary circumstances..."[17] Concerning the relation between human needs and human rights, he treats the inclusion of fundamental moral principles as a necessity for the transformation of needs into rights. He points out that:

> "...the rights are based not only on the existence of unfulfilled vital needs, but also upon an appeal to fundamental principles such as equality and human worth. That is, unless these moral principles have operative moral and political force, the growth of rights from needs will be frustrated. For principles like equality and human worth to have moral and political force, they must be taken seriously not merely as lofty ideals but as guides for social reform".[18]

There are also other conceptual criteria used to distinguish human rights from other rights. Edel[19]

classifies them by their properties, status and function. He sets out four properties of human rights. These are: generality, importance, endurance, and inalienability.

First and foremost human rights are general rights which pertain to all human beings. They are needed by all without reference to race, citizenship, religion, sex, place of birth or other discriminatory qualifications.

The second test of human rights is their importance. Human rights are more basic and more fundamental, as compared to other rights. They are basic and fundamental because of their transcendental nature as compared to other rights. As a matter of fact, they are the sources of other rights.

The third test of human rights is their capacity to endure, even in changing circumstances. They are valid under all circumstances, irrespective of time and space, and do not permit derogation. They must be essential, unvarying and enduring in identity, so as to represent the immutability of human values and of civilization.[20] For instance, the laws prohibiting racial discrimination, genocide and slavery should be of such a nature.

The fourth test of human rights is their inalienability. This is the central core of human rights, and is indispensable to the nature of human personality. As reflected in the American Declaration of Independence, rights such as the right to life, liberty and the pursuit of happiness are minimum requirements that are essential to the integrity of the human personality.

There are two other criteria set by Edel to distinguish human rights from other rights: status and function. As to the status of human rights, they must be rights of inherent nature, to signify the fundamental values of the society in which they are intended to operate. As regards function, their normative values flow through and control the relations between a political society and its members.[21]

From this precursory review of the concept of human rights, we will proceed to see further developments of human rights in the twentieth century. Since the beginning of this century, there has been a progressive widening of the dimension of human rights, from the individual to the collectivity, and now to mankind as a whole. This conceptual evolution of human rights has to be reinterpreted in the light of new ethical demands.[22]

The discussion will be based on existing human rights law, and other international law documents relevant to the topic.

2.2. Generations of Human Rights

The signing of the United Nations Charter in 1945 marked the formal realization that human rights is a matter for international concern. One of the purposes of the United Nations was "to achieve international co-operation... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[23] Further developments towards the internationalization of human rights was marked by the adoption of: the 1948 Universal Declaration of Human Rights; the two international covenants on human rights of 1966; and the three regional human rights instruments.[24]

The two human rights covenants are binding on the States Parties to them. Together with the Universal Declaration, they are part of international law, binding on all States.[25] The human rights in these international documents did not come into existence at once. They have undergone an evolutionary process over the centuries. Each

evolutionary stage is regarded as a human rights "generation".[26] Three generations of human rights have so far been recognized.

2.2.1. First Generation Human Rights

The "first generation" human rights are mainly rights asserting freedom from certain governmental restrictions. Most of the rights in this generation were declared by the eighteenth century American and French Revolutions. These are the civil and political rights acquired by individuals as a result of those two revolutions. As a result of the declarations by America and France men were "converted from subjects to citizens."[27]

As they stand today, "first generation" human rights are those rights which are stipulated in the International Covenant on Civil and Political Rights. The main civil and political rights in this generation are the right to life, liberty, justice, freedom of thought and conscience. These rights were included in all liberal constitutions, which claimed to provide guarantees of freedom for all.[28] But in actual practice, only a small section of the society could exercise such rights effectively, namely, those possessed of property. These political and civil rights could not

fare well in a situation where the accumulation of wealth in the hands a few capitalists caused the dependence of the working masses on the owners of the means of production. The marxist analysis of the society had maintained that civil and political rights were useless unless backed by social and economic rights.[29]

2.2.2. Second Generation Human Rights

Following Marx's sharp criticism of the American and French constitutions of the eighteenth century, the dimension of human rights began to expand.[30] At the end of the nineteenth century, the civil and political rights of the previous century were enriched by social and economic rights. This evolutionary development marked the emergence of the "second generation"[31] human rights. The two World Wars greatly influenced the evolutionary course of human rights in the twentieth century. After the Second World War, both the liberal and Marxist traditions played a major role in the formulation of the Universal Declaration of Human Rights. Article 23 and 27 of the Declaration are the cornerstones of the economic, social and cultural rights. These rights were mainly advocated by the adherents of the Marxist ideology.

The Western Libertarian view of human rights emphasizes the individual as the possessor of certain inalienable rights, rights which he or she may lose by unjustly diminishing the rights of others, and which can be voluntarily waived, but which cannot be taken away even by a majority however great its size or critical its needs.[32] The Marxists, however, challenged this view of Western liberals as a doctrine of the survival of the fittest, and instead advocated fair distribution of wealth among the members of the society. As a compromise between socialism and capitalism, the two human rights covenants attempted to accommodate the human rights conceptions advanced by both sides.

The "second generation" human rights, as set out in the covenant of Economic, Social and Cultural Rights, are mainly individual rights to be enjoyed by everyone in the Society. The subjects of these rights are individual persons, as is the case with "first generation" human rights. Both generations are coexistent, and have to be mutually interactive, for the better protection of human rights.[33]

Though the emergence of "second generation" rights is attributed to the urgings of the Marxist ideology, the

economic, social and cultural rights in question, in practice, remain highly important even after the fall of socialism in its home country. This is so in particular because economic and social rights are the aspiration of the majority of peoples in developing countries, where poverty and material disadvantage are the norm. The demise of socialism in the former USSR did not herald the somnolence of these rights. As a matter of fact, the concern for these rights remains as great as ever.[34]

2.2.3. Third Generation Human Rights (Collective Rights)

2.2.3.1. First-phase Development

A decade after the Universal Declaration of Human Rights, new and vital issues of human rights began to arise. Some of the issues were related to the emergence of the new States. Accession to independence by many former colonies has called for a new approach to the human rights issue. The dimension of human rights has widened and included group rights within its scope. Rights of groups as opposed to individuals, were recognized internationally for the first time by the General Assembly of the United Nations in 1966.[35] These collective rights are termed

"third generation" human rights.[36] These rights are viewed by different writers as: solidarity rights;[37] collective rights;[38] group rights;[39] all peoples' rights;[40] intergenerational rights;[41] and rights of mankind.[42]

Despite such differential terminology, all the writers on "third generation" rights agree that these rights had been missing from the body of international human rights law.[43] Their importance lies in the fact that they are needed by a collectivity, as opposed to individual rights.

Though the recognition of collective rights in international law is a recent development, their roots can be traced back to the eighteenth and nineteenth centuries. According to Agius,[44] there are three major factors which paved the way for the emergence of collective rights on the international level. These were: trade unions' struggle for their freedom of association, and for their rights to bargain collectively; the struggle of minority-groups for their own rights; and the growing awareness of peoples' rights to self-determination.[45]

One of the first moves in this direction was the legalization of trade unions. For instance, the Trade

Union Act of 1871 in England effectively legalized the trade unions, and thereby enabled the workers to collectively bargain for better wages, shorter working hours and better working conditions.[46] Long before the adoption of the Universal Declaration of Human Rights, trade unions were the champions of civil and political rights. The establishment of the International Labour Organisation (ILO) in 1919 gave great impetus to the freedom of association.

Apparently, it was the struggle of the workers through their trade unions which among other factors contributed to the adoption of the Covenant of Economic, Social and Cultural Rights in 1966. The 1947 International Labour Conference adopted a decision which called upon the ILO to continue its efforts to prepare conventions providing for the implementation of the principles proclaimed by the conference. Accordingly, the ILO adopted:[47] the Convention on the Freedom of Association and Protection of the Right to Organise (1948); the Convention on the Right to Organise and Collective Bargaining (1949); the Abolition of Forced Labour Convention (1957); and the Discrimination (Employment and Occupation) Convention (1958). These conventions have contributed a lot to human rights protection for workers.

By these conventions, State Parties are required to provide protection for workers against acts of anti-union discrimination, and to undertake the establishment of appropriate machinery to ensure respect for the right to organise. They are also required to take measures to encourage and promote collective negotiations of employees' and employers' organisations.[48] Article 23(4) of the Universal Declaration of Human Rights reaffirmed the importance of collective rights when it clearly recognized the right to form and join a trade union. Article 22 of the International Covenant on Civil and Political Rights and Article 8 of the International Covenant on Economic, Social and Cultural Rights provide for a similar right.

The second factor, in historical perspective, that contributed to the emergence of collective rights was the struggle of minorities for their rights. Traditionally, States had discretionary powers in the treatment of their nationals.[49] But when a State arbitrarily oppresses its own citizens, particularly on an ethnic, a religious or linguistic basis, the intervention of other States might be inevitable. One of the earliest such interventions was the one agreed upon by Great Britain, France and Russia against the Ottoman Empire in 1827.[50] Several interventions were carried out by European powers in the distant past, to

end massacres in different countries.

The protection of minorities was one of the most important international concerns after the First World War. There were several treaties signed by many countries with minority problems. Some of these are:[52] Treaty of Versailles with Poland (1919); Treaties of Saint-Germain-en-Laye with Austria, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovens (1919); Treaty of Neuilly-Sur-Seine with Bulgaria (1919); Treaty of Trianon with Hungary (1920); Treaty of Sèvres with Greece (1920); and Treaty of Lausanne with Turkey (1923). Most of the "minorities treaties" were made with newly created States of Central and Eastern Europe, as a result of the break-up of the Austro-Hungarian Empire.[53] Minority protection was later on placed under the League of Nations, and the relevant treaties were made subject to its consent before any modification to them was effected.[54]

Surprisingly, there is no specific reference to minorities in the United Nations Charter or the Universal Declaration of Human Rights. The General Assembly decided, in 1948, not to include specific provisions on the question of minorities in the Universal Declaration of Human Rights; but it recommended that "in the preparation of any

international treaties, decisions or other acts establishing new States, or new boundaries between States, special attention be paid to the protection of any minority which may be created thereby."[55] However, the 1966 Covenant on Civil and Political Rights provides for the right of minorities. Article 27 of this Covenant stipulates that members of ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, or to profess and practice their own religion.

The protection of this collective right is more evident even in the context of the sharp ethnic and religious differences prevailing in the former Yugoslavian territory. The problem of "ethnic cleansing"[56] is resurfacing and its magnitude has called for international attention. The Serbs' campaign to "cleanse" a territory of another ethnic group is gruesome and tragic. The situation in the former Yugoslavian territory has invited the intervention of a United Nations Peace-keeping Force, and subsequently, a North Atlantic Treaty Organisation (NATO) Strike-Force to stop the process.[57]

The third major factor in the emergence of collective rights was the right of peoples to self-determination. Though the quest for self-determination was evident

before the Second World War, its greatest achievements occurred after the war. It was recognized by the UN Charter as peoples' right. One of the objectives of the UN as stated in its Charter was "to develop friendly relations among nations based on respects for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[58]

In 1958, the General Assembly reaffirmed that "the right of peoples to self-determination is a prerequisite for the full enjoyment of all fundamental human rights".[59] Further, in the 1960s, the UN played a major role in the process of decolonization, when it accepted all newly independent State as members, and adopted Resolution 1803(XVII) on The Permanent Sovereignty of Peoples over their Natural Resources.[60] These two rights were of vital importance to the newly independent States. There were more important than the rights of individuals against their governments, in the eyes of the leaders of the newly independent States.[61] The right to self-determination and the right of peoples to dispose of their natural wealth and resources freely were identically regulated in Article 1(1) and (2) of each of the Human Rights Covenants of 1966.

The above-discussed "third generation" human rights, namely, the right of workers to form trade-unions and of collective bargaining, the right of the minority-groups to their identity, and the right of peoples to self-determination and their sovereignty over natural resources, are not new rights under the category of human rights. All are recognized and accepted in international law. They are the harbingers of the "third generation" human rights in the making. The evolution of human rights is progressively widening its scope, to embrace mankind as a whole. The quest for the recognition and acceptance of new human rights is increasing, as a result of new-born global challenges, an example of such challenges is the environmental crisis, which has come with the growing deterioration of nature's amenities virtually everywhere.

2.2.3.2. Second-phase Development

After the adoption of the two human rights covenants in 1966, it soon became clear that certain very important rights had not been incorporated in these instruments. The list of missing rights is long and ranges from individual rights to global rights of mankind. On these gaps in the human rights law, Louis Henkin has the following

to say:

> "In the West, at least as much as elsewhere, there is also a growing tendency to see human rights even larger, at least in aspiration, to include all that goes to make up a life essential to human dignity, including autonomy, privacy, idiosyncrasy, self-development, security, peace, a healthy environment, and participation in decisions that affect the individual."[62]

Some of the new "third generation" rights mentioned by Henkin have gone half-way to acceptance by international law. One of the most important rights in this regard is the right to development. The idea of human right to development emerged as a contribution of jurists to the general international debate on the issue of development. It came into being and was conceptualized at the beginning of the 1970s, and gained a more general recognition towards the end of the decade.[63]

The United Nations General Assembly has repeatedly stressed that the right to development is a human right of vital importance.[64] Many of the resolutions and declarations by the General Assembly signified the necessity of this right for all people.

The Organisation of African Unity (OAU) was the first regional organisation to recognise the right to development. The African Charter on Human and Peoples' Rights, adopted by the 18th Assembly of Heads of State and Governments, expressed the conviction that "it is

henceforth essential to pay particular attention to the right to development. The right to development and the civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality..."[65] Further, it is stated that the right to development is a right of all peoples.[66] As far as the OAU is concerned, the right to development is a fundamental human right of prime importance.

The United Nations has paid considerable attention to the right to development. In 1979 and 1981, the UN Secretary-General prepared two reports which analysed the international dimension of the right to development, as well as its national and regional dimensions.[67] In the course of 1980 and 1981, the UN organised seminars and working groups dealing with the task of analysing the concept of the right to development, and preparing a concrete proposal for a draft declaration on such a right.[68] Accordingly, drafts were submitted to the General Assembly and were discussed in two consecutive annual meetings.[69]

In 1986, the General Assembly finalised its discussion on the right to development by recognizing it as a fundamental human right of all human beings, taken individually or collectively.[70] Article 1 of the UN

General Assembly Resolution 41/128 of 1986 reads as follows:

> "The right to development is an inalienable right by virtue of which every person and all persons are entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized."

This resolution marks the acceptance of the right into the body of international law. The validity of the right for development as a human right has become unquestionable. Be this as it may, there is no binding treaty for its enforcement so far.

Apart from the UN's efforts, there were many attempts by other organisations towards the realization of the right to development.[71] One of the recent appeals was made by the 1993 UN Conference on Human Rights which among other things declared that:

> "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human right".[72]

The next most important new human rights of the "third generation" are: the right to a healthy environment, peace, benefit from the common heritage of mankind, and the right to

humanitarian assistance.[73] In many recent Conventions, Charters, documents, agreements and treaties, reference is made to environmental rights as fundamental rights of mankind.[74]

The second-phase development of the "third generation" human rights is enhanced by the new principles of "common heritage of mankind"[75] and "intergenerational equity"[76] whose main concerns are the conservation and preservation of natural and environmental resources in the interest of present and future generations.

The principle of the common heritage of mankind was first initiated by international discussions which were intended to reform the traditional regulations under the Law of the Sea. The old regulations of the Law of the Sea, which were based on the freedom of navigation for transportation and fishing purposes, had become obsolete as a result of scientific and technological advances. The new scientific and technological achievements opened the way for possible exploitation of the vast under-water and sea-bed resources. This phenomenon created fear among developing countries that developed countries would soon make national claims on sea-bed and ocean floor.[77] Calls were thus made for a change in the Law of the Sea.

In 1967, the UN opened the debate on the Law of the Sea. In these debates, the developing countries have played a prominent role. The Maltese representative to the UN, Arvid Padro, said that "the sea-bed and ocean floor are the common heritage of mankind and should be used and exploited for peaceful purposes and for the benefit of mankind as a whole."[78] This concept of common heritage of mankind has come to form the beginning of a new era in the Law of the Sea, and the whole international legal system.

The First UN resolution that mentions the term is the Declaration of Principles Governing the Sea-bed and Ocean Floor and the Sub-soil thereof, beyond the Limits of National Jurisdiction of 17 December 1970. The resolution declares that "the sea-bed and ocean floor and the sub-soil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind."[80] Further, the UN Covention on the Law of the Sea reaffirms the same by declaring that "all rights in the resources of the Area are vested in mankind as a whole."[81]

Besides, the 1967 "Moon Treaty"[82] and the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies make similar reference to the concept

of common heritage of mankind. The extension of the concept of common heritage to outer space can be seen from Article 4 of the Agreement, which reads:

> "The exploration and use of the moon should be the province of all mankind and shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development. Due regard shall be made to the interest of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations."[84]

It is interesting to note that a great number of documents which employ the term "mankind", do make explicit reference to "present and future generations'. This takes us to the principle of "intergenerational equity". Edith Brown Weiss[85] has summarized the principle of intergenerational equity as the principle of: "Conservation of options", each generation not to unduly restrict the option availability of resources to future generations; "Conservation of quality", each generation to pass no worse condition of the planet to the next than it received, and "conservation of access," each generation to provide its members with equitable rights of access to the legacy from past generations. Weiss termed these intergenerational rights as "planetary rights" derived from the temporal relationship between generations in using the natural

environment and cultural resources.[86] Concerning the protection of these rights, she submits that the State should serve as the primary guarantor of the planetary rights of both present and future generations.[87]

This second-phase development of the "third generation" rights, to the extent of attempting a protection of the right of unborn generation, poses a challenge to the existing principles of international law.[88] As a matter of fact most of the newly emerging human rights are related to environmental protection. From the ongoing discussion, we can see that almost all claimed rights are environmental, in one way or another. Among the emerging "third generation" rights, the right to development and the right to benefit from the common heritage of mankind cannot be envisaged without having regard to environmental protection. The right to a healthy environment is one of the most important collective rights of the "third generation" human rights.

2.3. The Emergence of the Right to a Healthy Environment as a Fundamental Human Right

2.3.1. Environmental Crisis as a Factual Problem

The unprecendented increase in population, and the

consequences of human activities in this century have given rise to a deterioration of the environment and a depletion of natural resources that threaten our planet.[89] As a result of this wanton destruction of the earth's life-support system, mankind has become an endangered species.[90] The magnitude of man's impact on his environment necessitated a full-scale reconsideration of the relationship between environment and development.

The first international concern about the growing destruction of the environment was expressed by the 1971 Founex Report of experts.[91] Taking into account the rate of population growth and the rate of natural resources depletion the Founex Report concluded that by the year 2000:

> If, by some miracle all these persons were to be brought up to the standard of living now enjoyed by the people of the United States ... [the extraction of resources to achieve this desirable goal would deplete the earth's resources]. Their extraction would virtually deplete the earth of all high-grade mineral resources and would necessitate our living off the leanest of the earth substance: the waters of the sea and ordinary rock.[92]

The current environmental problems are caused by factors related to unsustainable use of natural resources, and pollution. Some of the problems are of a global nature. For example, the rain-forest destruction,

desertification, long-range transfrontier pollution, destruction of the ozone layer and global warming, are phenomena that will cause common concern to mankind.[93] The cumulative effects of these environmental injuries would undoubtedly put an end to all living creatures on earth and in the sea. The entire problem is closely linked to human activity. It is an "environmental boomerang"[94] occurring in connection with development schemes, in which unwelcomed, or unexpected consequences have arisen.

Apart from environmental problems arising out of development activities, there are also deliberate activities aimed at destroying the human being and the environment. One of such deliberate acts was the nuclear bombing of Hiroshima and Nagasaki towns in 1945, whose effect on the human environment still persist in those towns.[95] The indiscriminate bombardment of cities, towns and countryside areas in effect rendered the civilian population a military target of a new form of warfare - environmental warfare.[96]

During the Vietnam war, the Vietnamese environment was a military target. Vast tracts of forest land were destroyed by the US troops to weaken the Vietamese resistance.[97] The result was a debilitating environmental degradation,

including crop failure and poisoning of water sources.[98] Such a deliberate destruction of the ecosystem is termed "ecocide" by Richard Falk, who summarized the concept as follows:

> [I]t is important to understand the extent to which environmental warfare is linked to the over all tactics of high-technology counter-insurgency warfare, and extends the indiscriminateness of warfare carried on against people to the land itself. Just as counter-insurgency warfare tends toward genocide with respect to the people, so it tends toward ecocide with respect to the environment.[99]

The deliberate destruction of ecosystem, as illustrated by Falk, is certainly a violation of human right of the people living in that particular area. He further proposed that crimes of ecocide should be punished as in the case of genocide crimes. Anticipating the inevitable need for environmental protection as a fundamental human right, Falk proposed an ecocide crime convention whose main objective was to punish environmental crimes.[100] However, this proposed convention on the crime of ecocide may have difficulty gaining general acceptance. As a result of the unwillingness of States to submit their nationals, or themselves before international proceedings, there are not yet binding treaties concerning remedies for environmental destruction.[101]

The concept of ecocide is more pressing than the problems envisaged in genocide acts. Irreparable alteration to the environment may threaten entire populations, and it is tantamount to crime against humanity, perhaps, to a greater extent than genocide which may be limited only to a given ethnic minority or religious minority in an area.[102]

The above mentioned situations of environmental destruction necessitated international concern for proper environmental protection. For the last two decades, there have been continuous efforts to include the right to a healthy environment in the international human rights instruments.[103] The case for such a change in international human rights law has become still more pressing, in the light of new environmental challenges which had less urgency two decades ago.

2.3.2. Emergence of the Right to a Healthy Environment

The right to a healthy environment is a newly emerging human right. The first legal instrument to mention the concept of the right to a healthy environment was the 1969 US National Environmental Policy Act (NEPA). The Act states that a "healthful environment" is a necessary condition

for the maintenance of environmental quality and overall welfare of man.[104] This could be taken as the recognition of the right to a healthy environment under the US Federal Laws.

The first international effort in this respect was the 1972 UN Conference on the Human Environment. The Stockholm Declaration made it clear that the natural and man-made environment are linked to the very existence of man. As one of its principles, the Stockholm Declaration stated that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations....[105]

The second principle of the Stockholm Declaration similarly provides for the protection of the human environment:

> The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.[106]

The cumulative reading of principles 1 and 2 of the Stockholm Declaration, in conjunction with paragraph 1 of its proclamation, clearly expresses the position of the

participants on the possible recognition of environmental human rights. Based on this fact, we can assume that the right to a healthy environment is recognised as a fundamental right by the international community.

The Stockholm Declaration, in its entirety, reveals that contemporary environmental problems are mostly transboundary. But principle 21 of the Declaration poses some issues of national protection of the environment. It reaffirms the principle of state sovereignty in environmental policy formulation, and in the exploitation of environmental resources.[107] According to this principle, States may not cause damage beyond their national jurisdictions, but they may do so within their national jurisdiction.

Principle 21 of the Stockholm Declaration attempts to balance the right of States to be free from external interferences with that of State responsibility. This is in line with the right of States to exercise full sovereignty over their natural resources. The UN General Assembly Resolution 1803(XVII) of 14 December 1962, on the permanent sovereignty over Natural Resources, has led to the inclusion of the same right in the International Covenant on Civil and Political Rights, and the International Covenant on

Economic, Social and Cultural Rights in 1966.[109] Article one of both covenants provide for the right of people to freely pursue their economic, social and cultural development as well as freedom to dispose of their natural wealth and resources. Such rights fall within the category of "third generation" human rights. Besides, they are closely related to environmental rights of peoples.

In light of the Stockholm Declaration, environmental rights are fundamental human rights deserving international protection. But the existing practice of States show that the right of exploitation and enjoyment of property overrides the principles of conservation and preservation of environmental resources.[110] In most of the cases, States tend to give greater value to their absolute sovereignty than environmental protection.

States' rhetorical insistence on absolute sovereignty has greatly impeded the realization of the right to a healthy environment as a fundamental human right. Though more than 100 States accepted the principle of environmental protection at Stockholm, the hesitation towards its realization could only be explained by a concern for sovereignty. On this point Barbara Ward wrote that:

> Nationalism is a tough political power to replace. Throughout the twentieth century we have watched grudging efforts to modify the cruder forms of nationalism, and continuing resistance to this process. This may explain the decade of UN Conferences, where over a hundred governments have repeatedly voted in favour of resolutions on international action, but signally failed to do much to implement them. There is a curious tension between what governments subconsciously know to be the international realities and what they are prepared to accept in limitation of their own sovereign interests.[111]

Be this as it may, the environmental awareness brought about by the 1972 Stockholm Conference, and subsequent similar efforts has greatly influenced the course of events in environmental protection. It has been noticed that environmental protection is a global issue. Environmental degradation and pollution are caused by both developed and developing countries.[112] The developed countries cause pollution due to heavy industrialization, while the underdeveloped countries contribute to the destruction of their environment by inappropriate use of their resources, for survival. Poverty related environmental situations such as deforestation, overgrazing, overuse of marginal land, and congested city life are becoming global problems.

As a result of post-Stockholm efforts in the field of environmental protection, it has now been agreed by the international community that environment and development

are inseparable. In the run-up to the 1992 Rio Earth Summit, the World Commission on Environment and Development (WCED) greatly contributed to the emergence of the new principle of sustainable development - the principle of integrating environmental protection and development objectives in national economic planning.

The concept of sustainable development, as defined by the Commission can be extended to the protection of human rights of the present and future generations. The core concept of sustainable development is said to be: 'Meeting the needs of the present generation without compromising the ability of future generation'.[114] To date, the principle of sustainable development is welcomed by most countries. The United Nations Environment Programme (UNEP) has prepared guidelines for implementing sustainability. This is the procedure of Environmental Impact Assessment (EIA). It is an 'examination, analysis and assessment of planned activities with the view to ensuring environmentally sound sustainable development'[115] by competent authorities.

Sustainable development has become an agenda of compromise between developed and developing countries, as well as between the present and the coming generations.[116] This has been confirmed by the 1992 Rio Summit which

adopted "Agenda 21" as a programme of action into the 21st century and beyond.[117] The Rio Declaration on Environment and Development puts human rights protection at the centre of sustainable development. Principle 1 of the Declaration obliquely refers to environmental human rights, where it states that "human beings are entitled to a healthy and productive life in harmony with nature". The Stockholm and Rio de Janero UN Conferences on environmental protection have laid down the concept of the right to a healthy environment. As a result of these conferences the international community has become aware of the fact that environmental protection is a vital concern of mankind as a whole. The recognition of the right to a healthy environment is no doubt a basis for its due recognition in the international legal system.

Many recently concluded conferences in the field of environment and human rights urge the recognition of the right of individuals and groups to a healthy environment. One of the recently concluded conferences, the UN World Conference on Human Rights, held at Vienna (Austria) in June 1993, made it clear that States should adopt and vigorously implement all existing conventions relating to pollution control and dumping of toxic and dangerous substances.[118]

Though they fall short of providing a legally binding provision on the right to a healthy environment, the UN Conferences on environment and human rights have laid down the guiding principles and philosophical foundations for the concept. Different UN Conferences made it clear that the right to a healthy environment is an extension to the right to life.[119] This logical extension of the right to a healthy environment to the right to life may enable us to deal with it as a fundamental human right. But this alone is not sufficient to guarantee the implementation of the right, it has to be provided in an explicit manner in the international human rights instruments. Concerning the need for incorporating environmental rights into human rights instruments, Gormley wrote:

> The right to a pure, healthful, or decent environment, is essentially a new human right at least in so far as enforcement by international and regional institutions is concerned. Notwithstanding, at the level of jurisprudence there is some validity to the proposition that preservation of the remaining ecology and environment is included within the scope of the inalienable rights of man, as enunciated in the great human rights charters.[120]

Gromley was anticipating that the Council of Europe would be the first regional organisation to recognize the right to a healthy environment. In fact, the Council of Europe was the first to intend the enactment of environmental human rights in the early 1970s. A draft

proposal was presented to the Council, entitling individuals, groups and non-governmental organisations to enforce the right to a healthy environment.[121] For instance, the 1973 Draft Protocol to the European Convention on Human Rights provides as follows:

> 1. No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life.
>
> 2. An impairment of well-being may, however, be deemed to be tolerable if it is necessary for the maintenance and development of the economic conditions of the community and if there is no alternative way of making it possible to avoid this impairment.[122]

The cumulative reading of the two paragraphs would give the impression that individuals may not invoke the right to a healthy environment when the economic development of the community has to be accorded priority. The Draft Protocol further provides for the right of individuals to seek information and explanation on any adverse environmental

impairment from competent authorities.[123] Minor environmental impairment should be tolerated for the sake of the Society. Be this as it may, the Draft Protocol in question has not yet been adopted by the Council of Europe.[124]

Contrary to Gormley's assumption, it was the Organisation of Africa Unity (OAU), rather than the Council of Europe, which was the first organisation to recognise the right to a healthy environment. The African Charter on Human and Peoples' Rights is the first human rights instrument to clearly recognise the right to a healthy environment. Article 24 of the Charter states that "all peoples shall have the right to a general satisfactory environment to their development." As a matter of fact, the African Charter on Human and Peoples' Rights contains most of the "third generation" human rights. Apart from the right to a healthy environment, the Charter provides for "all peoples" right to: (a) political independence (Arts. 19-20); (b) sovereignty over wealth and natural resources (Art. 21); (c) development and enjoyment of the common heritage of mankind (Art. 22); and (d) national peace and security (Art. 23).

Another regional human rights instrument that provides for the right to a healthy environment is the Additional

At the international level, there is a series of conventions and multilateral treaties which provide for the protection of human health and well-being directly or indirectly. Almost all treaties dealing with outerspace, and those dealing with the law of the sea have provisions on the right of the present and future generations seeking to make the generations beneficiaries of the resources thereof and to preserve the quality of those resources.[127] Some of the recently concluded treaties specifically provide for the protection of human health. The Vienna Convention for the Protection of the Ozone Layer states one of its objects is to "protect human health and the environment against adverse effects resulting from modifications of the ozone layer."[128]

Taking into account all the parallel developments in the field of human rights protection, the principle of the right to a healthy environment is one of the newly emerging human rights deserving due recognition and acceptance by the international human rights law. It encompasses many of the emerging human rights of the "third generation". The combination of national, regional and global efforts in the protection of human rights, will sooner or later place this right at the centre of all fundamental rights.

2.3.3. The Validity of the Right to a Healthy Environment as a Fundamental Human Right

Examined in the light of the jurisprudence and philosophy of human rights, the right to a healthy environment is intimately connected with the right to life. It was the right to life itself that necessitated the recognition of the right to a healthy environment. Two aspects of human life, namely, the physical existence and health of human beings, and the dignity of that existence called for the safeguarding of the right to a healthy environment.[129] By and large, this right is a fundamental right of mankind as a whole, including present and future generations.

The need for the protection of environmental rights is justified, in the light of threats caused by global warming, ozone layer depletion, atmospheric nuclear testing, transboundary air pollution by toxic wastes, etc. These acts of environmental destructions, as perceived by Professor Falk, are severe violations of human rights, affecting large number of people.[130] In explicating the term "ecocide", Professor Falk described environmental "offences" as acts that:

> "involve official conduct that seriously endangers the life, health and serenity of current and future generations. The notion of human rights is incomplete to the extent that it fails to encompass those forms of deliberate behaviour that produce serious environmental damage ... Environmental quality is a critical dimension of human dignity that may have a significant impact on development and even survival, of mankind."[131]

The above quotation clearly indicates that the right to a healthy environment ought to constitute a central aspect of the list of fundamental human rights.

Based on the criteria set out by Winslade[132], to distinguish the fundamental human rights from other rights, the right to a healthy environment satisfies the requirement of vitality to all human beings. It is impossible to think of life devoid of life-giving and life-supporting elements. It is in the interests of almost everybody to live in a healthy environment.

As regards the four conceptual criteria set out by Edel,[133] namely, generality, importance, endurance and inalienability, the right to a healthy environment will satisfy all of them. Being an extension to the right to life for all human beings, it satisfies all tests of a fundamental human right. Therefore, there is no doubt as to the qualification of the right to a healthy environment as a fundamental human right.

Besides, environmental awareness is being enhanced by the growing co-operation of States on important environmental issues. Presently, there seems to be a consensus among the international community about the fact that we inhabit only one earth, with only one environment for one human family. The newly emerging "third generation" human rights will offer a new challenge to the existing international legal system which may demand its modification, or may even call for the promulgation of new sets of rights of mankind as a whole.

FOOTNOTES

1. Rebecca M.M. Wallace, International Law: A Student Introduction (London: Sweet & Maxwell, 1986), p.175.

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4. Article 2 (French) Declaration of the Rights of Man and of Citizens, 1789.

5. John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), p.18.

6. Louis Henkin, The Rights of Man Today (Boulder, Colorado: Westview Press, 1978), p.(xii).

7. Ibid.

8. F.E. Dowrick, (ed.) Human Rights: Problems, Perspectives and Texts (Kettering Northamptonshire: University of Durham, 1979), p.12.

9. Ibid.

10. Henkin, Supra Note 6, p.2.

11. Alfred P. Rubin, "Are Human Rights Legal", in Yoram Dinstein (ed), The Protection of Minorities and Human Rights (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1992), pp. 44-45.

12. Ibid.

13. Andrew Clapham, Human Rights and European Community: A Critical Overview [European Union - The Human Rights Challenge; Vol. 1], (Florence - Baden - Baden: 1991), p.13.

14. Ibid.

15. Ibid. p.14.

16. A. Edel, "Some Reflections on the Concept of Human Rights", in Human Rights - Amintaphil 1, 2(1971); as cited by R.S. Pathak, "The Human Rights System as a Conceptual Framework for Environmental Law", in Edith B. Weiss (ed) Environmental Change and International Law: New Challenges and Dimensions, (Tokyo: United Nations University Press,1992),p.210.

17. Ibid. p.211.

18. Ibid.

19. Ibid. p.213.

20. Clapham, supra note 13, p.13.

21. Pathak, supra note 16, p.214.

22. Emmanuel Agius, "From Individual to Collective Rights, to the Rights of Mankind: The Historical Evolution of the Subject of Human Rights", in Salvino Busuttil et al (eds), Our Responsibilities Towards Future Generations: A Programme of UNESCO and the International Environment Institute (Malta: UNESCO and Foundation for International Studies, 1990), p.27.

23. Article 1(3) UN Charter.

24. Regional human rights instruments are: African Charter on Human and Peoples' Rights, (1981); American Convention on Human Rights (1969); and European Convention on Human Rights (1950).

25. Pathak, supra note 16, p.215.

26. Ibid.

27. Agius, supra note 22, p.28.

28. Ibid. p.29.

29. Ibid.

30. Ibid.

31. Ibid.

32. Ronald Dworkin, Taking Rights Seriously (London: Duckworth, 1977), pp. 184-205.

33. Pathak, supra note 16, p. 216.

34. For instance, after the downfall socialism and break-up of the former USSR, Russia faced severe economic problems. The economic policy change led to a political uncertainities and chaos in leadership. The situation there is still gloomy, with a possibility of takeover of power by an ultra-nationalist party led by Vladimir Zhirinovsky.

35. Agius, supra note 22, p.30

36. Tom J. Farer, "Human Rights and Scientific and Technological Progress: A western perspective". in C.G. Weeramantry (ed.), Human Rights and Scientific and Technological Development (Tokyo: United Nations University Press, 1990), p.62.

37. W.A. Whitehouse, "A Theological Perspective", in Dowrick above at note 8, p.50.

38. Robertson, supra note 3, pp. 196-97.

39. Ibid.

40. Ibid.

41. Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (Tokyo: United Nations University Press, 1989) p. 34 ff.

42. Peter S. Inglot, "The Common Heritage and the Rights of Future Generations", in Bussuttil et al at note 22 above p. 67.

43. Weeramantry, supra note 36, p. 62.

44. Agius, supra note 22, p.31.

45. Ibid, pp. 31 - 33.

46. Ibid. p. 31.

47. The text of the Conventions could be found in ILO, International Labour Conventions and Recommendations (1919-1991), (2 Volumes) (Geneva: International Labour Office, 1992).

48. Egon Schweb, "Some Aspects of the Measures of Implementation of the Covenant on Economic, Social and Cultural Rights" in Human Rights Journal, Vol. 1 (1968) pp.363 - 377.

49. Colin Warbrick, "The Protection of Human Rights in National Emergencies", in Dowrick, supra note 8, pp. 89 - 90.

50. Agius, supra note 22, p.32.

51. Ibid.

52. S.N. Dhar, International Relations and World Politics since 1919 (New Delhi: Kalyani Publishers, 1982), pp. 3 - 18.

53. Ibid.

54. Robertson, supra note 3, p.20.

55. Ibid.

56. A. Bell-Fialkoff, "A Brief History of Ethnic Cleansing" in Foreign Affairs, Vol. 72, No. 3 (1993) p. 110. As a result of sharp differences between the ethnic and religious groups in the former Yugoslavia, three states (Croatia, Serbia and Slovenia) have already taken separate identity. Bosnia-Herzogovina might follow the suit soon.

57. The NATO did not launch the Air Strike due to the compliance of Serbian forces to withdraw their artillery pieces from the town of Sarajevo beyond 20 kilometers of the vicinity from the town, a precondition laid down by the United Nations in collaboration with USA and NATO.

58. Article 1(2) UN Charter.

59. J. G. Starke, Introduction to International Law (London: Butterworths, 1989), p. 123.

60. Ibid. 125.

61. Agius, supra note 22, p.34.

62. Henkin, supra note 6, p.21.

63. Danilo Turk, "The Human Right to Development", in Peter Van Dijk et al (eds), Restructuring the International Economic Order: The Role of Law and Lawyers (New York: Kluwer Publishers, 1986), p. 85.

64. See General Assembly Resolutions: 34/46 of 23 November 1979; 35/174 of 15 December 1980; 36/133 of 14 December 1981; 37/199 of 12 December 1982; 38/124 of 16 December 1983; 39/145 of December 14, 1984; 40/124 of 13 December 1985; and 41/128 of 4 December 1986.

65. African Charter on Human and Peoples' Right, preambular paragraph 7.

66. Article 22 of African Charter:
1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

67. UN-Doc. E/CN. 4/1334, 2 January 1979.

68. UN-Doc. E/CN. 4/1488, 31 December 1981.

69. A working group of Governmental Experts on the Right to Development set up by the UN Commission on Human Rights submitted four proposals between 1982 and 1985, see UN-Doc. E/CN. 4/1985/11, Annexes.

70. Article 2 of the General Assembly res. 41/128 of 4 December 1986.

71. Philip Alston, "Conjuring up New Human Rights: A proposal for Quality Control", in 78 A.J.I.L. (1984) pp. 607 - 621.

72. The United Nations World Conference on Human Rights Vienna Declaration (1993). The text of the Declaration could be found in International Legal Materials, vol. 32 no.6 (1993), pp. 1162 - 87.

73. The African Charter is the only human rights instrument to use the concept of the "common heritage of mankind", Art. 22(1) provides for the right of peoples to enjoy the benefits of the common heritage of mankind.

74. Agius, supra note 22, p.35.

75. Ibid. p.36.

76. Weiss at note 41 supra, p.34.

77. See J.G. Starke at note 59 supra, pp. 242 - 292.

78. A. Padro, "First Statement to the First Committee of the General Assembly, November 1, 1967", in The Common Heritage: Selected papers on ocean and World Order 1967 - 1974 (Malta: Malta University Press, 1975), p. 41.

79. Ibid.

80. General Assembly Resolution 2749 (xxv) of 1970.

81. Article 137(2) United Nations Convention on the Law of the Sea (1982).

82. Article 1, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967) or "Moon Treaty".

83. Agreement Governing the Activities of States of the Moon and Other Celestial Bodies (1979).

84. Ibid. Article 4(1).

85. Weiss, supra note 41, pp. 34 - 45.

86. Ibid. p. 95.

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88. Agius, supra note 22, p. 43.

89. Maurice F. Strong, "Eco '92: Critical Challenges and Global Solutions", in Journal of International Affairs vol. 44 no. 2(1991), p. 297.

90. J. B. Ojwang, National Domestication of the Biological Diversity Convention: Elements of a Model Law, [International Conference on the Convention on Biological Diversity: National interest and Global imperatives - held at UNEP Headquarters, Nairobi, January 26 - 29, 1993], (Nairobi: ACTS, 1993), p.2; W. Paul Gormley, Human Rights and Environment: The Need for International Co-operation (Leyden: A.W. Sijthoff, 1976), p.32.

91. David Kay and Eugen Sklnikoff (eds), World Eco-crisis: International Organisations in Response (London: University of Wisconsin Press, 1972), pp. 74, 174; Gormley, Ibid, p.6.

92. Gormley, Ibid.

93. Toru, "Emerging principles and Rules for the Prevention and Mitigation of Environmental Harm", in Edith B. Weiss at note 16 supra, p. 110.

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95. Lynton Caldwell, In Defense of Earth: International Protection of Biosphere (Bloomington, London:

Indiana University Press, 1972), p. 104.

96. Arther Westing, "Environmental Warfare", in Environmental Law vol., 15 (1985), p. 645.

98. Richard A. Falk, "Environmental Disruption by Military Means and International Law" in Arther Westing (ed.), Environmental Warfare: A Technical, Legal and Policy Appraisal (London/Philadelphia: Stockholm International Peace Research Institute, 1984), pp. 33 - 45.

99. Richard Falk, "Environmental Warfare and Ecocide: Facts, Appraisal and Proposals", 9 Revue Belge de droit International (1973) p. 1, as quoted in Gormley,supra note 90, p. 14.

100. Falk, supra note 98 supra, p. 45.

101. Gormley, supra note 90, pp. 14 - 15.

102. A.A. Cancado Trindade, "The Contribution of Human Rights Law to Environmental Protection, with special reference to Global Environmental Change", in Edith Brown Weiss (ed) at note 16 supra, p. 261.

103. Ibid. p. 271.

104. The U.S. National Environmental Policy Act (1969), pub.L. No. 91 - 190, sections 101(a) and 101(c).

105. Principles of the 1972 Stockholm Declaration on the Human Environment; Mostafa K. Tolba (ed), Evolving Environmental Perceptions: From Stockholm to Nairobi (London: Butterworths, 1988), p. 4.

106. Ibid. p.5.

107. Ibid. p. 7 para. 5.

108. Gormley, supra note 91, p. 36.

109. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966, respectivelly, in their Article 1(2) identically provide that: "All people may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case

may a people be deprived of its own means of subsistence".

110. Gormley, supra note 91, p. 37.

111. Barbara Ward, "Forward", in Erik Eckhom, Down to Earth (New York: Norton & Coy, 1982), p.(xi).

112. Jan Kulig, "Environmental Policies for Developing Countries and Their Development Strategy", in Development and Environment (Paris: UN, 1972) pp. 96 -98.

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117. United Nations Conference on Environment and Development (UNCED), held at Rio de Janero from 3rd - 14th June 1992.

118. International Legal Materials (ILM) vol. 32 No. 6 (1993) p.1666.

119. Preambular paragraph 1 and principles 1 and 2 of the Stockholm Declaration on the Human Environment; principle 1 of the Rio Declaration on Environment and Development, and part 1, paragraph 11 of the UN World Conference on Human Rights - Vienna Declaration, 1993.

120. Gormley, supra note 91, p.41.

121. Ibid. pp. 90 - 102.

122. Article 1 of the Draft protocol on European Human Rights Convention concerning new human rights (1973). This draft has not yet been approved by the Council of Europe.

123. Ibid. Art. 2.

124. A. Cassese et al (eds), Human Rights and the European Community: The Substantive Law [European Union - The Human Rights Challenge Vol. III] (Baden-Baden: European University Institute, 1991), p.27.

125. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, (1988).

126. See Edith Brown Weiss at note 41 supra, annex B.

127. Ibid. p. 34 ff.

128. See the last paragraph of the preamble to the Vienna Convention for the Protection of the Ozone Layer, Vienna, 1985.

129. A. A. Cancado Trindade, note 102 supra, p. 274.

130. Ibid. p. 276.

131. Ibid.

132. See Pathak, supra note 16, p. 210.

133. Ibid. p. 211.

CHAPTER THREE

3. INTERNATIONAL AND NATIONAL PERSPECTIVES OF THE RIGHT TO A HEALTHY ENVIRONMENT

3.1 The Right to a Healthy Environment as Conceived in the International Human Rights Instruments and by International Conferences

3.1.1. The U.N. Charter and the Human Rights Covenants

The existing international human rights instruments do not expressly provide for the right to a healthy environment as a human right. But there are some incidental references to such a right in almost all important human rights instruments. Some provisions of the UN Charter could be also interpreted to accommodate the right to a healthy environment.

One of the objectives of the UN, as it is set out in Article 1(3) of its Charter, is to achieve international co-operation in solving problems of an economic, social, cultural or humanitarian character, which impede the scope for respect for human rights and fundamental freedoms. This objective was underlined by the adoption in 1948 of the Universal Declaration of Human Rights, which is usually considered as the cornerstone of all subsequent human

rights instruments. This Declaration has no specific provision on environmental rights. It is only if we are at liberty to interpret the right to a healthy environment as a right to life, that we could trace it in the Universal Declaration. In our previous discussion on the nature of the right to a healthy environment (Chapter 2), we have asserted that it is the extension of the right to life, in the spirit of the 1972 Stockholm Declaration on the Human Environment.

With such an assumption, we can turn to Article 3 of the Universal Declaration, which provides for the right to life, liberty and security of the person. Current trends in human activity point in the direction of an environmental crisis and to the extent that law can give a solution, it is desirable to adopt liberal interpretations of law. On this basis it will be possible to find relevant elements of this right in international human rights instruments.

The right to life is one of the fundamental human rights recognized by the 1966 International Covenant on Civil and Political Rights. Article 6(1) of this Covenant guarantees every individual's right to life. In both the Universal Declaration and the Covenant, the right to life seems to be restricted to the physical protection of an individual

against death. But the concept of a healthy environment, within the context of the Stockholm Declaration, is inseparable from the right to life. By the first preambular paragraph of the Declaration, the two rights are co-extensive and are essential as compared to all other human rights.[1] Furthermore, the principles of Stockholm provide for the protection of the environment for the interest of present and future generations.[2]

Though the Stockholm Declaration is non-binding, it can be used as an additional guideline to strengthen the relationship between human rights and environmental protection. In the absence of a clearly defined environmental right in the two international human rights covenants, states parties to them may not be obliged to recognize the right to a healthy environment, over and above their existing moral commitment under the Stockholm Declaration, which recognized such rights.

The International Covenant on Economic, Social and Cultural Rights (1966) has certain relevant provisions on the right to a healthy environment. Towards guaranteeing an adequate standard of living, Article 11(1) of the Covenant mentions "the right to an adequate standard of living ... and to the continous improvement of living conditions." Article

12(1) of the Covenant provides for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", whose attainment is subject to "the improvement of all aspects of environmental and industrial hygiene." These provisions clearly go beyond the provisions of the Universal Declaration of Human Rights and the Civil and Political Rights Covenant, in underlining environmental health in relation to the protection of life. The goal of attaining the highest standard of physical and mental health, as envisaged by the Covenant, can hardly be realized except by avoiding or abating environmental impairment.

The right to a healthy environment, as contemplated under the Economic, Social and Cultural Covenant, would invite individuals to exercise their rights against their States which are parties to it. It may, in addition, require State Parties to provide necessary conditions for a healthy environment.[3] The Stockholm concept of environmental right is of a vital importance here. The linking of life to health may help to resolve a dilemma.

The right to health and medical care, together with the right to food and the right to shelter, are part and parcel of the right to life. All these rights revolve, in one way or the other, around environmental protection.[4] One can hardly

contemplate the reality of life, without paying regard to its supporting elements.[5] The right to health as an extension of the right to life, may serve as the starting point towards the conception of a right to a healthy environment.[6] The right to a healthy environment may in this regard, be taken as an extension of the right to health.

In light of Article 25 of the Universal Declaration of Human Rights, which provides for the right to a standard of living adequate for the health and well-being ... including food, clothing, housing and medical care ...," the right to a healthy environment should have been clearly regulated in the two human rights covenants. In the absence of a clear stipulation to that effect, the importance of environmental protection would justify a liberal interpretation of Article 6(1) of the Civil and Political Rights Covenant and Articles 11 and 12 of the Economic, Social and Cultural Rights covenant in favour of the right of individuals to a healthy environment. The Declaration and Principles of the Stockholm Conference on the Human Environment may clear the way for such an interpretation of the said provisions of the two covenants.

It should be noted that the Stockholm Conference bore a special social and political significance which is only

comparable with a liberation process, seeking to free humans from environmental disasters of their own making.[7] Prior to Stockholm, there were certain misunderstanding between the developing and the developed countries, as regards the environment. The idea of balancing the rate of technological development with that of the carrying capacity of the environment, which was advanced by developed countries, was unpalatable to many developing countries, which were just embarking on industrialization. Thanks to the Stockholm Conference, these conflicting perceptions were compromised, and the idea of sustainable development was adopted by all States.

According to McCormick,[8] the 26 principles of the Stockholm Declaration can be summarized into the following five groups:-

1. Safeguarding and conservation of natural resources and maintenance and equitable share of non-renewable resources;

2. Integrating environment into development;

3. Enjoyment of national environmental resources without endangering other States;

4. Curtailment of pollution within the capacity of the environment to clean itself; and

5. Use of science, technology, education and research in the promotion of environmental protection.

The observance of these principles will considerably enhance the protection of the right to a healthy environment.

3.1.2. The Role of UNEP in Environmental Protection: with special reference to the Human Environment

One of the tangible outcomes of the Stockholm Conference was the creation of the United Nations Environment Programme (UNEP), in 1972.[9] The expectation was that UNEP would uphold the right to a healthy environment as one of its guiding principles. To live up to the expectation, UNEP, through its Governing Council, made certain efforts to protect the environment.

The Governing Council of UNEP, established as its policy-making body, was intended to be an organ for co-ordination of activities related to the world

environment. One of the objectives of UNEP was to identify and assess the major environmental problems for which "Earthwatch" was designated as its instrument of monitoring and evaluation.[10] The improvement of the living conditions of the world's disadvantaged peoples was one of the priority areas of UNEP.[11] The Governing Council's decisions and recommendations have reflected commendable concerns for sustainable development such as conservation of wildlife and genetic resources, preparation of a proposed code of conduct to govern weather modification and preservation of marine environment.[12]

Among the achievements of UNEP in the field of the protection of human environment is the convening of the UN Conference on Human Settlements (UNCHS), commonly known as Habitat, in 1976. The Habitat Conference has adopted wide-ranging recommendations for the betterment of human settlements.[13] The Habitat Declaration was a manifestation of the general respect for human rights geared towards the goal of sustainable socio-economic development.

On the occasion of the tenth anniversary of the Stockholm Conference, in 1982, a declaration known as the "Nairobi Declaration"[14] was adopted to reaffirm and strengthen the Stockholm Declaration. The Nairobi

Declaration stated that the Action Plan adopted by the Stockholm Conference had only been "partly implemented", and noted that environmental problems such as deforestation, soil and water degradation, desertification, depletion of the ozone layer, hazardous waste disposal and extinction of animal and plant species, had assumed alarming proportions.[15] Noting the emergence of the concept of sustainable development, the Nairobi Declaration urged all States to ensure the right of present and future generations to a healthy environment.[16]

Following the Nairobi Declaration, the Governing Council of UNEP, has formulated programmes and priorities for environmental protection. The following priority areas are relevant to our discussion:

> [B]etterment of human settlement; better protection of human health; prevention or mitigation of the consequences of natural disasters; and plan to combat desertification.[17]

According to Starke,[18] one remarkable achievement of UNEP in this respect is its sponsoring of the 1985 Vienna Convention for the protection of the Ozone Layer, whose aim was to combat the threat to Ozone-layer depletion, by restricting the emission of chlorofluorocarbons (CFCs), the substances that deplete the ozone layer and expose plant

and animal life to direct ultra-violet radiation.[19] UNEP has also initiated the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal. The Convention aims at solving environmental pollution problems likely to arise from hazardous wastes handlings.[20] It seeks to prevent non-environmentally sound disposal of hazardous wastes; and it obligates States Parties to refrain from illegal traffic in wastes.[21]

In its further move towards the protection of the human environment, UNEP has endeavored to address the issues of "common concern of mankind" in the wake of global environmental crisis. This could be evidenced from UNEP's contribution to the "Meeting of the Group of Legal Experts to examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues" in Malta, in 1990.[22] This meeting concluded that "environmental protection should be linked to the philosophy of human rights, or to its general framework"[23] so as to avoid the "generations" of human rights. These experts further proposed the establishment of a link between human rights protection and environmental protection, based on the fundamental right to life and health in their wider dimension."[24] Moreover, they called upon the UN to adopt a Declaration of Principles, or a Code of Conduct, or a

body of Guidelines and Principles,[25] to guarantee the protection of environmental rights.

UNEP, as a special UN agency for the environment, is expected to press for the universal recognition and implementation of the right to a healthy environment. It may, in its capacity as UN agency, play an important role in reducing hazards of environmental pollution to acceptable levels. It may contribute to that end by assessing and evaluating potential environmental hazards of major pollutants; disseminating information; upgrading national capacities to assess, prevent and control environmental pollution.

3.1.3. WCED and UNCED on Environmental Rights

Of the numerous attempts made to recognize environmental rights in the realm of international law, the proposal of the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED) clearly proposes the right to a healthy environment as a fundamental human right.[26] As a body entrusted with drafting a global agenda for the twenty-first century and beyond, WCED has further proposed a legal principle to guide States towards the conservation of natural and

environmental resources, for the benefit of future generations.[27] This is a reitaration of the Stockholm Declaration which stated:

> "To defend and improve the human environment for present and future generations has become an imperative goal for mankind - a goal to pursue together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development."[28]

The post Stockholm trend of providing for human rights of present and future generations is becoming an international standard for every important environmental treaty. Most of the time this terminology is used along with the concept of "common heritage of mankind", which is commonly found in the preambular paragraphs of environmental treaties of universal importance concluded after the Stockholm Conference. Some of the Conventions which incorporate this principle are: the 1972 Paris Convention for the Protection of World Cultural and Natural Heritage; the 1972 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora; the 1976 Barcelona Convention for the protection of the Mediterranean Sea against pollution; the 1976 Apia Convention on Conservation of Nature in the South Pacific; the 1978 Kuwait Regional Convention for Co-operation on the Protection of Marine Environment from pollution; the 1976

Berne Convention on the Conservation of European Wildlife and Natural Habitat; the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals; the 1983 Cartagena Convention for the protection and Development of Marine Environment of the Wider Caribbean Region; and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.[29]

Reference to the benefit of present and future generations is also made in many of the UN General Assembly resolutions. Some of these are: UNGA Resolution No: 3281 on the Charter of Economic Rights and Duties of States; UNGA Resolution No: 36/7 of 27 October 1981 on the Historical Responsibility of States for the Prevention of Nature for Present and Future Generations; and UNGA Resolution on the World Charter for Nature.

The 1992 United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, adopted the Rio Declaration on Environment and Development, which laid down certain environmental principles, in the same way of the Stockholm Declaration. The first principle of the Rio Declaration provides for an environmental right:

> Human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Though it gives human beings the right to healthy life in harmony with nature, this principle is blended with productivity factor which may inhibit its separate enjoyment. Human beings are referred to, only, as the "centre of concern" of sustainable development. Compared to the Stockholm Declaration on the Human Environment, and the proposals of the WCED's Expert Group on Environmental Law, the UNCED principle on the right to a healthy environment has the appearance of an anticlimax.

In contrast to the right to a healthy life, UNCED has explicitly recognized the right to development as a fundamental human right for all, including present and future generations. Principle 3 of the Rio Declaration reads:

> The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

The restrictive turn in UNCED's standpoint, vis-a-vis the right to a healthy environment, seems to be dictated by the experience of States after the Stockholm Declaration. According to Philippe Sand, many governments of developed and developing countries were "confronted from within and

without by environmental groups and other popular movements opposing their environmentally destructive policies."[30] States have reasons to fear the legal implications of linking international environmental law and the existing international mechanisms for the protection of human rights.[31] States do not want to subject themselves to the jurisdiction of international dispute settlement institutions.

Regardless of the doubt it cast on the recognition of the right to a healthy environment as a human right, UNCED has adopted "Agenda 21", a detailed programme of action for sustainable development, which among other things aims at solving all environmental degradation problems eventually. Moreover, Agenda 21 promotes the concept of global partnership in the use and conservation of the natural resources of the earth. The accomplishment of this programme may solve the issue of the right to a healthy environment as well.

3.2 International Humanitarian Law and the Right to a Healthy Environment

International humanitarian law is a set of rules "governing the use of armed forces and the treatment of

individuals in the course of war and armed conflict."[32] The main purpose of these rules is to reduce or limit the suffering of individuals and outline the area within which the practice of armed conflict is permissible.[33] The history of humanitarian law can be traced back to the nineteenth century. The Hague Conventions of 1889 and 1907[34] created a comprehensive basis for a modern law of warfare.

The first humanitarian law instrument to introduce environmental protection was the 1977 Protocol Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts. In this instrument were included some important provisions on the protection of the environment. Additional Protocol I to the Geneva Conventions has two articles in this respect. Article 35(3) provides as follows:

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

Article 55 provides for environmental protection with special reference to the health and survival of the people in the area of the conflict, and beyond. It states:

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

(2) Attacks against the natural environment by way of repraisals are prohibited.

The 1977 Additional Protocol II to the Geneva Conventions prohibits attacks against "dangerous installations"[35] which, when attacked, would have widespread environmental repercussions on the civilian population. Such installations include: dams, dykes and nuclear reactors. Attacks on nuclear reactors, for instance, can cause considerable environmental damage.[36]

Although these Additional Protocols were mainly intended to regulate war-time situations, their provisions on the protection of the natural environment can serve as a legal basis for duties to ensure environmental security, in the interests of both present and future generations.

It is believed that environmental provisions of the Additional Protocols to the Geneva Conventions were necessitated by the events that took place during the Vietnam War, where widespread environmental destruction took place, arising from the deliberate use of

herbicides, bulldozers, and due to extensive bombardments that damaged the ecological balance.[37] This situation was aptly described by Richard Falk as "total war".[38] Total war, is a situation where deliberate destruction of entire cities and villages, by air and ground bombardments, takes place. According to Falk, flagrant disregard of environmental safety was the basis for some of the war crimes that have led to judicial trials in the past.[39] For example, nine out of ten of the Nazi German civilian administrators of the Polish forests were accused of war crimes, by the UN War Crimes Commission at Nuremberg, because they had implemented a Nazi policy of ruthless exploitation of Polish forestry, a policy which amounted to "pillaging", and involved "the wholesale cutting of polish timber to an extent far in excess of what was necessary to preserve timber resources of the country."[40]

The level and character of environmental destruction during the Vietnam War was similar to that which characterised the Nazi pillaging of Poland. The US waged a "total war", in the course of which the Vietnamese environment had become a military target.[41] As a matter of fact, there was no humanitarian law prohibiting environmental destruction as a military objective or otherwise, prior to the 1977 Protocol Additional to the

1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflict. The 1972 Stockholm Conference on the Human Environment, although it did not comprehensively tackle issues of environmental destruction for military objectives, acknowledged by Principle 26 of its declaration, that serious threats to the environment were posed by nuclear weapons:

> Man and his environment must be spared the effect of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

Following the Stockholm Conference, there were UN General Assembly resolutions which dealt with issues related to the protection of the human environment. The UNGA resolutions on the "Effects of Atomic Radiation", and the "Prohibition of Action to Influence the Environment and Climate for Military and Other Purposes Incompatible with Maintenance of International Security, Human Well-being and Health",[42] urge States to adopt international conventions to guarantee future eradication of all forms of weapons of mass destruction. Accordingly, some important conventions were adopted soon after the resolutions were adopted.

The First post-Stockholm Convention to address the issue was the 1976 UN Convention on the Prohibition of

Military or any other Hostile Use of Environmental Modification Technique (ENMOD).[43] This Convention contains some provisions which address humanitarian law issues. In fact, Article 35(3) of the 1977 Additional Protocol I of the Geneva Conventions of 1949 is a reiteration of Article 1(1) of the ENMOD Convention, which provides:

> Each State party to this Convention undertakes not to engage in military or other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.

Moreover, Article 55(1) of the 1977 Additional Protocol I to the Geneva Conventions specifically includes the protection of environment as a means of ensuring human health and survival. The concept of natural environment under this Article is wide enough to cover the biological environment in which people live. The express reference to the health and survival of the population is an indication of the intention to protect the right to health of the people in the conflict areas. This may be seen as a human rights safeguard for the people. The right to health and the right to life are inseparable, as we have noted in Chapter 2 of this study. According to A.A.C. Trindade, such rights could fill gaps in the international structure for human rights protection. On the chain of relationship accompanying the right to life and health, Trindade has the following to

say:

> [T]he right to life, the right to health, and to some extent the right to physical integrity appears as "bridges between the domains of international human rights law, humanitarian law, refugee law, and environmental law.[44]

In all the above-mentioned domains of international law, the protection of human life and health appears to be the primary concern of legal safeguards. In its further effort to protect the natural environment, the UNGA has adopted the 1982 World Charter for Nature, which, inter alia, declared that: "Nature shall be secured against degradation caused by warfare or other hostile activities."[45]

The International Law Commission (ILC) has also made contributions to the development of international humanitarian law in the field of environmental protection. The ILC has adopted some Draft Articles on State responsibility. In one of its proposals environmental degradation is defined as an international crime. Article 19 states that:

> [A]n international crime may result inter alia, from: ... a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.[46]

The ILC had further adopted the Draft Code of Crimes against Peace and Security of Mankind. Article 25 of the Draft Code provides for the conviction of individuals who may wilfully cause serious environmental impairments. The Commission's Draft Article on State responsibility also provides for State liability for every internationally wrongful act. Articles 7 and 8 of the Draft Articles consider acts committed by persons and institutions, acting on behalf of States as acts of States. The ILC recommends that environmental crimes should be punishable under the penal law of States.[47]

The 1991 Gulf War called for the UN condemnation of environmental destruction as a method of warfare.[48] The spilling of oil into the Persian Gulf, and the burning of Kuwaiti oil wells by Iraq would fit the meaning of environmental destruction as method of warfare. The oil spills caused enormous loss of fish and other sea animals, while the burning oil wells caused acid rain over vast areas in the nearby States.[49] As a result of this, the Government of Jordan was moved to propose a new humanitarian law instrument to the UN General Assembly. In its statement, Jordan stated that:

> The existing 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was revealed being painfully inadequate during the Gulf conflict.

> We find that the terms of the existing Convention are so broad and vague as to be virtually impossible to enforce. We also find no provision for a mechanism capable of the investigation and settlement of any future dispute under the Convention. Furthermore, the Convention does not provide for advanced environmental scientific data to be made available to all States at the initial stages of crisis prevention.[50]

Jordan proposed that the General Assembly should establish a committee to submit a new treaty, with an efficient mechanism for combating the exploitation of the environment in times of armed conflict.[51] In the meantime, UNEP had taken the initiative of covening the UN Inter-Agency Consultations in February 1991, as soon as the news of serious oil spills hit the headlines, to seek comprehensive and co-ordinated measures to contain the environmental crisis sparked by the Gulf War.[52] Subsequently, the UN Security Council passed Resolution 687(1991) which held Iraq "liable under international law for any direct loss, damage, including environmental damage and depletion of natural resources - as a result of Irag's unlawful invasion and occupation of Kuwait."[53]

The proposal submitted by Jordan was examined by the Legal Committee of the General Assembly and by the International Committee of the Red Cross (ICRC). The ICRC, in its findings under the title "Protection of the Environment in times of Armed Conflict", considered that the existing international humanitarian law is inadequate to

the task of protecting the environment. According to the ICRC, the inadequacy lies in its lack of implementation mechanism, and lack of substantive provisions on environmental protection.

The Legal Committee of the General Assembly on the other hand, had come up with two views. One view was that the existing body of international law for environmental protection in times of armed conflict was adequate, except for the lack of its wider acceptance and effective implementation. This view suggests that there should be no need for reformulation of the existing law. The other view was that the existing rules of international humanitarian law on the protection of the environment were insufficient. It was suggested that the existing rules needed to be defined and uniformly applied.[54]

The same issue was taken up by UNCED in the context of the General Review Conference of the Parties under ENMOD. With regard to the protection of the environment in times of armed conflict, the Rio Declaration on Environment and Development states that:

> Warfare is inherently destructive to sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate

in its further development, as necessary.[55]

"Agenda 21", the programme of action for sustainable development adopted by UNCED, calls for appropriate measures to be taken to curb large-scale environmental destruction during armed conflict.[56]

Finally, the States Parties to the ENMOD Convention, in response to the UNCED and ICRC proposals, resolved to keep on improving the Convention from time to time. Since their meeting in Geneva, in 1992, for the improvement of the provisions of the Convention on "eliminating the dangers of military or any other hostile use of environmental modification techniques,"[57] States parties have adopted the Final Declaration. In their Declaration, they have agreed that ENMOD provides an adequate basis for guaranteeing the protection of the environment in times of armed conflict. Accordingly, they decided not to consider any review of ENMOD earlier than 1977.[58]

Though international humanitarian law is only applicable to situations of armed conflict, its provisions on the protection of the environment are far-reaching enough to provide a basis of protection for the civilian population during the conflict and in the aftermath.

3.3. The Right to a Healthy Environment and the International Refugee Law: with special Reference to Environmental Refugees

The protection of refugees is one of the domains of international human rights law. Currently, massive migrations of people have contributed to the creation of a considerable refugee population. Refugee populations are created by the displacement of people from their places of origin. The causes of displacement are varied. One of the causes of migration is environmental degradation of a significant magnitude. Unfortunately, the existing international refugee law does not take environmental refugees into consideration.

The 1951 Convention Relating to the Status of Refugees defines the term "refugee" as any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for the reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country.[59]

This definition does not take environmental refugees into account, even though this category of refugees currently outnumbers conventional refugees. The scope of

the definition is limited to persons who were displaced as a result of the Second World War, mainly European refugees. The menacing environmental degradation over the past couple of decades has given rise to the notion of environmental refugees,[60] thus giving reason for a redefinition of the term "refugee".

The United Nations High Commission for Refugees (UNHCR), by virtue of its competence to provide protection and assistance for all displaced and persecuted persons,[61] has managed to assist both economic and environmental refugees. According to Article 1(1) of the Statute of the UNHCR, the Office of the High Commissioner is expected to protect the lives of refugees: this, it appears, would include protection against environmental disaster, whether caused naturally or by human conduct. On the basis of such competence, the UNHCR gives emergency material assistance to millions of refugees in Africa, Asia and Latin America, among whom environmental refugees are the majority.[62]

According to Dr. Norman Myers, coordinator of a three-year-study on environmental refugees for the Climate Institute in Washington DC, the current number of environmental refugees in the world is about 25 million, out of a total of 43 million refugees of all types.[63] Myers

estimates the number of environmental refugees could grow to 50 million by the year 2000 or shortly after. Out of some 20 million African refugees, just over half are environmental refugees within their own countries.[64] As a result of drought, soil erosion, desertification and other environmental ills, Africa has been the scene of environmental migrants for quite some decades.

Based on these facts, the OAU's 1969 Convention Governing Specific Aspects of Refugee Problems in Africa may be regarded as encompassing environmental refugees. The definition of "refugee" is given as, a person who, owing to "external aggression, military occupation, foreign domination, or other events, seriously disturbing public order in either part or the whole of the country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[65] The expression "events seriously disturbing public order" can be construed to mean environmental disaster. Accordingly, the definition could accommodate environmental refugees.

Following the OAU Convention on refugee problems, the Central American States under the auspices of the UNHCR, adopted the 1984 Cartagena Declaration on the refugee

problems of Central America.[66] The Declaration defines "refugees" as persons who have "fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[67] This definition is a reiteration of the one in the OAU Convention, with slight variations. Other circumstances which may disturb the public order will obviously include environmental disaster. In certain conditions, environmental crises may cause political and social revolutions. The Ethiopian Revolution of 1974 was mainly caused by the then prevailing environmental problems, rather than by direct political factors. The Haile Selassie regime was blamed for the death of hundreds of thousands of famine victims, caused by environmental disruption in Wollo region, Northern Ethiopia. The hidden drought claimed more than 200,000 human souls.[68] The regime's cover up of the famine situation was used as one of the pretexts for the deposal of Emperor Haile Selassie. The regime was also blamed for prohibiting the famished people from moving to other areas of the country for food begging, so as not to expose the hidden famine.[69]

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Although many of the environmental refugees are from the developing countries, such a phenomenon is not uncommon in developed countries. The Chernobyl nuclear reactor accident, which occurred in 1986, in the Ukraine Republic of the former USSR, was one of the most serious environmental disasters, and caused a massive migration of people.[70] As a result of the radiation from the Chernobyl reactor, many Byelorussians have crossed into the Republic of Czechoslovakia and still living there, as environmental refugees; for their place of origin is rendered uninhabitable by the effects of the radiation.[71] Moreover, the environmental pollution caused by the reactor's fallout is reported to be responsible for cancer cases in some of the former Republic of the USSR.[72]

Human migration, whether it results from human action, such as nuclear accidents or deliberate ecological pillaging or from effects of climate change, such as soil erosion, coastal flooding, cyclones, desertification and agricultural disruption,[73] will have to be dealt with under a regulatory framework that provides for protection for and assistance to displaced persons.

International refugee law has to include environmental refugees in its definition of the term "refugee". Today

environmental refugees constitute more than 50 per cent of the total of all types of refugees in the world.[74] For this reason, it is long overdue for the 1951 Refugee Convention to amend its definition of the term "refugee" to include severe environmental degradation as one of the criteria to determine the refugee status of displaced persons.

3.4 Regional Perspectives of the Right to a Healthy Environment

The protection of the human environment has become part of international environmental law since the Stockholm Conference on the Human Environment. However, the non-binding nature of the Stockholm Declaration has hindered the practical implementation of the adopted principles, at the international level, save for some regional and sub-regional initiatives, under which environmental rights have been recognised. The sub-regional initiatives appear to be more practical than the regional and international declarations, which have not been followed up with practical action.

The first sub-regional treaty to recognise the individual right to a healthy environment was the 19 February 1974 Convention on the Protection of the

Environment between Denmark, Finland, Norway and Sweden, which entered into force on 5th October 1976.[75] The Convention guarantees individuals of contracting States the right to seek damage for environmental nuisance, and the right to appeal against any decision of the appropriate court or Administrative Authority of that State in which the environmentally harmful activities are being carried out.[76] The Convention established a special supervisory authority to safeguard the right of individuals by facilitating legal procedures for the enforcement of the conventional rights.

Another attempt to recognise environmental rights was made by member States of the Organisation for Economic Co-operation and Development (OECD), who, despite their failure to adopt a binding treaty, have laid down recommendations on "principles concerning Transfrontier Pollution". These principles seek to introduce legal regulations that provide protection for persons inside and outside the polluting States.[77] The major regional organisations, namely, the Organisation of African Unity (OAU), the Organisation of American States (OAS), and the Council of Europe have shown efforts towards the protection of environmental rights. The OAU and the OAS have already recognised the right to a healthy environment as a

fundamental human right. The Council of Europe has recognised the right in principle but it has not yet assumed any binding obligations. The various regional perspectives of the right to a healthy environment are discussed below.

3.4.1. The Organisation of African Unity and the Protection of Environmental Rights

Right from its inception in 1963, the OAU has taken a position forward to the protection of the human environment. In its declaration of purposes, the OAU Charter provides for collaboration of its members, in quest of a better life for their people, and co-ordination and harmonization of their policies in the fields of health and sanitation.[78] These objectives are reflections of the concern for the protection of human rights, in respect of the environment. These elements, in the absence of explicit references to environmental rights, may be taken as relevant clues, on the intention of member States.

Nearly two decades after its foundation, the OAU, in furthering its commitment to the protection of human rights, adopted the African Charter on Human and Peoples' Rights (1981). This Charter has certain distinctive features, when

seen in relation to other international and regional human rights instruments. One of these features is the distinction which the Charter makes between individual rights and "peoples' rights".[79] It is interesting to note that, in the Charter, all "third-generation" human rights, namely, the rights to existence, self-determination, permanent sovereignty over natural resources, development, peace and security and a satisfactory environment, are referred to as peoples' rights.[80]

The right to a satisfactory environment which is provided for under Article 24 of the African Charter, is a collective right of peoples and on this account it is arguable whether it could be extended to the individual. The term "people" has not been defined in the African Charter. In the absence of such a definition, it is difficult to see the extent of application of peoples' rights. Within the context of "third-generation" human rights, the term "people" could mean many things ranging from groups of people to mankind as a whole. In the context of African traditional life, however, "people" may include an individual as well. It is believed that the life of an individual is inextricably linked with community life, and that individual could express his identity through the community.[82] Accordingly, individuals or groups of

people, as members of the community, may claim their right to a healthy environment.

The other distinctive feature of the African Charter is the absence of a court system, which is similarly believed to be justified on the basis of notions of law and dispute settlement. The resort to traditional settlement of disputes through reconciliation, with the aim of reaching a consensus, is believed to be an African legal tradition to be upheld by the OAU.[83] It was indeed considered, at the time of formulation of the Charter, that the involvement of courts would be counterproductive, as it would undermine the sovereignty of States, by subjecting them to a jurisdiction of such courts.[84] In his report to the 27th Summit of the OAU, U.O. Umuzurike, the Chairman of African Commission on Human and Peoples' Rights, pointed out that:

> Experience has shown that States are not eager to point accusing fingers against other States unless their vital interests are involved, and in order to avoid similar censure against themselves in the event of an aberration. The Charter concedes the right of complaint to non-State entities interpreted to include individuals and organisations and these include non-African ones.[85]

The mandate of the African Commission to interpret the African Charter is subject to approval and consent of the Assembly of Heads of State and Government. This Assembly has

a bad reputation of ignoring human rights protection issues. For instance, it has repeatedly ignored the call for the creation of an African Court of Human Rights.[86] It is believed that the continued absence of court system would debilitate the significance of the African Charter and its commission.[87]

Another important OAU's document is the Lagos Plan of Action (1980). This plan of Action has a chapter on "Environment and Development,"[88] which contains important recommendations on environmental protection. According to the Plan of Action, Member States of OAU are required to co-operate in tackling transboundary environmental situations, and to incorporate environmental impact assessment (EIA) in their national development plans.[89] The plan of action contains several recommendations on environmental management issues. Some of these recommendations deal with human life protection and betterment of the human environment. Of these: environmental sanitation and health; safe drinking water supply; human settlement improvement; air pollution control; and environmental education and training,[90] are some of the concerns related to the right to a healthy environment. These recommendations were aimed at striving towards sustainable development, at regional and national levels. African

States were urged to back up the objectives of the plan of action through their national legislations.[91]

In promoting the objectives of the Lagos Plan of Action, the OAU has encouraged the creation of intergovernmental environmental institutions and organisations at regional and sub-regional levels. And a number of States have already taken action, especially in relation to the situation of widespread drought which affects many parts of the continent.[92] An example is the Inter-Governmental Authority on Drought and Development (IGADD), by the Eastern African States, for combating the root causes of drought and desertification.[93] This organisation has objectives similar to those of the UN Sudano-Sahelian Office (UNSO). UNSO was established in 1973, following the West African Sahel drought of 1968-1973, to coordinate medium and long term assistance to States members of the permanent Inter-State Committee on Drought and Desertification.[94]

With its headquarters in Djibouti, IGADD has the task of promoting the sub-region's efforts in combating the effects of drought, desertification and other related hazards of environmental degradations. By its "Regional Pilot Project on Environmental Management for Sustainable

Development," IGADD aims to slow down the rate of environmental degradation, and to improve the living condition of the people.[95] Food security is one of the priorities to be achieved. To this end, the Secretariat of IGADD is running the project "Early Warning and Food Information System for Food Security", as a basis for regular collection of data from the national Early Warning Systems.[96] To enhance the Early Warning Systems, IGADD is also running a "Remote Sensing Project"[97] in Nairobi since 1988. These efforts would undoubtedly alleviate environmental degradation and improve the living condition of the people in the region.

In another attempt to enhance environmental protection, the First African Ministerial Conference on the Environment was held in Cairo from 16-18 December 1985. This Conference adopted a resolution entitled "Environmental Co-operation in Africa."[98] The Conference urged all African States to co-operate in the cause of environmental protection; in the:"design and implementation of regional co-operation programme to combat desertification in the region covered by the permanent Inter-State Committee on Drought Control in the Sahel, the Maghreb, the member States of the Economic Community of West African States, Egypt, the Sudan, ... and also in the Horn of Africa, the Kalahari

region and Central Africa".[99]

In 1991, the OAU adopted the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the control of their Transboundary Movement within Africa.[100] It was initiated as a counter to the Basel Convention on the control of Transboundary Movement of Hazardous Wastes and their Disposal,[101] which, according to the OAU, was detrimental to African People for its allowing transboundary movement of wastes. The OAU does not favour imports of hazardous wastes into the African Continent, and it has urged all member States to prohibit such transfers of hazardous wastes. It is feared that the Basel Convention, which permits the export and import of hazardous wastes, with the consent and prior knowledge of concerned States, might have contemplated Africa as a possible dumping site for the industrialized world.[102]

Most of the wastes shipments in the past were towards Africa. Many African leaders have considered such shipments as "a crime against Africa and the African peoples", while Kenya's President, Mr. D.T. arap Moi, has termed it as "garbage imperialism."[103] Such concerns are reflected in the Bamako Convention, which among other thing prohibits any import of hazardous wastes into Africa in the following

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> All parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from any non-contrating parties. Such import shall be deemed illegal and a criminal act.[104]

In addition to the ban of the movement of wastes into Africa, States Parties have also agreed to protect the health of African people against the adverse effects which may result from the generation of hazardous wastes originating within the continent.[105] Though the Bamako Convention bans the movement of hazardous wastes into Africa, it is not totally against transboundary movement

of such wastes within Africa. In effect, the importation or exportation of hazardous wastes between African countries is possible, where provision is made for sound disposal. The Convention states that "each party shall ensure that hazardous wastes to be exported are managed in an environmentally sound manner in the state of import and of transit."[106] But any exportation of such wastes to States which may have outlawed it is prohibited.

Being concerned about the dangers associated with waste importation into Africa, African States have ratified the Basel Convention only in moderate numbers.[107] As at 9 February 1995, only 12 African countries had become parties, namely: The Comoros, Côte d'Ivoire, Egypt, Mauritius, Nigeria, Senegal, Seychelles, South Africa, Tanzania, Zaire and Zambia. It is a paradox that only four countries, namely Libyan Arab Jamahiriya, Mauritius, Tunisia and Zimbabwe had become parties to the Bamako Convention, as at 31 August 1994. Thus it is hardly surprising that, despite the adoption of the Bamako Convention in January 1991, the African Continent has continued to be a waste disposal site for the industrial world. For example, in September 1991, Italian and Swiss firms trading in hazardous wastes entered into a contract for the export of various types of waste to Somalia, for

twenty years.[108] The deal was between the firms and a Somali national who posed as the Minister of Health in Somalia. The value of the first phase of the contract, for the shipment of 100,000 to 150,000 tonnes of waste, was believed to be US $80 million.[109] The total agreed shipment was about half a million tonnes of hazardous waste. But thanks to UNEP's timely intervention, this deal was aborted before any consignment reached the territory of Somalia.[110] As a consequence of this incident, UNEP called upon African States to sign and ratify both the Basel and Bamako Conventions.[110a] The former Executive Director of UNEP, Dr. Mustafa Tolba, was quoted as saying: "For Africa to save itself, its countries must sign and ratify both Conventions. One only wouldn't do it."[111] The Basel Convention entered into force on 5 May 1992; but the Bamako Convention has not yet received the ratifications required for entry into force.[112] The entry into force of the Bamako Convention may help to curtail shipments of hazardous wastes into Africa.

The commitment of African States to enhance the protection of the human environment is reaffirmed by some recently concluded regional treaties. One of such treaty is the Abuja Treaty Establishing the African Economic Community (1991). In reaffirming African States'

commitment to promote the environmental right of the African people, the Treaty provides that:[113]

> 1. Member States undertake to promote a healthy environment. To this end, they shall adopt national, regional and continental policies, strategies and establish appropriate institutions for the protection and enhancement of the environment.
>
> 2. ... Member States shall take necessary measures to accelerate the reform and innovation process leading to ecologically sound and socially acceptable development policies and programmes.

From the foregoing discussion, it appears that a "healthy environment" is becoming the catchword of the OAU in all its deliberations on environmental issues. The prospects for this right are highly promising in the Continent. However, there are certain conditions yet to be fulfilled. The reinforcement of the mandate of the African Commission on Human and Peoples' Rights, and the creation of an African Court of Human Rights are the two most important conditions to be fulfilled, for a proper implementation of all the human rights, as envisaged in the African Charter, and other legal instruments.

3.4.2. The Council of Europe and the Right to a Healthy Environment

The Council of Europe, since its establishment in 1949,

has made major contributions to the protection of human rights. Its first treaty was the European Convention on Human Rights (1950), which has not only ensured the protection of fundamental rights and freedoms, but has also provided for mechanisms for implementation.[114] The European Commission on Human Rights is an institution for the implementation of the individual rights contained in the Convention.

The European Social Charter, the counterpart of the European Convention on Human Rights in the sphere of economic and social rights,[115] is an additional legal instrument to enhance human rights protection in the member States of the Council. The Social Charter provides for economic and social rights, which to some extent deal with the right to a healthy environment. The right to health, or to a healthy environment, is not directly mentioned in the European Convention on Human Rights. The only way to find such a right in the Convention would be by an analogical interpretation of the right to life provided for under Article 2, as a composite of environmental well-being and the corollaries to it.

The Social Charter, however, makes a direct reference to the right to health. Article 11 states in part as

follows:

> With a view to harmonize the effective exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed ... to remove as far as possible the causes of ill-health.

Part 1, paragraph 11 of the Social Charter states that "everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable." Can this provision be considered as a recognition of the right of individuals to a healthy environment? Assuming that it is recognised as such, can it be enforced?

In the first place, the Contracting Parties declined to include Article 11(on the right to protection of health) in the alternative list of mandatory articles, out of which a contracting party has to select at least five articles, to be bound by the Charter.[116] Secondly, even where a party adopts the article on the right to protection of health, it is questionable whether the provisions would suffice to create a right to a healthy environment within the context of contemporary environmental problems. A reading of the Charter in its entirety gives the impression that contracting parties were only concerned about the working environment, where the safety of individual workers is

the main object. As regards dispute settlement, the procedure laid down in the Charter does not allow individuals to lodge complaints against the State. Moreover, the system is run by the Committee of Ministers which is limited to making recommendations to the parties concerned.[117] In any event, the Social Charter cannot be taken as a guarantee for the protection of the right to a healthy environment for individuals, or groups.

On the other hand, the European Convention on Human Rights is limited to civil and political rights. Neither the Convention nor its subsequent protocols mention social or economic rights. So far, the Council of Europe has not yet included the right to a healthy environment in any binding legal instrument. However, efforts have been made over the last two decades to bring about the recognition of this right.

In 1964, the Council of Europe convened a Conference on Air Pollution, for the purpose of examining the scientific methods of dealing with the causes of air pollution and its effects on the health of individuals.[118] This was long before the admission of environmental law into the domain of international law. The agenda of the conference was restricted to environmental problems, and excluded

matters of law. Many of the problems related to air pollution were raised at the Conference, and were duly considered by subsequent international environmental conferences, including the Stockholm Conference on the Human Environment.[119]

In 1970, the Council of Europe organised another conference which declared the year as the European Conservation Year. In his opening address to the conference Prince Liege of Belgium said that:

> Our aim during this year is precisely that of awakening the European public to those problems, or putting them on their guard and even let us admit, making them so uneasy that they will support large-scale action ... There are alarming reports which no longer talk merely of pollution or the disappearance of certain species of flora and fauna, but which even question man's capacity to survive if he continues to be as improvident as in the past.[120]

This conference was important in certain respects. It is believed to have enhanced the sensitisation of the European public, and to have influenced world opinion positively.[121]

1970 can be taken as a year of environmental revolutions in Europe and the USA. The concern of a few scientists, administrators and environmental groups in the relevant countries did mark the dawn of a new

environmental era. The revolution took the form of a movement.[122] Prior to the 1970s, there was a conservationist movement whose focus was on the non-human environment, basically centred on the rational management of natural resources. This movement was concerned mostly about wildlife and habitat, while the new environmentalism has been concerned about human survival itself.[123]

Environmental movements in Europe had reached the magnificent stage, where a number of environmental parties were functioning alongside political parties. In the early 1970s such parties were functioning in Belgium and the then Federal Republic of Germany.[124] The European environmental movements of the 1970s had greatly enhanced environmental awareness within the continent and elsewhere.[125] The idea of individual rights to a healthy environment was propounded during that period[126], a period which saw the Consultative Assembly of the Council of Europe, and its Legal Committee submit draft proposals on environmental rights, as human rights, for consideration by the Council.[127] Despite the remarkable proposals submitted by the Consultative Assembly, the Council of Europe did not enact the right to a healthy environment as a fundamental human right. This fact could be attributed to fear by member States, of floods of applications seeking remedy for environmental damage.[128]

The European Commission on Human Rights is said to have received several hundreds of individual complaints annually during the early 1970s.[129]

Short of a recognition of the right to a healthy environment, there are several European environmental instruments which, in one way or another, referred to the protection of the environment as part and parcel of human rights protection. Most of them arose from recommendations by the Consultative Assembly of the Council of Europe. The Council has adopted hundreds of environmental documents in the form of non-binding recommendations and resolutions; binding regulations that are applicable in member states; decisions binding on persons to whom they are addressed; and directives that must be implemented by the laws and regulations of member states.[130] Regrettably, none of the documents so far adopted contain the right to a healthy environment.[131] It was only in the early 1970s that the Council expressed its intention to create environmental rights that would be directly enforceable by individuals and or groups.[132] Thereafter, however, environmental rights issues were played down by the Council of Europe,[133] until only relatively recently.

In 1989, the European Parliament, in its consultative role for the Council of Ministers of Europe, through its Institutional Affairs Committee prepared a Declaration of Fundamental Rights and Freedoms, in an effort to revive issues of environmental rights. Article 24 of the Declaration states that:

1. The following shall form an integral part of community policy:
   - the preservation, protection and improvement of the quality of the environment
   - the protection of customers and users against risks of damage to their health and safety and against unfair commercial transactions
2. The Community Institutions shall be required to adopt all the measures necessary for the attainment of these objectives.[134]

The 1989 European Conference on Environment and Health seems to be more promising for the possible recognition of a right to a healthy environment.[135] This is the first conference of its kind (environment and health) in the European region. The participants of the Conference were the Ministers of Environment and of Health, of the member States of the European Region of the World Health Organisation (WHO). The Conference adopted the European Charter on Environment and Health.[136] The Charter provides for the rights and duties of individuals in relation to environmental protection as follows:

1. Every individual is entitled to:

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

2. Every individual has a responsibility to contribute to the protection of the environment, in the interests of his or her own health and the health of others.[137]

This Charter was also adopted by the Commission of the European Communities. The Commission may use the Charter as a guideline for future action by the European Union, in areas which lie within its competence.[138]

The European Conference on Environment and Health suggested that such principles as "prevention is better than cure", and "polluter pays", should be elements of public policy in environment and health matters.[139] Cleaner production, sound management of chemicals, enhanced health care and environmental impact assessment are some of the strategies that were proposed by the Conference. States were also urged to pay particular attention to environmental and health conditions caused by factors such as ozone layer depletion, water pollution, food pollution due to pesticides, etc.[140] These and other environmental

problems were seen in the light of the principle of sustainable development, which was advanced by WCED, and later re-emphasized by UNCED(1992).

These efforts in the protection of environmental rights, by the Council of Europe, may lead to success in the near future. Given the Council's well-established Court of Human Rights, the prospects for the implementation of the right to a healthy environment in Europe are good.

3.4.3. The Inter-American System and the Right to a Healthy Environment

Soon after its establishment in 1948, the Organisation of American States (OAS) created an organ charged with the task of promoting human rights, and enhancing awareness on human rights, among the peoples of America.[141] The rights to be promoted were enunciated in the American Declaration of the Rights and Duties of Man, of 1948.[142] Building on this Declaration, the Statute of the Inter-American Commission on Human Rights was adopted in 1960, followed by American Convention on Human Rights,[143] which was adopted in 1969. There was no protection of environmental rights in any of these instruments.

It was after four decades of its existence that OAS recognised the right to a healthy environment as a fundamental human right. The General Assembly of the OAS passed a resolution adopting the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights(1988), which inter alia, provides for the rights of individuals to health, a healthy environment, and food.[144] Article 11 of this Additional Protocol states as follows:

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

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

Compared to the OAU's Charter, the Inter-American Human Rights System is more specific as to the extent of application of the right to a healthy environment. It clearly provides for individual rights, unlike the African Charter's concept of "peoples' rights", which fails to disclose the pertinent subjects. Moreover, the American Convention on Human Rights has a workable machinery of

implementation. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have the mandate to receive applications from all applicants, provided that all national remedies have been exhausted.[145]

Accordingly, individuals and groups may bring action in their national courts, and may subsequently lodge their petitions with the Inter-American Commission, where they are not satisfied with the national decision. The provisions on the rights to health and food provide for such a procedural right.[146] States Parties have agreed to guarantee the right of their citizens to enjoy the highest levels of mental and physical development.[147] Their commitment includes the proper implementation of all the rights envisaged in the protocol.[148]

The Additional Protocol to the American Convention on Human Rights, is the first regional human rights instrument to clearly recognise the right of individuals to a healthy environment. Its entry into force will enhance the human rights protection in the American States.

From the tenor of ongoing debates, it could be concluded that the right to a healthy environment has not yet

become a well-established human right under the existing body of international law. However, treaty law has shown beyond doubt, that the right to a healthy environment is emerging as a fundamental human right. Moreover, the developments in treaty-making and diplomatic initiatives have remarkably influenced the evolution of environmental rights, at the national level.

3.5. National Perspectives of the Right to a Healthy Environment

The role of national legislation in environmental protection is growing. Much national legislation has been influenced by the Stockholm Conference on the Human Environment(1972). Most of the national constitutions adopted after this period have some provisions on environmental rights.[149]

According to Koppen and Ladeur,[150] there are three ways in which environmental rights could be formulated in modern constitutions. The common situation is where the State assumes the obligation to protect the environment. The second situation is the guaranteeing of individual rights to a healthy environment. The third situation is the imposition of a duty on the individual to protect the

environment. National environmental rights and duties, in constitutional law, are usually inter-linked so as to maintain the sustainability of social development and enhanced human rights protection.[151] The achievement of such an objective depends on the state of legal development of each State.

The adoption of the right to a healthy environment as a human right, in the national constitution, is by itself a step forward for its implementation. Constitutional environmental rights may even point the direction for implementation by public bodies, and thereby signify the crucial nature of environmental issues in the safeguarding of the interests of individuals, groups, peoples and even succeeding generations.[152]

Environmental rights can also be recognised by comprehensive national environmental legislation,[153] or a code of national environmental laws.[154] Both approaches to the protection of environmental rights are in use in many countries.

3.5.1. State Protection of the Environment

A number of post-Stockholm national constitutions have provisions on the obligation of States to protect the environment, in the interest of their citizens. It is interesting to note, however, that many of them are programmatic declarations, rather than enforceable commitments on the part of the State.[155] For instance, the Constitution of the Socialist Republic of Burma of 1974 provides for the duty of State organs, at different levels, to protect, preserve and develop the natural environment; but it does not make reference to the rights and duties of citizens.[156] The Namibian Constitution also provides for state protection of the environment, in the interest of all Namibians. Article 95(L) states that the State has the obligation to promote and maintain environmental security for present and future generations of Namibians.

On the other hand, there are some modern constitutions which provide for State obligations to protect the environment, as a human right. The Spanish and Portuguese constitutions provide for state obligations to protect the natural environment, and at the same time entitle individuals to a healthy environment.[157] This bipolar formulation of environmental rights is a vital condition for the protection of humankind and its environment. Several countries have amended their constitutions so as to

include provisions on the protection of the environment.[158] For example, the Portuguese Constitution clearly obligates the State to prevent, control and compensate for environmental destruction affecting its citizens.[159] State agencies are required to ensure environmental resource conservation, in the interests of all citizens.

The stipulations on environment in Socialist constitutions have certain notable characteristics. They either empower the State to manage environmental affairs, or vest in it the general competence to protect the interests of the public. Article 26 of the 1982 Constitution of China can be cited as an example in this respect. The Article provides in part as follows:

> The State protects and improves the living environment and ecological environment and prevents and remedies pollution and other public hazards.

The commitment of the State to prevent a wide-ranging set of environmental damages is clear from the above constitutional provision. But it is doubtful whether individuals and groups are entitled to remedies for environmental injuries. The fact that China is a Socialist State casts doubt on its scope for safeguarding <u>individual</u> rights to a healthy environment. Socialist States tend to have more interest in the protection of collective

rights, than individual rights. Moreover, the major sources of pollution are State-owned industries and enterprises, which presents a dilemma in setting the order of priority between economic development and environmental protection.

In those countries where State obligation to protect the environment is set out in legislation subordinate to the constitution, individuals and groups would face a problem in invoking the right to a healthy environment as a fundamental right. One of the problematic national enactments in this respect, is the US National Environmental Policy Act (NEPA)(1969), whose application is limited to the federal level. The right to a healthy environment provided for under NEPA is said to be non-constitutional,[160] if not unconstitutional. In many of the States of the US, environmental litigation dealing with the right to a healthy environment has failed to qualify under the concept of fundamental human rights.[161] It is repeatedly stressed that NEPA cannot be invoked at State levels, for it is a Federal Act and should be used only in connection with federal environmental matters,[162] in which case it is limited to inter-State environmental cases.

Therefore, the right to a healthful environment provided for in NEPA could not serve the purpose of constitutional rights in the US legal system. It is only the inclusion of such a right in the US constitution that would guarantee its protection as a human right. Until such an inclusion is effected, there would be no valid claim to the right to a healthy environment, under the US law.

Due to increased environmental hazards caused by human activities, some States have already established environmental crimes, making them part of their penal law. For example, Spain has amended its criminal code to include environmental offences as crimes. Section 347 of the code provides for environmental offences as crimes punishable under the law. Penalties are set out for those who: "in violation of the laws and regulations on environmental protection shall cause or commit direct or indirect emissions or discharges of any kind into the atmosphere, soil or inland or maritime waters liable to cause serious damage to the health of persons, animal life, forests and natural and cultivated areas."[163]

Over the last two decades, more than twenty countries have made important criminal law reforms that included

environmental wrongs in the category of punishable crimes.[164]

The sanctioning and punishment of environmental crimes could be dealt with under either the criminal law or administrative law. In many countries, environmental pollution matters are regulated by administrative laws.[165] For example, penal sanctions against environmental wrongs in Belgium, France, Italy, the UK, the USA and Canada are exclusively left to administrative laws.[166] Practice has shown that administrative law has much potential as a mechanism for limiting environmental damage. This scope is largely dependent on administrative law's role in the licensing and supervision of projects likely to affect the environment. Licensing the EIA procedure, which falls within the ambit of administrative law, is one of the measures that facilitate the limitation of environmental damage.[167] By means of administrative law, a State may refuse to grant a permit for any planned activity likely to cause damage, or require the proponents of the planned activity to adjust their plans according to desired environmental standards.

In his analysis of the penal sanctions of different countries, Gunter Heine[168] formulated three models

indicating the relationship between criminal law and administrative law, in the field of environmental protection. In his first model, he deals with criminal law that is absolutely independent of administrative provisions, and which applies where injury to the environment coincides with a situation of "concrete danger to life and limb."[169] The criminal codes of Germany, Denmark, The Netherlands, Poland and Portugal are classified under this model. The presumption here is that the particularly serious behaviour penalized by the criminal law could not be subject to any administrative consent.

His second model deals with criminal law that is relatively subordinate to administrative law. This is a situation where environmental wrongs arise out of activities under an administrative permit. In such cases no criminal sanction may be imposed, unless those activities have led to actual damaging effects in the environment.[170] But, this does not mean that an administrative permit gives the polluter an absolute right. There are cases where a licensee possesses an out-dated permit which in no way corresponds to current environmental standards.[171] Such an act is by itself an offence under the laws of many countries. Examples of the model under discussion are: the criminal

laws of Austria, Spain, Sweden, Switzerland and Yugoslavia.[172]

The third model is related to the criminal laws absolutely dependent on administrative provisions. The role of these laws is to guarantee the enforcement of administrative regulations and the co-operation of enterprises with the administrative agencies.[173] In countries such as Canada, the UK and the USA, criminal sanctions would be applied only to a situation where there are no administrative enforcement mechanisms.[174] Under normal circumstances, the administration takes all necessary measures to ensure the proper observance of its regulations. Criminal prosecution will be a last resort, in cases of repeated or continuous violation of administrative regulations.

Criminal sanctions alone may not suffice to uphold the required environmental standards, unless complemented by other mechanisms. Public awareness and education on the environment would appear to be important complements to legal arrangements for its protection.[175] Though ignorance of the law is no defence in criminal law, awareness of the law is an advantage on the part of the public. A number of countries have prescribed bases for environmental

prosecution. For example, in the UK and USA, prosecutions for environmental offences are limited to those cases where some elements of intention are believed to be present.[176] In Austria, Germany and Switzerland, it is only the persistent perpetrators who are prosecuted.[177]

In addition to enacting environmental laws, States need to promote environmental awareness and education programmes among the public. Moreover, public participation in environmental decision-making is an important aspect of environmental management towards sustainable development. Such a combination of efforts between the State and the public would significantly contribute to national environmental protection programmes.

3.5.2. Individual Rights to Environmental Protection

The right of individuals to a healthy environment is provided for in some constitutions, which provide for State obligations to protect the environment. Environmental rights are usually set out in the same articles that oblige a State to take measures for the protection of the environment. These rights, in most cases, appear as combined rights and duties, for individuals, in respect

of environmental protection.[178] Such a combination of rights and duties is to be found, for instance, in the Constitutions of Peru and Portugal:

> Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature. Everyone has the duty to conserve the said environment (Article 123 of the 1979 Peruvian Constitution).
>
> All have the right to a human health, healthy and ecologically balanced human environment and the duty to protect it (Article 66(1) of the 1982 Portuguese Constitution).

This coupling of individual rights and duties, one notes, will not necessarily provide a perfect panacea. Environmental rights cannot be realised except through active participation by the public. Moreover, the realisation of these rights will also depend on a fair balancing of interests between different individuals. [179]

The constitution of Portugal makes detailed guarantees for environmental rights. Article 66(3) of the Constitution provides that:

> It is granted to all the right to promote, in accordance with the law, the prevention or cessation of factors of environmental deterioration, as well as the right to corresponding compensation in the case of <u>direct</u> damage [emphasis added].

The reference to "direct" damage in this provision seems to require everybody to show personal injury, in case of environmental damage, before any compensation is made.[180] Proof of direct damage in environmental cases is often very difficult. For instance, it might be impossible for an individual to show the extent of damage he suffered as a direct consequence of ozone layer depletion, caused by activities of States, or other legal persons.

Some recently adopted African Constitutions have clear provisions on the right to a healthy environment. For instance, Article 44 of the 1995 Constitution of Ethiopia provides for the right of "all persons to live in a clean and healthy environment." Article 29 of the 1993 South African constitution provides for the right of every person to "an environment which is not detrimental to his or her health or well-being." Article 39 of the 1995 Ugandan Constitution provides for the right of "every Ugandan" to a clean and healthy environment.

There are constitutions which not only provide for a combination of environmental rights and duties, but indeed go further to set out comprehensive provisions on the environment. Article 225 of the 1987 Brazilian Constitution is an example. Within its detailed section on environmental rights, it provides for: individual right to an ecologically

balanced environment; obligation of public authorities and the community to preserve and protect the environment for the interest of present and future generations; publicity for environmental impact statements (EIS); and promotion of formal environmental education and public environmental awareness.[181]

Public participation in the preparation of EIA and EIS has proved to be of considerable importance in the field of environmental management.[182] It serves a vital check on quality. In the UK, sample studies of EIS revealed that only about 25 per cent of the sampled EISs were satisfactory while 40 per cent were regarded as hardly at all complying with the specified requirements.[183] The inclusion of provisions on EIA and EIS in the Constitution of States will enhance the means of protection for environmental rights.

Similar environmental rights could be provided for in ordinary legislation. Separate national environmental enactments and regulations are common in many countries, both developed and developing.[184] Virtually all recent environmental legislation has, in one way or another, made attempts to protect environmental rights.

There are still other means of national protection of environmental rights. There are cases where courts set precedents for environmental rights. In countries where court decisions are used as precedents, the final judgements of the highest courts may create such rights. In the US, for example, the Federal Courts may adjudicate disputes relating to a healthy environment, and any decision reached thereby could be invoked as a precedent by all litigants on similar issues. But there is a fear that such precedents could open the floodgate of environmental litigation. Kirchick dismisses such fears as groundless, when he says that:

> Although there are fears that the federal courts would be unduly congested with environmental suits if the courts were to enunciate a constitutional right to a reasonably non-hazardous environment, these concerns appear to be unfounded.[185]

As observed by some reputable US Lawyers, environmental cases are as important as other cases heard in the Federal courts, and far more important than most.[186] For long, environmental rights litigants in the US were persistently disqualified on grounds of locus standi[187]. Lack of standing to sue, an aspect of procedural rights, is one of the major obstacles to the recognition of the right to a healthy environment in countries where there are no explicit constitutional provisions conferring rights.

In India, however, judicial activism has brought some progress in this respect, in recent times. The Indian High Courts, on several occasions, declared the right to a healthy environment to be a fundamental right, in the light of Article 21 of the Constitution, which provides for the right to life.[188] The Indian Supreme Court was reluctant to recognise this right for quite a long time. But in 1991, the Supreme Court of India, in Subhash Kumar V. State of Bihar,[189] declared this right to be a fundamental human right. In its judgement, the court held that:

> "Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life."[190]

This case can be invoked as a precedent in all subsequent environmental litigation based on similar issues, in India.

In many of the common law countries, the right to a healthy environment, as a fundamental human right, would face the problem of enforcement due to locus standi. This presents a major difficulty, as the courts require proof of direct personal damage. Individual and group

environmental litigants are faced with problems of representation, and proof of personal damage.[191] In the USA, for instance, all environmental associations that brought actions for the protection of the environment lost their cases due to lack of standing.[192] In Kenya too, the High Court took a similar position on the right to environmental protection. In Wangari Maathai V. Kenya Times Media Trust, the plaintiff, sought a permanent injunction to restrain the defendant from building a multi-storey complex at a major park in Nairobi. She alleged that the erection of the building would cause environmental degradation.[193] The High Court ruled that the plaintiff has no locus standi in the case.[194]

From the foregoing discussion, it is clear that the right to a healthy environment is gaining firm ground at all levels. Its national perspectives are becoming more and more promising. It has already become a fundamental human right under the constitution in many countries.[195] Judicial activism, such as that found in India and the Philippines,[196] has contributed much by setting precedents for the right to a healthy environment. This right, as may be gathered from the discussion in this study, is destined to be incorporated in legally binding international instruments as a fundamental human right in the near future.

FOOTNOTES

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8. Ibid, p.103.

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14. Tolba, supra note 1, p.9.

15. Ibid.

16. Ibid.

17. Starke supra note 10, p.416.

18. Ibid.

19. Preambular paragraph 8 of the Vienna Convention for the Protection of the Ozone Layer, 1985.

20. Preambular paragraph 2 of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, 1989.

21. Ibid, Art. 9.

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43. UN General Assembly Resolution 31/72 of 10 December 1976.

44. Trindade, supra note 4, pp.295-96.[emphases in the original]

45. General Assembly Resolution 37/7 of 28 November 1982, on the World Charter for Nature, paragraph 5 of the "principles".

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157. Articles 66 and 45 of the Constitutions of Portugal and Spain respectively.

158. China, Art. 26; Cuba, Art. 27; Czechoslovakia, Art. 15; Ecuador, Art. 19; Greece, Art. 24; Guayana, Art. 36; Honduras, Art. 145; India, Art. 48A; Iran, Art. 50; South Korea, Art. 35; The Netherlands, Art. 21; Peru, Art. 123; Portugal, Art. 66; Spain, Art. 45; Thailand, Art. 65; Turkey, Art. 56; and Yemen (South), Art. 16.

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164. Austria (1989), China (1979), Colombia (1981), Cuba (1987), Czechoslovakia (1989), Denmark (1987), Germany (1980), Greece (1986), India (1986), Japan (1970), The Netherlands (1989), Norway (1981), Poland (1980), Portugal (1983), South-Korea (1977), Spain (1983), Sweden (1989), Switzerland (1985), Turkey (1983), USSR (1982) and Yugoslavia (1977). See Gunter Heine, "Elaboration of Norms and the Protection of the Environment", in Claudio Zanghi (ed.) Protection of the Environment and the Penal Law (Bari: Cacucci Editore, 1993), pp. 57-77.

165. Ibid., p.67.

166. Ibid., p.64.

167. UNEP, Decision 14/25 of the Governing Council of 17 June 1987 on Goals and Principles of EIA, in Environmental Law Guidelines and Principles: Environmental Impact Assessment. (Nairobi: UNEP, 1987), principle 1.

168. Heine, supra note 164, p.66.

169. Ibid.

170. Ibid., p.69.

171. Ibid., p.70.

172. Ibid., p.66.

173. Ibid., p.71.

174. Ibid.

175. Maurice Strong, "ECO '92: Critical Challenges and Global Solutions", in (1991) Journal of International Affairs, Vol. 44, p.309.

176. Heine, supra note 164, p.73.

177. Ibid., p.74.

178. Constitutions of: Peru, Art. 123; Poland, Art. 71; Portugal, Art. 66; Spain, Art. 45; USSR, Arts. 42; and 67.

179. Koppen and Ladeur, supra note 131, p.25.

180. Ibid.

181. Article 225, Section 1, sub-sections I - IV of 1987 Brazilian Constitution.

182. W.R. Sheate, "Public Participation: The Key to Effective Environmental Assessment", in EPL, vol. 21(1991), p.157.

183. Ibid.

184. See the 1969 US Federal Legislation on National Environmental Protection Act (NEPA), - Section 101; the 1989 South African Environment Conservation Act No. 73; Zambian Environmental Act of 1990 (Sections 3-18)); Nigerian Decrees on National Environmental Protection (Effluents Limitation) Regulations, and National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations of 1991 respectively. (On the South African Environment Conservation Act, see M.A. Rabie, monograph on South Africa, in the International Encyclopaedia of Laws (Deventer: Kluwer Law and Taxation Publishers, 1991), pp. 49-73.

185. Kirchick, supra note 160, p. 537.

186. Ibid., pp. 537-538.

187. Ibid., pp. 524-532. In the U.S. despite remarkable development in the field of environmental protection, there has been no change as far as issues of locus standi are concerned.

188. Nandan S. Nelivigi et al, "The Judiciary and the Environment: Recent Trends and Developments", in EPL vol. 23 (1993), p.102.

189. Ibid.

190. Ibid., p.103.

191. David D. Gregory, Standing to sue in Environmental Litigation in the United States of America [IUCN Environmental Law Paper no. 2], (Morges: 1972), p.13.

192. Ibid., pp. 14-29.

193. Daily Nation, (Nairobi) Saturday, November 25, 1989, p.1.

194. Daily Nation, (Nairobi) Tuesday, December 12, 1989, p.24.

195. Weiss, supra note 149, pp. 297-327.

196. Nelivigi et al, supra note 188; Minors OPOSA Case, in 33 I.L.M. 173 (1994).

CHAPTER FOUR

4. THE ROLE OF DISPUTE SETTLEMENT IN THE PROTECTION OF ENVIRONMENTAL RIGHTS - WITH REFERENCE TO INTERNATIONAL AND NATIONAL CASES

4.1. General Observations

Notwithstanding the increasing recognition of the right to a healthy environment, at national and international levels, the mechanisms of implementation and enforcement at both levels are rather underdeveloped. The restriction on *locus standi*, and the requirement of *ratione loci* are the main limitations impeding the exercise of environment rights by individuals and groups. Despite these limitations, there are certain developments which have enhanced the recognition of the right to a healthy environment as a fundamental human right. Dispute settlement institutions have played an important role in this respect. The following discussion is an attempt to show the contribution of dispute settlement in that respect.

Dispute settlement is an important component in the interpretation and enforcement of existing laws.[1] Prevention and settlement of disputes are among the main functions of law. Although dispute settlement is a means by which existing laws are interpreted and enforced, there

are cases where certain disputes lay a foundation for the creation of new norms. Such a process of norm creation is an established tradition of the common law system, where the reasoning of the judges gives rise to new rules known as 'precedents'.[2] This common law tradition of precedent has, to some extent, become part of the existing international law.

There are international precedents established through the decisions of the International Court of Justice (ICJ), and international arbitral tribunals. One of the leading international environmental cases is the Final Arbitral Award of the Trail Smelter.[3] The principle of state responsibility for transboundary environmental interference, as it stands now under principle 21 of the Stockholm Declaration, is a precedent set by this case.

Short of setting a binding rule, there are numerous environmental disputes which have strongly called for the recognition of the right of peoples to be free from environmental injuries. The right of people to be free from nuclear radiation has been a major concern, ever since the emergence of nuclear reactors. Though international environmental disputes are between states, the issues involved ultimately relate to the welfare and interests

of their peoples.

The proper forum for environmental rights dispute settlement would have been a human rights court, or the UN Human Rights Committee. Regrettably, this right is not expressly provided for under the two International Covenants on Human Rights (1966). The same is true for the European Convention on Human Rights. The African Charter on Human and Peoples' Rights, and the American Convention on Human Rights, notwithstanding their recognition of the right to a healthy environment, have no reported cases turning on the right to a healthy environment.[4]

On the sub-regional level, however, there are some treaties on transboundary air pollution. There are three treaties which give legal standing to nationals of States Parties. These are: (1) The International Joint Commission between Canada and the United States (1909), granting legal rights to the nationals of both countries;[5] (2) the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (1974), granting legal standing to residents of member states;[6] and (3) the North American Agreement on Environmental Co-operation (NAAEC) between Canada, Mexico and the United States (1993), giving the injured parties, including their nationals, a choice

of forum for bringing an action.[7]

In the absence of appropriate regional or global fora that will entertain individual complaint for environmental injuries, there are some four other ways of raising a complaint: (1) a victim of a pollution can take action before the court in his own country; (2) a citizen can request his country to intervene on his behalf; (3) a state may claim compensation for direct injury to itself, through violation of its sovereignty; and (4) the problem could be solved through inter-governmental agreement.[8] The first three approaches are common procedures used in a number of countries. Logically, they could be used by anybody anywhere. The last approach is the one adopted by the Nordic and the North American States.

4.2. International Environmental Dispute Settlement: Types and Jurisdictions

Peaceful settlement of disputes among states is one of the most important principles of international law. The United Nations Charter names peaceful dispute settlement as one means of maintaining international peace and security.[9] Furthermore, the Charter provides for pacific dispute settlement as follows:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[10]

Environmental disputes between states should also be settled by one of the procedures enumerated above. The choice of a particular mode of dispute settlement, is left to the parties themselves. However, there are possibilities of requiring compulsory recourse to one of the procedures, by prior agreement.

Many environmental conventions provide for one of the procedures as the primary means of settlement of disputes. For example, the UN Convention on the Law of the Sea (UNCLOS) (1982) recommends conciliation as a means of settling disputes.[11]

Though it is theoretically difficult to take a position against peaceful settlement of disputes, some states have resorted to reservation options provided in the treaties. Reservations to the ICJ's compulsory jurisdiction are common. In accordance with Article 36 of the ICJ Statute, a state may recognize the compulsory jurisdiction of the court, and may at the same time declare its reservation as to some issues. For example, Canada modified its acceptance

of compulsory ICJ jurisdiction with regard to:

> "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the Coast of Canada".[12]

For the purpose of protecting its interests in the Exclusive Economic Zone (EEZ), Canada revoked its acceptance of compulsory jurisdiction as to disputes related thereto. Such reservation against compulsory jurisdiction may prove dangerous, as it may open the way to aggression.

Many environmental treaties have provisions on peaceful settlement of disputes. Several of them provide for the compulsory jurisdiction of the ICJ, or international arbitration. Except for few cases of non-compliance, the ICJ's judgements are immune from lateral attacks by states.[13] Vitiations of arbitral awards by claims of nullity at international law are common, especially when vital interests of states are involved. One of the first international decisions to be rejected was the Corfu Channel judgement, where Albania refused to pay compensation for damage caused to British warships and personnel. But this judgement was later fulfilled by the terms of an

agreement between Albania and the United Kingdom in 1992.[14]

Some of the judgements of the ICJ, and some international tribunal awards have dealt with issues concerning the environmental rights of individuals. State submissions in some applications before international judicial institutions contain claims related to the protection of the health or property of their nationals. The following cases are of relevance, in this respect.

4.2.1. Trail Smelter Arbitration on Air Pollution

This was the first transboundary air pollution case to be decided by international arbitration. It was a long-drawn out case between Canada and the United States which took more than a decade to be finally decided. The dispute was related to damages which occurred in the State of Washington, as a result of air pollution caused by zinc and lead smelting plants belonging to a Canadian Mining and Smelting Company. In 1927, farmers in the USA[15] complained of damage caused to their crops and health, due to sulphur dioxide emissions from the Canadian side of the border. The damage was said to have taken place since 1925.

The Smelting Company at first concluded special settlements with individual complainants. But settlements ceased to be made subsequently. This failure led to the intervention of the US Government, apparently on behalf of its citizens. In June 1927, the two governments set up an International Joint Commission to investigate the matter. The Joint Commission presented its assessment in 1931, finding Canada liable for damage; and it recommended compensation for persons in the State of Washington.[16] The Commission further recommended that the Smelter at Trail take measures to reduce the amount of sulphur dioxide emission. Though damage was compensated, the emission problem continued subsequently.

Although Canada agreed to pay damages, the U.S. government made a representation to the Canadian government calling for a permanent settlement on the matter. Diplomatic negotiations between the two countries led to the signing of the 1935 Convention for the Settlement of Difficulties Arising from Operation of the Smelter at Trail.[17] By Article 3 of this Convention the two countries decided to submit the following questions to arbitration by a tribunal set up for that purpose.

1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the

first day of January 1932, and, if so, what indemnity should be paid therefore?

2. In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the future, and if so, to what extent?

3. In the light of the answers to the second question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

4. What compensation, if any, should be paid on account of any decision rendered by the Tribunal pursuant to the two preceding questions?[18]

The tribunal found that the Trail Smelter had caused damage after the first day of January, 1932, and on that basis determined the amount of compensation to be paid for crop yield reduction in the State of Washington.[19] The U.S. claim for compensation in respect of wrong done in violation of sovereignty was refused, on the ground that the Convention was concerned only with the material damage caused by the Smelter.

As regards question 2, the Tribunal found that the pollution caused by the Smelter was of a serious nature, causing injuries which were established by clear and convincing evidence. In its Final Award, the Tribunal stated that:

"So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein

> referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals".[20]

This decision shows that the tribunal took American nuisance law into consideration in the determination of the damage caused by the Trail Smelter.

As regards question 3, the Tribunal suggested a regime whereby the operation of the Trail Smelter would be subject to emission control mechanisms. The object of the regime was to avoid any further transboundary emissions.

Question 4 was answered in such a manner as to enable the U.S. Government to seek compensation in the event that substantial harm was caused subsequently. Failure on the part of the smelter to comply with the established regime would entitle the U.S. Government to seek compensation.[21]

The case before the tribunal took 13 years to be finally decided, in 1939. As a result of the award, the damage caused to the farmers was curtailed. Unlike the Interim Award, the Final Award failed to adequately compensate the affected farmers. In its interim decision the tribunal awarded $78,000 for damage to cleared and uncleared land. But the Final Award of the tribunal declined to compensate the U.S. Government for damage to crops, trees etc, on the ground that

the government failed to provide sufficient evidence. Had the residents in the State of Washington been allowed to have access to the judicial institutions of Canada to bring actions against the Smelter, their remedies would have been more fully and more expeditiously rendered. The State-level solution was much prolonged and excluded compensation for the health hazards suffered by the farmers.[22]

In spite of its long-drawn out proceedings, the Trail Smelter Arbitration made important contributions in two respects. First it established the precedent of investigating transboundary pollution damage through international arbitration. Second, it established the principle of state responsibility for transboundary environmental interferences.[23] Furthermore, the Tribunal opened up the possibility of individual action against transboundary polluters, in the event of serious consequences.[24] These are some of the contributions which have influenced the subsequent development of the principles of international environmental law.

4.2.2. Corfu Channel Case (United Kingdom vs. Albania)[25]

This was a dispute between the United Kingdom and

Albania over an incident, on 22 October 1946, at Corfu Channel, in Albanian territorial waters. On the material date, two minefield explosions caused damage to two British warships resulting in loss of life to personnel. The U.K. sought compensation for the loss of life and property.

In 1949, the ICJ gave judgement on the merits of the case. Although the merits of the case do not show any important transboundary environmental pollution, the judgement raised some issues of human rights protection.[26] The Court's judgement contains the following statement:

> "On certain general and well-recognized principles, namely: elementary consideration of humanity, even more exciting in peace than in war; the principle of freedom of maritime communication, and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states".[27]

The phrase "elementary consideration of humanity" has a tone of humanitarian law which is a complementary human rights consideration during wartime. The court emphasized the requirement of early notification of dangerous situations in all events. Recalling the 1907 Hague Convention No. VIII on the obligation of states to notify the existence of mass destruction weapons such as minefields during war-time, the court found no reason why the same principle could not be applied during peace-time.[28]

The principle of strict liability applied by the court could accommodate any case of transboundary environmental pollution that might arise in the future. The judgement of the court is a reaffirmation and an enforcement of the principle of state responsibility earlier established by the Trail Smelter Arbitration.

4.2.3. The Nuclear Test Cases

4.2.3.1. The Submissions

In 1973, two applications concerning atmospheric nuclear tests were brought before the ICJ. Australia and New Zealand applied to the court to adjudge and declare the French Government nuclear tests as a violation of their rights under international law.[29] Both countries sought to have atmospheric nuclear tests declared illegal on the ground that the nuclear radioactive fall-outs were threatening the health of their peoples. According to the scientific data submitted by Australia and New Zealand, nuclear fall-out and radiation were deposited on their territories and on areas under their soverignty, i.e. the non-self-governing territories of Niue, the Tokelau Island, Cook Islands and Western Samoa.[30]

The French Government's atmospheric nuclear tests was a threat to the South Pacific Region as a whole. The people inhabiting this region were rendered targets of direct radiation. Australia and New Zealand alleged the violation of their territorial integrity, and asserted the right of their people to be free from nuclear fall-out and radiation.[31] The effect of the nuclear fall-out was aptly expressed in New Zealand's application as follows:

> "Such tropospheric fall-out has reached New Zealand ... and other pacific territories in which New Zealand monitors levels of radioactivity after each series of French nuclear weapons tests in the pacific. Fall-out reaches these areas within two or three weeks after having circled the earth in an easterly direction or, occasionally, by means of "blowback", that is by means of an anticyclonic eddy diverting part of the radioactive cloud westward, within a few days".[32]

According to this statement, the nuclear radioactive cloud can affect several areas around the globe before it finally sinks into the troposphere.[33] It was on the basis of these facts that Australia and New Zealand had shown serious concern for the protection of their people against the fall-out and radiation from nuclear tests.

Australia's application contained similar allegations of violation of international law. Australia's rights, under international law and the UN Charter, were said to be violated in the following respects:

"(i) The right of Australia and its people, in common with other states and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;

(ii) The deposit of radioactive fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent: (a) violates Australian sovereignty over its territory; (b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources..."[34]

The scope of Australia's submission may not go beyond affirming the traditional diplomatic protection of its nationals, but her oral arguments on the issue of human rights were remarkable; she asserted the right of peoples to be free from nuclear pollution.

New Zealand's application contains submission that advanced global concern for human rights protection. She contended that France's nuclear testing violates international law by endangering the life and health of the international community.[35] The written and oral arguments of both countries had the effect of showing that the preservation of a healthy global environment is one of the fundamental rights to be protected, in the interests of the international community.[36] They argued that such interests of the international community can be invoked by any interested state. This argument is based on the

provisions of Articles 55 and 56 of the UN Charter, which provide for the rights and duties of states to protect human rights.

4.2.3.2. Decisions of the ICJ

Despite the force of the submissions by Australia and New Zealand, France denied that these states and their peoples suffered any legally significant damage attributable to her nuclear tests. Besides, France could not accept the competence of the ICJ to try the case. Accordingly, the French Government took no part in the litigation. But the ICJ issued orders stating that it has competence to try the case.[37] In its two separate but similar orders, as interim measures for the protection of the rights of the applicant states, the court ordered France to stop nuclear testing affecting the two states.

The interim solution to the dispute between Australia and France provides the following measure:

> "The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the court or prejudice the rights of the other party in respect of the carrying out of whatever decision the court may render in the case; and in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian

territory".[38]

The interim measures contained in the order concerning the dispute between New Zealand and France is similar in content. In issuing these orders, the court seemed to intend to give the applicants an opportunity to prove the existence of their claimed rights on the basis of international law, possibly as a basis for the prohibition of nuclear tests in the atmosphere.[39] Applicant states would be required to produce evidence that the alleged damage was the consequence of the nuclear tests.

As Goldie observed, the applicant states have to show that their "governmental and popular action" had gone further than deep and widely-held concern, and had crystallized into prohibitive norm which could be spelt out either as a peremptory rule forbidding all atmospheric nuclear testing; or a hypothetical rule forbidding states from engaging in nuclear testing which causes radioactive fall-out in the territory of other states without their consent.[40] The applicants may invoke Article 2(4) of the UN Charter, and a series of General Assembly Resolutions regarding nuclear weapons and their handling.[41]

The ICJ's orders of 22 June 1973, which set out provisional measures, is a recognition of the existence of the claimed rights in the international legal system.

The issuance of the orders would have been meaningless if such a legal position had not been assumed. Notwithstanding the separate,[42] dissenting[43] opinions given against the admissibility of human rights issues before the ICJ, Australia and New Zealand considered that unjustified radioactive pollution is an act of aggression in appearance, and of genocide in effect.[44] They repeatedly argued that the international community's right to be free from nuclear pollution is a question of the survival of mankind.[45] Accordingly, they emphasized the need for a representation of mankind before the international judicial organs.

In admitting the Australian and New Zealand applications, which inter alia raise the issue of the rights of people outside their jurisdiction, the ICJ had shown a remarkable change of stand on the issue of locus standi. In the South West Africa Cases,[46] Ethiopia and Liberia were denied standing on the ground that they represented people who were not their nationals. In the present cases, Australia and New Zealand claimed to represent their peoples and other peoples as well. ICJ's acceptance of such a representation entails the granting of locus standi which was denied in the earlier cases.

However, the Nuclear Test Cases could not be finally decided. The pronouncement of illegality in respect of the French atmospheric nuclear tests, lost its significance on account of France's announcement of the completion of its tests in 1974.[47] Based on France's announcement of the cessation of any further atmospheric nuclear tests, the ICJ concluded its judgement as follows:

> "Thus the court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fall to be determined".[48]

Had France continued its atmospheric tests, there would have been a pronouncement of the ICJ, which probably would have been rejected by France, for it had already challenged the competence of the court. France's refusal to accept the provisional measures of protection for the environment could be taken as an indication of its likely reaction to a final pronouncement of the court, had there been one. Moreover, the precedent of Iceland, in refusing to respect the decisions of the ICJ on the Interim Measures of Protection in the Fisheries Jurisdiction Cases[49], could serve as a basis for anticipating the fate of a final judgement in the Nuclear Test Cases.

Australia's and New Zealand's submissions have contributed to the development of environmental movements in several countries. These submissions are believed to have influenced many lawyers, scientists and environmentalists to form views favouring the recognition of the right to a healthy environment, as a fundamental human right.[50] The recent nuclear reactor accident at Chernobyl (1986) and its consequences have enhanced the call for the recognition of the right to be free from nuclear radiation.

4.3. The Chernobyl Nuclear Reactor Incident Cases, and a New Call for an International Environmental Court

4.3.1. Chernobyl Cases

The 26 April 1986 nuclear reactor accident at Chernobyl, in the Ukraine Republic of the former USSR, once more reminded the international community of the devastating impact of nuclear pollution. The International Atomic Energy Agency (IAEA), immediately after the accident, initiated two important conventions to be applicable in the event of a nuclear accident. The

Convention on Early Notification of a Nuclear Accident, and the Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency were adopted a few months after the incident.[51]

State Parties to the conventions agreed, inter alia, to facilitate prompt assistance in the event of a nuclear accident or radiological emergency, with the object of minimising the consequences, and protecting life, property and the environment from the effects of radioactive emissions.[52] More than 40 states and two international organizations, namely WHO and WMO, became initial parties to both conventions upon adoption.[53]

The Chernobyl accident has demonstrated that environmental damage affecting human beings and natural resources can spread across long distances and many countries.[54] The failure of the former USSR Government to notify the international community forthwith about the Chernobyl accident caused avoidable damage inside and outside its own territory.[55] The Convention on Early Notification of a Nuclear Accident(1986) provides for the immediate notification of any nuclear accident. States Parties are required to "forthwith notify, directly or through the International Atomic Energy Agency those

states which are or may be physically affected as specified in article 1 ... of the nuclear accident, its nature, the time of occurrence and its exact location where appropriate..."[56]

Basically, the purpose of these conventions is technical and scientific co-operation between states in the event of a nuclear accident. The parties have agreed to use any one of the peaceful means of dispute settlement, such as consultation, negotiation, arbitration or adjudication by the ICJ.[57] These procedures of dispute settlement are meant only for State Parties. But the actual victims of the pollution are individuals, while the polluters are specific nuclear plants in some countries. As international law stands now individuals cannot be parties before international dispute settlement institutions.[58] Yet, states are rarely prepared to bring action on behalf of their citizens. In the Chernobyl accident case, the states whose nationals were affected did not support their nationals, either by instituting action before the ICJ, or by means of diplomatic protection against the polluting state.[59] There are indeed Chernobyl accident cases where individual claims were frustrated by the courts of the countries where the complaints had arisen.

In Germany, in the Franziska Baumann (Plaintiff) Case,[60] a six-year old girl, represented by her parents, brought action before a Munich Civil Court for the injury to her health occasioned by the Chernobyl accident. The girl alleged that she was highly contaminated by an extremely radioactive rainfall. The claim was filed against the former USSR, the former Federal Republic of Germany, the Federal State of Bavaria, and the Municipality of Munich, for their failure to give early warning to prevent the danger of contamination by radioactivity.

Despite the court's declaration of the admissibility of the action against the former USSR and the former Federal Republic of Germany, after more than 4 years of litigation the plaintiff withdrew the claims against both states. The litigation cost (court fee) became too high and unaffordable for the plaintiff. Moreover, the German state organs concerned with the case tried "to give the impression of being very reliable and to drag on the case by vague and irritating information"[61], in an apparent attempt to discourage the plaintiff.

In Austria, two interesting cases came up to the Supreme Court level. In the first case, two Austrian hunters brought action against the USSR for negligently causing

the Chernobyl accident, with the effect of impairing their hunting business.[62] They claimed that the radiation from Chernobyl rendered a number of deer in their hunting areas unfit for hunting. They prayed for an order of liability without fault, against the USSR, and for appropriate compensation. The Court of First Instance rejected the claim on the ground that it had no jurisdiction ratione loci, because of the non-existence of USSR property in Austria. The Court of Second Instance and the Supreme Court of Austria affirmed the decision of the Court of First Instance.

In the second case, an Austrian woman[63] brought action against the USSR for damage caused to her health as a result of radioactive emission from the Chernobyl reactor. The courts (the Court of First Instance, the Court of Appeal and the Supreme Court) rejected the claim for compensation on the basis of lack of jurisdiction.

In Switzerland, a vegetable producing and selling company brought action against the Swiss Government and other public authorities, alleging that their warning about the Chernobyl accident caused significant loss in the sale of the vegetables - quite the reverse of the Franziska Baumann case.[64] The company contended that "various press releases and national recommendations of the Swiss

Government and other public authorities warning the population not to consume vegetables, had caused a significant loss in the sale of the goods concerned."[65] The Swiss court, before which the case was brought, awarded compensation for the damage caused by Chernobyl's radioactive contamination. The court took into account the fact that the plaintiff had no chance to bring an action for compensation before a court on the territory where the accident had occurred, the USSR.

It is interesting to note that all national courts, in the above Chernobyl-related decisions, declared their incompetence to try the polluting state or its polluting agency. All individual efforts to sue a foreign state, or its organs before national courts elsewhere had failed due to lack of jurisdiction, or of an opportunity for enforcement.[66] As we have already noted earlier in this section, the existing international judicial institution, the ICJ, does not entertain individual complaint. Furthermore, states are invariably reluctant to bring action on behalf of their citizens. In these circumstances, how can the evolving environmental rights be enforced? Do we need new international mechanisms for environmental dispute settlement?

4.3.2. The Call for an International Environmental Court

As a result of the growing number of environmental disputes, most of them presenting an urgent case for expeditious resolution, there have been suggestions and proposals for the establishment of an International Environmental Court.[67] The growing magnitude of environmental problems has tended to show that the ICJ cannot cope with all environmental cases brought before it. Recently, Amedeo Postiglione came up with a proposal for the creation of an International Court of the Environment within the UN framework. He wrote:

> "The human right to the environment needs a structural and permanent guarantee, on an international level, in order to ensure that the right of access to environmental information, the right to participate in administrative and judicial proceedings, and the right to the courts are effectively protected in the widest possible social terms everywhere, and are comparable to the global ecological system constituted by the planet".[68]

These concerns are warranted by such serious environmental disputes as the Nuclear Test Cases and the Chernobyl Cases of Austria, Germany and Switzerland. These cases have already shown the need for environmental information, and for an international judicial institution to settle disputes arising out of such incidents.

Postiglione's proposal for a Court of the Environment advocates the right of individuals to bring action against any polluter. According to him, such a court would be primarily a human rights court, concerned with the right to a healthy environment, as a right in that category.[69]

The proposal by Postiglione has two important procedural innovations, as compared to the ICJ: (a) it meets the need for a compulsory jurisdiction that is missing today, at least for the more serious cases of environmental damage affecting the interests of the entire international community; (b) it also gives access to individuals, on the basis that they have a fundamental human right to the environment.[70] He also proposed a permanent World Commission for the Environment, responsible for the filtering or screening of claims of individuals before they reach the court,[71] similar to the procedure of the European Commission of Human Rights.

Sir Robert Jennings, President of the ICJ, in his statement before UNCED, disclosed that a discussion was going on in the court about the establishment of a permanent Chamber for Environmental Matters.[72] He believes that such a Chamber would suffice to handle all environmental issues. A year after his statement, the ICJ, in its announcement

of 19 July 1993, declared that:

> "In view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters..." [Emphasis added].[73]

Although it is a significant step by itself, the establishment of the chamber is unlikely to solve any of the crucial problems which led to the call for the creation of a new International Court for the Environment. It may solve some of the existing environmental dispute settlement problems. If it is composed of judges who are competent in the field of the environment, the chamber may facilitate the resolution of urgent environmental matters expeditiously. But there is no change as far as the parties to the dispute are concerned. Only states can be parties before the chamber. Although the ICJ announced that the chamber entertains "any environmental case", it is unrealistic to expect that the court would extend legal access to individual environmental litigants. This is unlikely, for states are unlikely to be willing to relinquish their sovereignty, and expose themselves to legal proceedings,[74] where individuals are equally treated as sovereign states.

Alfred Rest, in his research on the possibility of the Permanent Court of Arbitration (PCA), serving as a future Environmental Court, has pointed out two advantages of this court. First, the PCA provides four of the dispute settlement methods listed in Art. 33 of the UN Charter: enquiry, mediation, conciliation and arbitration. With regard to arbitration, the new optional rules (adopted in 1992 and 1993) may grant access to states, individuals and groups.[75] The main drawback with disputes before the PCA is that its jurisdiction is not compulsory. Its competence is derived from the voluntary submission of the parties, or from an agreement to submit any existing dispute to arbitration.

Second, the operating costs of the PCA are covered by the UN budget.[76] This will help to avoid an additional budget requirement, in the establishment of a new Court of the Environment.

From the foregoing discussion, it is evident that the procedural mechanism for the enforcement of the right to a healthy environment is underdeveloped. Besides the general lagging of law behind social development, the procedural aspect of its development lags far behind the susbstantive aspect, at least at the international level. At the national

level, however, there are certain remarkable achievements in the areas of both substantive and procedural law. The Philippines Supreme Court decision, discussed in Section 5 of this Chapter, can be cited as an example in this regard.

4.4. Individual and Group Recourse for Environmental Harm in Civil and Common Law Countries: A Comparative Survey

Under both civil and common law systems, individuals have traditionally sought recourse for environmental damage by instituting action against the polluters, for compensation or injuctive relief. However, with the development in recent times, of national environmental laws, the procedures for bringing individual actions have varied from country to country. In the following brief survey of the relevant laws of the UK, the USA, France and Germany, an effort is made to show the position of individuals in cases of environmental injuries. The focus of the survey is locus standi, and the remedies available.

4.4.1. The Right to Sue for Environmental Harm

4.4.1.1. Common Law

The traditional requirements of locus standi in tort cases are applied in both legal systems. Traditionally, in both civil and common law systems, a plaintiff is required to have a locus standi in the case, unless one is authorised to sue in the name of the Attorney-General. In the common law system, a plaintiff has to show a violation of his substantive rights. The substantive law for the protection of environmental rights comes within the purview of the common law of nuisance. Accordingly, a plaintiff in an environmental harm case has to show the specific damage he/she has suffered as a result of the alleged nuisance.

In one of the leading pollution cases, Walter vs. Selfe[77], the plaintiff claimed that he had suffered from obnoxious smells emanating from the defendant's brick-works. The court acknowledged, in effect, that the plaintiff has the right to a healthy environment, for it treated the brick-works as a nuisance. Based on the common law doctrine of nuisance, the court decided that:

> "The plaintiff is entitled for ordinary purposes of breath and life to an unpolluted and untainted

> atmosphere - this does not necessarily mean air as fresh, free and pure as it was at the time of building the plaintiff's house ..., but air not incompatible or at least not rendered incompatible with physical comfort of human existence; ..., with reference to the climate and habitat of England."[78]

In respect of private environmental harm, the action is between a polluter as a defendant, and the person whose health or property is materially affected, as plaintiff. In all such cases, the affected individuals are required to show specific damage suffered. Such a nuisance is known as a private nuisance. The same act of nuisance may become public nuisance when it affects a number of people. Victims of public nuisance may not be required to show specific personal injury or damage to their other interests as required in the case of private nuisance. In the words of Lord Denning,[79] public nuisance is "a nuisance which is so widespread in its range or so indiscriminate in its effects that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on [as] the responsibility of the community at large."[80] A public nuisance is a public wrong punishable under the penal law of most countries.[81] Though in theory anybody may bring action against anyone who causes a public nuisance, such matters are essentially dealt with by the Attorney-General.

The courts in the common law system are generally reluctant to grant standing to individuals who want to sue on behalf of the community.[82] However, there is what is known as class action in many countries, where a group of individuals may institute action to protect their common interest. Despite rare possibilities of getting authorization to sue in the interest of the public, group actions when authorized may help in solving problems of environmental pollution.[83] In many instances, group actions failed due to failures to show direct injury to the group members.

In Sierra Club vs. Morton[84], the plaintiffs, members of the Sierra Club, were required to show any direct injury they had sustained, as a result of the alleged environmental impairment of the Mineral King Valley. The U.S. Federal Courts have on several occasions ruled that an individual cannot sue on behalf of a given natural resource such as a forest, a mountain or a stream alleging that the resource will be damaged.[85] But an individual whose economic livelihood is based on the given resource can proceed against the polluter.

4.4.1.2. Civil Law

Standing to sue in the civil law system is as

important as it is under the common law system. The locus standi requirement for individual injuries is quite similar in the various civil law countries. But as far as group claims are concerned, there are certain notable variations. For example, the German Law on the standing of groups differs from the French Law on the standing of associations.

In Germany, the right to bring an environmental suit is governed by the principles of Administrative Procedural Law. According to these principles, mere violation of the rules by a polluter is not sufficient to entitle one to bring an action. The rule of law in question must be one that has been enacted in the plaintiff's interest,[86] in order for him to bring suit. These administrative principles are applicable also in the field of environmental rights protection. The right of individuals to bring action against a polluting agency is highly limited by the principles of the Administrative Procedural Law.

In practice, however, persons living in the vicinity of industrial establishments have always been given standing to sue, on the basis of the right to protection from pollution. German courts grant standing to sue when industry causes unlawful air pollution, disturbance by noise or radiation.[87] In all such cases, the individual

plaintiff has to specify the claimed illegality of the polluter's action, and show the violation of a legal provision which grants him a special protection.

Before granting standing to sue, German courts will endeavour to ascertain the purpose of the law in question. They apprehend that a liberal granting of standing may jeopardize public or private interests. For example, all master plans and permits in Germany are issued with the force of law whether they are designed exclusively in the public interest or serve individual interest.[88] Once a permit is issued as a law, or a plan approved as such, any action to challenge it would be subject to scrutiny before granting standing. The courts try to balance the public and private interests, provided that they are covered by permit.

German citizens may, in the alternative, resort to a constitutional provision. According to Rehbinder,[89] there is a trend in Germany, of establishing standing through direct recourse to the fundamental rights provisions of the Constitution. Article 14 of the Constitution of Germany provides for the protection of property against violations causing serious and intolerable injury to the owner. However, courts are reluctant to grant standing on the basis of the general freedom of bringing action which is

provided for in the Constitution. The reluctance of the courts in this respect is mainly attributed to their concern to minimize the category of persons with standing.

German law of standing to sue is basically against class actions. However, certain associations would be granted restricted standing on the basis of their own interests. Despite the mounting pressure from environmental groups, for the enlargement of the right to standing, no amendment so far has been made to the German procedural laws.[90] According to the existing law, no association or individual can bring action as a representative of the public.

The position of French law on the standing of associations is slightly different from that of German law. In France, groups of people may exercise standing through environmental associations. However, the courts in France will allow actions only subject to "direct and personal injury" criteria, which are not easily established by an association.[91] Moreover, the judiciary generally takes the position that only the state, or its public agencies may bring action in the public interest.[92] French law also requires certain categories of associations to get special recognition before they can bring civil actions.

The French law relating to associations for the protection of the environment and the quality of life, recognizes the right to be a plaintiff in environmental cases. According to Decree No. 77-760 of 7 July 1977, environmental associations will be allowed:

> - "...to overcome the hesitancy of the criminal Chamber of the Court of Cassation, which will no longer be able to oppose associations' standing since a civil action is allowed following an injury; and
>
> -... to defend collective interests since the filing of a complaint as a party to a civil action sets public action in motion".[93]

This standing applies only to environmental protection associations which have been approved under the law on the protection of nature, as well as associations for the protection and improvement of the quality of life. Approved associations must, besides, satisfy certain eligibility requirements. The following types of association are eligible for approval:

(a) Associations with statutory activities in respect of the protection of nature and the environment (Article 40 of the Law of 10 July 1976);

(b) local citizens' associations (Article L-121:8 of

the Urban Code);

(c) associations for the protection and improvement of the quality of life and the environment, whose by-laws should manifest the desire of its members to protect the quality of lfe (Article L-160-1 of the Urban Code).

Determination of the representative capacity of associations is one of the controversial legal issues in France today. According to a decree of July 7, 1977, in addition to the criteria of eligibility mentioned above, associations are required to be in existence for a minimum period of three years in order to be accorded representative capacity. The formal requirements of French law are bound to exclude a good number of associations from eligibility to become environmental protection bodies. As pointed out by Prieur, "only those associations that are the most important and the richest ... are assured of being approved and becoming veritable small associations".[94] There are also cases where the number of members was taken into account in approving the eligibility of an association. For example, a Decree of 17 May 1974 requires 10,000 members for the approval of national consumers' associations. With such stringent eligibility requirements, the French law gives

only very limited standing to representative associations.

The establishment of standing for environmental associations and groups is an important factor in the process of enhancing the right to a healthy environment.

4.4.2. Remedies for Environmental Harm

The purpose of establishing standing to sue is to seek remedies for damage suffered by a victim of wrongful acts or omissions. Traditionally, there are two main types of remedies for environmental injuries, namely, monetary compensation and injunctive relief. Recently, criminal prosecution for environmental offences has served as an additional remedy for environmental injuries. When environmental pollution becomes a threat to the life, health or well-being of individuals or the community as a whole, different rights could be claimed, including the right to a healthy environment. The various remedies would in one way or another enhance the protection of this right.

4.4.2.1. Monetary Compensation

Under the common law of nuisance, negligence or

trespass, plaintiffs may be entitled to compensation for damage. Problems of environmental pollution are usually dealt with under this principle. One of the leading cases in this respect is Rylands vs. Fletcher.[95] The famous rule established by this case is that any person "who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape".[96] The thing that escaped in this particular case was water from the artificial reservoir which caused damage to the plaintiff's mine, by flooding. Such actual damage to property is recoverable in the form of monetary compensation.

When the damage in question is to the comfort and health of the plaintiff, the actual amount of damages recoverable is difficult to assess. The victim of the pollution may seek both monetary compensation and injunctive relief. But an injunction is not granted as of right at common law. The courts have a discretion whether to grant an injunction or award compensation.[97] The court may even refuse to grant compensation for future damage alleged by the plaintiff. It is only on the basis of a violation of certain special provisions of environmental legislation that future

damage may be compensated.

4.4.2.2. Injunctive Relief

The purpose of seeking an injunction is to stop further injuries in the future. When environmental pollution is of a serious nature, courts normally grant an injunction.[98] An injunction order is essential in cases of widespread pollution affecting the health of the community at large. Courts in the common law system may grant injunction for threatened injury, in cases where substantial, irreparable damage is likely to occur.[99] The most common grounds for the grant of injunction are, widespread pollution, and violations of environmental pollution control regulations at any level.[100]

The proceedings for injunction can be instituted by local authorities, or by individuals authorized by the Attorney-General to do so.[101] Causing environmental pollution in violation of a statutory duty is essentially a criminal act. Criminal prosecution for the violation of environmental statutes are becoming more frequent in a number of countries.

4.4.2.3. Criminal Liability for Environmental Offences

As we have noted earlier in this study, the manifold problems of environmental pollution have already become a threat to the very survival of mankind. As a partial solution to this challenge, many countries have amended their penal codes to include provisions on environmental crimes.[102] In addition to compensation and injunction as remedies, punishment for certain environmental offences as criminal acts is becoming an alternative method of environmental protection. Penalizing those who commit certain environmental violations will serve as a deterrent against practices of a polluting nature.

The sanctioning of environmental crimes may require due amendments to procedural laws, to facilitate proper enforcement. There has to be a mechanism whereby the police or the public prosecutor can initiate legal action against polluters. Pollution control legislation usually provides for the procedure of complaints, and indicates the persons authorized to make such complaints.[103] For example, in India, the Environmental Protection Act (1986) restricts the category of complaints to members of the Pollution Control Board, or somebody authorized by the Board.[104] The courts in India will not recognize complaints brought

without the knowledge of the Pollution Control Board.

In the United States, most of the earlier environmental legislation has been amended, so as to provide for new institutions and penal sanctions. In 1982, the Federal Government initiated a comprehensive programme for investigating and prosecuting environmental crimes.[105] An Environmental Crimes Unit was established in the Department of Justice to prosecute environmental offenders. Similar units were also organized in the various states of the Federation. In 1991, the then Attorney-General, Dick Thornburg, reported that the Federal prosecutors of environmental crimes had made a total of 761 indictments over the preceding five year period.[106] He said that about 55% of the convicted individuals were sentenced to prison terms.

The United States has recently adopted amendments to major environmental statutes, providing for harsh penalties against offenders. Despite the general requirement of intent, as a basis for criminal liability, amendments to the Clean Air and Clean Water Acts, made in 1990, provide for criminal prosecution for negligent acts without proof of intent.[107] The intent requirement has been replaced by "knowledge" of the consequence of the act in question.[108]

The knowledge necessary for the prosecution of the offender may be proved by circumstantial evidence. Proof of actual knowledge of the law on the part of the offender is not necessary - ignorance of the law is no defence.

Furthermore, the U.S. Federal Sentencing Commission abolished parole for environmental crimes.[109] The objective was to ensure that environmental offenders serve the total sentence. The guidelines of the Commission also severely restrict the use of probation for individual offenders. Probation may be allowed only if the minimum term of imprisonment specified for the offence is less than six months.[110] Accordingly, a person sentenced to more than a six-month term of imprisonment has to serve the full term.

Criminal liability for environmental offences is not limited to individuals only. U.S. environmental crimes enforcement programmes encompass the prosecution of corporate bodies and their officials. A corporation's "knowledge" may be proven by aggregating the knowledge of its employees, of the consequence of their own activities.[111] Many corporate bodies in the US, and their high ranking officials are reported to have been prosecuted for their environmental offences over the last decade.

For example, out of 134 prosecutions by the Federal Environmental Crimes Unit in 1990, 78% were indictments against corporations and their top officials.[112] More than half of the convicted individuals were awarded prison terms.

A corporation may be fined in sums of money large enough to serve as a deterrent against repetition of the offence. Fines and terms of imprisonment for environmental offences are believed to promote proper compliance with environmental laws.[113] The U.S. Assistant Attorney-General in Charge of the Environment and Natural Resources Division, Richard Stewart, was quoted as saying that:

> "The message sent to corporate managers is clear: violate environmental laws and you may save your company some money in the short run, but you may personally go to jail".[114]

There are cases where corporations and their officials were held criminally liable for their failure to observe standard procedures of operation.

For example, Exxon Corporation was charged with the commission of a crime in 1989, for a ten-million gallon spill of crude oil by its tanker Exxon Valdez,[115] around Alaska. One of the counts of felony was Exxon's "wilful and

knowing" conduct of hiring "an allegedly incompetent crew"[116], who might have caused the running aground of the tanker. Exxon Corporation was fined $5 billion in punitive damages. The amount was calculated to compensate more than 34,000 fishermen affected by the oil spills from Exxon Valdez, the tanker.[117] The Exxon Manager was fined $5000 for his wilful and knowing misconduct in hiring incompetent crew.

In a recent case in Canada, the court fined a company and its officials for environmental crimes. In R. vs. Bata Industries Limited,[118] the General Division of the Ontario Court held the Bata Company responsible for discharges of chemical waste into the underground water meant for public use. The act was considered as a crime against the community - endangering their health. The company was fined $120,000 in punitive damages. The "on-site" General Manager and the President of Bata Industries Limited were fined $6,000 each for their failure to prevent the discharge of the dangerous chemicals.[119]

In both the Bata and Exxon Valdez cases, the courts seem to be driven by the extent of the environmental damage caused, rather than the intent or wilful conduct of the actors in question. Such a strict approach by the courts

will contribute to the overall protection of environmental rights.

There are cases where national court dealt with environmental protection as a fundamental human right.[120] One of the most important decisions in this respect is that of the Supreme Court of the Philippines, delivered on 30 July 1993, which set a precedent with regard to the right of present and future generations. It is believed to be the first case to promote the concept of intergenerational responsibility and intergenerational justice.

4.5. Intergenerational Justice: Filipino Minors' Plea for the Right of Future Generations

4.5.1. The Gist of the Case

In 1990, a group of Filipino Minors, represented by their parents, brought action against their government to stop the issuance of Timber Licence Agreements (TLAs). They alleged that deforestation was causing irreparable environmental damage.[121] The government of the Philippines, represented by the Secretary of the Department of Environment and Natural Resources (DENR), argued that the plaintiffs had no locus standi in the case, and prayed

for a dismissal order. The trial court dismissed the complaint on the ground of locus standi. However, the Supreme Court reversed the decision of the trial court and ruled that the plaintiffs have the standing to represent their generation and the generations still unborn.

4.5.2. The Trial Court's Decision

Litigation began in 1990, when about 40 minors filed a civil case before a branch of the Manila Regional Trial Court. The plaintiffs instituted the complaint as a taxpayers' class suit against the defendant, the Secretary of DENR, and alleged that they are all "citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resources treasure - i.e. the country's virgin tropical rainforests".[122] They further stated that they represent their generation as well as future generations, considering that the physical appearance before the court, of these future generations, was impracticable.[123] They requested the court to order the defendant to cancel all existing TLAs in the country and to desist from issuing new ones.[124]

The minors' claims to a balanced and healthy environment emphasized the twin concepts of the theory of intergenerational equity - "intergenerational responsibility"- and "intergenerational justice", in the sustainable use of natural resources. They complained that the country's rainforests are being depleted to such an extent that they faced extermination in the near future. Using the scientific data available, the minors attributed certain national environmental tragedies to current practices of deforestation. Among the consequences of deforestation mentioned in their complaint were: water shortage, salinization of the water table; extinction of flora and fauna; dislocation of cultural communities; recurrent drought; violent typhoons; flooding of agricultural plains; and the greenhouse effect.[125] In their suit, the minors expressed their intention to present expert witnesses as well as documentary, photographic and audiovisual evidence, in the course of the trial.[126]

The plaintiffs set out in great detail the particulars of what they saw as violations of their rights. The main points in the complaint were as follows: (a) evident irreparable damage caused to the plaintiff minors' generation and to the generations yet unborn by the continued trend of deforestation; (b) as a result of

continued use of TLAs by the defendant, the coming generations may never see, use, benefit from or enjoy the forests; (c) the plaintiffs have a clear constitutional right to a balanced and healthful environment, and are entitled to its protection by the state; (d) the defendant's refusal to cancel TLAs is contrary to the constitutional policy of the state, of effecting an equitable distribution of natural resources, and promoting the right of the people to a healthy environment (Section 1 and 16 of the Constitution of the Philippines); (e) the defendant's act is contrary to the highest law of mankind, the natural law, and violative of the plaintiffs' right to self-preservation and perpetuation.[127] The plaintiffs prayed for instant action to arrest the destruction of the country's rainforests.

The defendant, however, filed a motion to dismiss the complaint on two grounds:
"(1) the plaintiff have no cause of action and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government."[128] The minors opposed the motion and stated that: "the complaint shows a clear and unmistakable cause of action... and the action presents a justiciable question as it involves the defendant's abuse of discretion".[129]

Despite the plaintiffs' opposition to the motion, the Judge of the Trial Court issued an order granting the motion of dismissal. The Trial Judge ruled that the granting of the relief sought by the plaintiff would result in the impairment of principles of contract, which is prohibited by the fundamental law of the land.[130] He further dismissed the complaint as based on vague and nebulous allegations blended with political sentiments. It was from this decision that the plaintiffs appealed to the Supreme Court.

4.5.3. The Supreme Court's Decision

The minors appealed to the Supreme Court to rescind and set aside the order of dismissal, on the ground that the trial court judge had gravely abused his discretion. They also joined the trial court as a respondent.

In May 1992, the Supreme Court directed the petitioners and the respondents to submit their memoranda. The representatives of the minors reiterated their previous cause of action.

The petitioners contended that they had a right to a healthy environment, on the basis of a number of laws, including the Civil Code, the Constitution, various

Presidential Decrees and several Executive Orders.

The Supreme Court found no difficulty in granting legal standing to the minors. The court was convinced that the petitioners had standing under the laws of the country. Expounding the concept of intergenerational responsibility, the court enumerated the contents of a balanced and healthful environment, in line with the Constitution's phrase "rhythm and harmony of nature".[131] The court believes the "rhythm and harmony of nature" to include "the judicious disposition, utilization, management, renewal and conservation of the country's forests, minerals, lands, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploitation, development and utilization be equitably accessible to the present as well as future generations".[132] The issue of standing for the minors to represent their generation and their successor - generations was resolved in such an unequivocal manner by the Supreme Court.

Having resolved the issue of locus standi, the Supreme Court carefully evaluated the complaint of the petitioners and the order of dismissal made by the trial court. It held that the order in question was issued in "grave abuse of discretion amounting to lack jurisdiction".[133] In

dismissing the case, the trial court had stated that the minors fell short of alleging a specific right they are seeking to enforce and protect, or a specific legal wrong they are seeking to prevent and redress.[134] In concluding the order of dismissal, the trial court judge had remarked:

> "The court is ... of the impression that it cannot, no matter how we stretch our jurisdiction, grant the relief prayed for by the plaintiffs, i.e., to cancel all existing timber licence agreements in the country and to cease and desist from receiving, accepting, processing, renewing or approving new timber licence agreements. For to do otherwise would amount to impairment of contracts abhorred by the fundamental law".[135]

The Supreme Court did not agree with the assertion that the plaintiffs had failed to allege a specific legal right violated, or a specific wrong committed. The Supreme Court considered one fundamental legal right, the right to a balanced and healthful ecology, which it held to have a place in the Constitution of the country.[136] It is worth noting that the right to a healthful environment is not set out under the "Fundamental Rights" section of the Filipino Constitution; it is provided for under the "Declaration of Principles and State Policies". The Supreme Court's remarks on this point were as follows:

> "Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation ... aptly and fittingly stressed by the petitioners ... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of mankind"[emphasis added][137]

The Supreme Court held that the respondent, the Secretary of DENR, had failed to advance the environmental policy of the Government. The liberal issuance of TLAs by the DENR was an abuse of its mandate to conserve, manage and develop the country's natural resources, particularly forests, in the interests of present and future generations of Filipinos. The Supreme Court noted that the rights of generations to equitable share in the natural resources is specifically stated in the Executive Order No. 192 of 1987, on the Reorganization of the DENR;[138] and the petition for the revocation of all existing TLAs was a plea for intergenerational justice, as enshrined in the Constitution.

The holding of the Supreme Court is based on Article II of Section 16 of the Constitution, and two Presidential Decrees of 1977. Article II of Section 16 speaks of the duty of the State to implement the right of its citizens to a balanced and healthy environment. Such a duty is presumed to imply, inter alia, "the judicious management and conservation of the country's forests,"[139] for the use

and enjoyment of present and future generations. The two Presidential Decrees provide for initiatives towards "environmental quality that is conducive to a life of dignity and well-being", and the "responsibility of each generation as a trustee and guardian of the environment for succeeding generations."[140] The destruction of forests, according to available scientific data, would inevitably result in an irreversible ecological imbalance. The Supreme Court took cognizance of the fact that the coming generations will inherit nothing other than parched earth, incapable of sustaining life-supporting systems.

On the basis of these facts, the Supreme Court observed that the granting of the TLAs by the Secretary of DENR, and the Order of Dismissal by the trial court judge were violations of the rights of others, and an abuse of discretion. The DENR Secretary has the duty to ensure the protection of the right of Filipinos to a healthy environment, as envisaged in the laws of the country. The judge had the duty to exercise his discretion with due care, so as not to jeopardize the environmental policy of the country. The Court also ordered the grantees of the TLAs, as indispensable parties in the case, to be included as defendants. The Supreme Court gave its decision as follows:

> "...[B]eing impressed with merit, the instant petition is hereby GRANTED, and the challenged Order of the respondent judge of 18 July 1991 dismissing Civil Case No. 90-777 is hereby set aside. The petitioners may therefore amend their complaint to implead as defendants the holders or grantees of the questioned timber licence agreements."[141]

4.5.4. The Significance of the Case

This is one of the most important environmental rights especially by its recognition of the right of individuals, groups and generations to a healthy environment. The court was cognisant of the emerging principles and concepts of intergenerational equity and responsibility, thus it set a precedent by enunciating the concept of "intergenerational justice".[142] The Supreme Court, with its long-standing reputation for upholding the interests of the Filipinos,[143] strove towards granting locus standi to present and future generations, whose environmental interests are at stake.

Despite the court's resolute interpretation of the constitutional provision on, "right to a balanced and healthful ecology", as a subjective and direct individual right, the specificity of this right is not altogether evident. Although "concurring in the result", Judge Felicano argued that the right to a balanced and healthful ecology cannot be taken as a specific right for two reasons: first, it is provided for under State policy section of

the Constitution; it imposes upon the State the duty to preserve and protect the environment. Secondly, the content of such a right is too broad and vague to make it a self-executing, probable and subjective legal right that is judically enforcable.[144]

According to Alfred Rest,[145] the court found itself in a dilemma on issues of substantive and procedural rights related to the case. On the one hand, the rate of deforestation caused by continuing timber logging was a threat to health and life for present and future generations, on the other hand, the authorised state organs and authorities refused to cancel the TLAs. This fact led to a situation where state organs or public authorities were guided mainly by the general policy declaration in the Constitution. In these circumstances, a judicial dictum was necessary to protect the injured individuals and the environment.[146] Such a situation will not qualify the importance of the use of express legislation, rather than judicial subterfuges, in the creation of substantive and procedural rights.

From the foregoing discussion, it is apparent that national courts are increasingly taking cognizance of the right of individuals and groups to a healthy environment. At

regional and international levels, the implementation and enforcement mechanisms for such a right are not yet well established. The call for the creation of an International Court of the Environment is a manifestation of this fact. The Minors Oposa case may be said to represent the more recent attempts to make up for the somewhat underdeveloped character of enforcement mechanisms in respect of environmental rights issues.

FOOTNOTES

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4. Maguelonne Dejeant-Pons, "The Right to Environment in Regional Human Rights Systems", in K.E. Mahoney and P. Mahoney (eds.), Human Rights in the Twenty-First Century: A Global Challenge, (Dordrecht: Martinus Nijhoff Publishers, 1993), pp. 598 - 614.

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7. Grant, Supra Note 5, pp. 456-57.

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10. Article 33(1) of the UN Charter.

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14. Jennings, Infra note 72, p. 314.

15. Interim Award of the Trail Smelter Arbitration can be found in (1939) AJIL, Vol. 33, P. 182.

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25. ICJ Reports (1949) p.4.

26. Ibid.

27. Ibid. p. 22.

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29. Applications Instituting Proceedings, ICJ Reports (1973), Nuclear Test Cases (New Zealand Vs. France and Australia Vs. France) of May 9, 1973, pp. 15-16 and 26-27 respectively.

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37. Bernd Ruster and Bruno Simma (eds.), International Protection of the Environment: Treaties and Related Documents (New York: Oceana Publications, Inc., 1976) pp. 7112-7114.

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42. ICJ Reports (1973) pp. 122; 156.

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44. Gormley, Supra Note 30, p. 158.

45. Ibid., p. 159.

46. ICJ Reports (1966), p. 6.

47. Ruster and Simma, Supra Note 37, p. 7119.

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50. Gormley, Supra Note 30, p. 178.

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56. Article 2(a) of the Convention on Early Notification of a Nuclear Accident(1986).

57. Article 11 of the Convention at Note 56 above and Article 13 of the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency,(1986) respectively.

58. Article 34(1) of the Statute of the ICJ.

59. Alfred Rest, "New Legal Instruments for Environmental Protection, Control and Restoration in Public International Law", in E.P.L. Vol. 23/6 (1993), p. 270.

60. Alfred Rest, "Need for an International Court for the Environment?: Underdeveloped Legal Protection for Individuals in Transboundary Litigation", in EPL, Vol. 24/4 (1994), p. 175.

61. Ibid., p. 176.

62. Ibid.

63. Ibid., p.177.

64. Ibid., p. 178.

65. Ibid.

66. Ibid., p. 182.

67. Amedeo Postiglione, "An International Court for the Environment?", in EPL, Vol. 23/2 (1993), p. 73; J.M.O. Oyuga, Judicial Methods of Settlement of International Environmental Disputes, LL.M. Diss., University of Nairobi, 1993, p. 170.

68. Amedeo, Supra Note 67, p. 74.

69. Ibid., pp. 76; 77.

70. Ibid., p. 70.

71. Ibid.

72. Robert Jennings (Sir), "Need of Environmental Court?", in EPL Vol. 22/5/6 (1993), p. 314.

73. ICJ, "Chamber for Environmental Matters", in EPL Vol. 23/6 (1993) p. 243.

74. Rest, Supra Note 60, p. 183.

75. Ibid.

76. Ibid., p. 184.

77. Jolanta Nowak (ed.), Environmental Law: International and Comparative Aspects (New York: Oceana Publication, Inc., 1976), p. 147.

78. Ibid. 148.

79. [1957] 2 Q.B. 169.

80. Ibid.

81. For example, Section 175 of the Penal Code of Kenya (Cap. 63) provides for the punishment of public nuisance.

82. See generally, David D. Gregory, Standing to Sue in the United States of America, (Morges, Switzerland: IUCN, 1972).

83. Stephen C. McCaffrey and Robert E. Lutz (eds.), Environmental Pollution and Individual Rights: An International Symposium (Deventer: Kluwer, 1978), pp. 19; 127; 131-132).

84. [405 U.S. 727] (1972).

85. McCaffrey and Lutz, Supra Note 83, p. 133.

86. Eckand Rehbinder, German Law on Standing to Sue (Morges, Switzerland: IUCN, 1972), p. 10.

87. Ibid.

88. Eckand Rehbinder, "Private Recourse for Environmental Harm - Germany", in McCaffrey and Lutz, Supra Note 83, p. 42.

89. Ibid.

90. Ibid.

91. Michel Prieur, "The Rights of Associations for the Protection of Nature and the Environment in France", in McCaffrey and Lutz, Supra Note 83, p. 75.

92. Ibid.

93. Ibid.

94. Ibid., 70.

95. [1868] L.R. 3 H.L. p. 330.

96. Ibid. 339-40.

97. R.N.D. Hamilton, "Private Recourse for Environmental Harm - England", in McCaffrey and Lutz, Supra Note 83, p. 24.

98. Ibid.

99. McCaffrey and Lutz, Supra Note 83, p. 130.

100. Harold Luntz et al, Torts: Cases and Commentaries (Sydney: Butterworths, 1980) p. 848.

101. Ibid.

102. For example, in 1983, the Bill to Reform the Criminal Code of Spain presented to the Spanish Parliament, provides for penalties for those who violate laws and regulations on environmental protection. See, "Spain: Environmental Offences", in EPL Vol. 11 (1983), p. 105.

103. D.R. Singh, "Environmental Crime Sanctioning Strategies and Sustainable Development", in Claudio Zanghi (ed.), Protection of the Environment and Penal Law (Bari: Cacucci Editore, 1993), p. 164; Clive I. Morrick, "The Mental Culpability requirements for proof of Environmental Crimes", in (1991) Columbia Journal of Environmental Law, Vol. 16, p. 253.

104. Singh, Supra Note 103, p. 164.

105. Mary E. Kris and G.L. Vannelli, "Today's Criminal Environment Programme: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an

Environmental Audit", in Columbia Journal of Environmental Law, Supra Note 103, p. 227.

106. Ibid., p. 230.

107. Ibid., p. 232.

108. Ibid.

109. Ibid., p. 231; The US Sentencing Commission issued sentencing guidelines, which came into effect on November 1, 1987. The guidelines require the federal judges to impose particularly harsh sentences for environmental crimes.

110. Ibid., at Note 15.

111. Roger J. Marzulla and Brett G. Kappel, "Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s", in Columbia Journal of Environmental Law, Supra Note 103, p. 201.

112. Kris and Vannelli, Supra Note 105, p. 232.

113. Marzulla and Kappel, Supra Note 111, p. 201.

114. Ibid. p. 216.

115. Kris and Vannelli, Supra Note 105, pp. 236-37.

116. Ibid.

117. International Herald Tribune, Tuesday, Sept. 20, 1994, "Exxon: A Shrinking Giant", pp. 9, 11.

118. Kathleen Kwan, "Sentencing and Environmental Crimes", in Journal of Environmental Law, Vol. 6 (1994), p. 106.

119. Ibid. p. 108.

120. Nandan S. Nelivigi et al, "India - The Judiciary and Environment: Recent Trends and Development", in EPL Vol.23/2 (1993), p. 102; Paul Stein, "Australia: A Unique Experiment in Environmental Dispute Resolution" in EPL Vol. 23//6 (1993), p. 227; Shyam Divan and Armin Rosencraz, "The Bhopal Settlement", in EPL, Vol. 19/5 (1989), p. 166.

121. The Philippines Supreme Court Decision in Minors Oposa Vs. Secretary of the Department of Environment

and Natural Resources (DENR), in 33 I.L.M. 173 (1994).

122. Ibid., p. 176.

123. Ibid., p. 177.

124. Ibid.

125. I.L.M. Supra at Note 121, p. 178.

126. Ibid.

127. Ibid., pp. 179-181.

128. Ibid., pp. 181-182.

129. Ibid., pp. 182.

130. Ibid.

131. Section 16, Article II of the 1987 Constitution of the Philippines.

132. I.L.M, Supra Note 121, p. 185.

133. Ibid., p. 186.

134. Ibid.

135. Ibid.

136. Section 16 of Article II of the Constitution provides: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rythm and harmony of nature".

137. I.L.M., Supra Note 121, p. 187.

138. Ibid., p. 189.

139. Ibid., p. 188.

140. Ibid.

141. Ibid., p. 198.

142. Edith Brown Weiss, "Intergenerational Justice and International Law", in Salvino Busuttil et al (eds.), Our Responsibilities Towards Future Generations: A Programme of UNESCO and the

International Environment Institute (Malta: UNESCO and Foundation for International Studies, 1990), p. 95.

143. Encyclopaedia Britannica, 15th Edition (1985), Vol. 25, p. 552.

144. I.L.M., Supra Note 121, p. 201.

145. Alfred Rest, "The OPOSA Decision: Implementing the Principles of Intergenerational Equity and Responsibility", in E.P.L., Vol. 24 (1994), p. 314.

146. Ibid., p. 319.

CHAPTER FIVE

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. CONCLUSIONS

In this study, it was hypothesized that there is a growing recognition of a legal right to a healthy environment. Examination of the existing international and national laws has revealed that such a right is partly based on existing legal arrangements, and partly founded on new situations of awareness. Many countries have sanctioned environmental offences as criminal acts punishable under their laws.[1] There is a widespread public opinion that "ecocide" is a crime against humanity which threatens the survival of present and future generations. Ecological balance must be maintained, to enable human beings to live harmoniously with the general environment, upon which they are dependant.

War, famine and natural catastrophes have been constant threats to mankind since time immemorial. Added to these have been more recent phenomena, such as ozone layer depletion, nuclear radiation, global warming, acid rain and hazardous waste pollution, which have posed even greater threats to the very survival of mankind. These environmental problems are consequences of human activities

undertaken in the process of scientific and technological advancement. Humankind has become an endangered species as a result of its own activities. In order to live and prosper, humankind has to devise a means of averting the looming danger in good time.

Over the last quarter-century, the international community has striven to limit some of the problems associated with environmental degradation. The UN General Assembly and UNEP have on several occasions expressed their concern over the dangers posed by nuclear weapons. For example, many representatives to the First Session of the Governing Council of UNEP, relying on Article 26 of the Stockholm Declaration, urged states to eliminate all nuclear weapons and other weapons of mass destruction. Important international treaties and agreements were also adopted, for the purpose of averting serious global environmental problems.[2] The "Earth Summit" at Rio de Janeiro, in June 1992, adopted "Agenda 21" as a programme of action for sustainable development. The programme proposes a panacea for most of the main problems of environmental degradation. In the event of its full implementation, "Agenda 21" could well serve as a formula for the survival of the coming generations.

As a matter of fact, it is not only the survival of humankind that is being sought, but also a better standard of living. A dignified physical existence, coupled with sustainable social and economic development, is the most important goal in question. A degraded quality of life is an encroachment upon the right to life. In fact, all human rights are complementaries to the right to life; and the right to a healthy environment is no less than a condition precedent to the right to life.

On our premise, the right to a healthy environment is a fundamental right of everybody. This argument is well supported by the provisions of international treaties. For example, Article 11(1) of the International Covenant on Civil and Political Rights, and Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, give clues favouring a recognition of the right of individuals to a clean environment. These clues are strengthened by important declarations of international conferences. The declaration of the Stockholm Conference on the Human Environment (1972) clearly stated that such a right is a fundamental human right, equivalent to the right to life. The Rio Declaration on Environment and Development, which came two decades later, reaffirmed the same principle, and restated the commitment of the

international community to protect the environment. Principle 1 of both Declarations recognizes the right of individuals to a healthy environment. Although they are non-binding, these two environmental declarations have a central place in the shaping of future trends in environmental protection.

A number of environmental treaties also make reference to the right to a healthy and clean environment. For example, the UN Convention on the Law of the Sea (1982), the Montreal Protocol on Substances that Deplete Ozone Layer (1987), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), and the Convention on Biological Diversity (1992) make reference to the environmental rights of individuals, groups, peoples and mankind as a whole.[3]

Regional organizations have also shown a profound concern for the protection of environmental rights. The American Convention on Human Rights, and the African Charter on Human and Peoples' Rights provide for the right to a healthy environment. The African Charter seeks to attain a generally satisfactory environment, and the development of the African peoples. The American Convention specifically provides for the right of individuals to a healthy

environment. The European Convention on Human Rights, however, has no specific provision on this right. Nevertheless, with the enhancement of regional integration in Europe, the European Union may become an ideal forum for the implementation of environmental rights.[4]

National perspectives on environmental rights have also grown considerably. Several national constitutions have provisions on the right to a healthy and balanced environment.[5] National codifications of environmental laws may serve to provide essential safeguards for the protection of the environment, and for human rights. Increased national initiatives of environmental protection are likely to result in the universal recognition of the right to a healthy environment.

In this study, it was further hypothesized that the existing international dispute settlement institutions, as they now stand, are not suitable forums for individual litigants in cases involving the violation of environmental rights. Suggestions were made for the creation of appropriate mechanisms of dispute settlement for environmental cases, including the establishment of a new Environment Court. This will be justifiable so long as the international judicial institutions deny access to

individual and group litigants, in matters related to the protection of environmental rights. The statute of the ICJ recognizes only states as parties to a dispute before this court. Due to this procedural impediment, individual victims of transboundary environmental pollution cannot bring action against the polluters.

Progressive developments in international environmental law have taken place in recent times, largely on account of pressures from victims of environmental pollution, environmental groups, and international lawyers. One recent achievement in the field of environmental dispute settlement is the establishment of a Chamber for Environmental Matters by the ICJ.[6] This Chamber may assist in solving some of the problems that have constituted obstacles to the expeditious resolution of environmental disputes in the past; but it may not be a panacea to all problems of environmental litigation. In the first place, this chamber falls within the framework of the ICJ, and hence locus standi is limited to states. Individuals and entities other than states are barred from becoming disputants before the ICJ. For this reason, the establishment of the Environmental Chamber is only a partial solution to problems of environmental dispute settlement. It is to be noted, however, that this chamber may enhance the expeditious

resolution of environmental disputes between states.

Amedeo Postiglione has proposed the creation of an International Court for the Environment.[7] He submits that such a court "meets the need for a compulsory jurisdiction that is lacking today and that is necessary at least for the more serious cases of environmental damage affecting the interests of the entire international community, without single states being able to use their 'veto'."[8] There is a contrary view to such a proposal by Jennings,[9] who thinks that environmental cases should be entertained by the ICJ. He is of the opinion that an environmental chamber would do the job.

5.2. RECOMMENDATIONS

Several recommendations have been made to safeguard the environmental rights of individuals and groups over the last two decades. As a result, a number of countries have already incorporated the right to a healthy and clean environment in their national constitutions. Nevertheless, the majority of the national constitutions have not yet incorporated this right.

It is necessary that all states should accept and implement the right to a healthy environment as a fundamental human right. States could achieve this object either by amending their constitution, to provide for such a right, or by promulgating a comprehensive national environmental legislation providing for all-round protection for the environment. National environmental laws should provide for the right of an individual to seek appropriate remedies for actual or threatened environmental injuries. Individuals and groups should be given locus standi in all serious environmental pollution cases.

Depending on the magnitude and prevalence of environmental degradation in a given country, a special environmental court might be necessary for the expeditious resolution of disputes. Australia, for example, in 1980, established the Land and Environment Court, to enhance the enforcement of environmental protection laws.[10] Such courts are necessary for a speedy and effective resolution of environmental issues. The Australian court's experience over the last decade and a half, suggests that there are a number of distinct advantages in terms of costs, efficiency and justice, to be drawn from such a judicial arrangement.[11] The court has also solved the problem of locus standi. Everybody is entitled to bring an action for violation of

environmental statutes, without being required to show his standing to sue.[12] This model shows the clear advantage to be derived from the establishment of special environmental courts.

A similar recommendation is applicable at the regional level. The regional courts of justice, or those for human rights, should establish a special chamber for environmental affairs, or environmental rights. Such an arrangement could be made, for instance, under the American Convention on Human Rights, or the European Convention on Human Rights, which already have appropriate court systems. The African Charter on Human and Peoples' Rights has to be reinforced by the establishment of a Court of Human Rights, for better human rights protection in the continent. Such a court should also have a special chamber, for environmental rights disputes. It will be necessary that any courts or tribunals set up for environmental matters, should give access to individuals and groups, who complain of violation of their environmental rights.

A regional organisation such as the Council of Europe, will need to amend the European Convention on Human Rights, so as to include the right to a healthy environment as a fundamental human right. The Council of Europe was the first

regional organization to consider recommendations for the adoption of the right to a healthy environment. Proposals for such a right were begun in Europe as early as 1970, and are still awaiting acceptance by the Council.[13] As Europe moves closer to more intimate degrees of regional unity, one of the main issues for a consensus could well be the adoption of the right to a healthy environment as a human right.

A number of international environmental treaties and agreements have in the past been adopted, for the protection of the environment. Recommendations have also been made for the protection of the right to a healthy environment as a component of international human rights. The WCED Legal Experts' Group proposed that the right to a healthy environment, and enjoyment of the amenities of natural resources, be treated as fundamental rights of present and future generations.[14] The Legal Experts' Group called upon states to adopt principles of sustainable development in their social and economic activities. Similarly, in 1990, the Meeting of the Group of Legal Experts[15] to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues, suggested that the gap between environmental and human rights protection should be bridged so as to enhance the human quality of life.[16]

In its modern connotation, the right to life necessarily entails the right to a healthy environment.[17] The right to health or a healthy environment is, conversely, a fundamental element in the right to life, that is, the one right which is protected by all human rights instruments. However, for the avoidance of any ambiguity, it is necessary to provide explicitly for this right in all treaties dealing with human rights. Accordingly, it is recommended here that this right be incorporated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As the basic foundation for international legal instruments, the UN Charter also needs to be amended so as to include environmental protection as one of its purposes. These amendments are likely to strengthen the framework for environmental rights protection at all levels. International recognition for and acceptance of the right to a healthy environment will, besides, also serve to provide a basis for national and regional laws of environmental protection.

For the proper implementation and enforcement of international human and environmental rights, in the interests of individuals and groups, it will be necessary

to develop international procedural rights. The recent establishment of the Chamber for Environmental Matters by the ICJ is a positive step towards this goal. This initiative would have been more fruitful if the statute of the ICJ had been amended to allow individuals and entities other than states, to have access to the chamber, at least in cases of serious human rights violations.

Alternatively, it is recommended here that an international court of human rights be established. Individual and group victims of human rights violations should be given access to this court, directly, or through an international commission of human rights. For a better and more efficient resolution of environmental rights disputes, a special chamber might be necessary, in such an international court of human rights.

FOOTNOTES

1. See Claudio Zanghi (ed.) Protection of the Environment and Penal Law, (Bari: Cacucci Editore, 1993); Roger J. Marzulla and Brett G. Kappel, "Nowhere to Run, Nowhere to Hide: Criminal Liability for Violation of Environmental Statutes in the 1990s", in Columbia Journal of Environmental Law, Vol. 16, p. 201.

2. For example, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977); Vienna Convention on Early Notification of a Nuclear Accident (1986); Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986); and Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal [Basel], (1989).

3. Preambles of the said treaties make reference to environmental rights of present and future generation. More specifically, the Basel Convention and the Montreal Protocol speak of the right to a healthy environment.

4. Ida Koppen and K.H. Ladeur, "Environmental Rights", in Antonio Cassese et al (eds.) Human Rights and the European Community: The Substantive Law [European Union - The Human Rights Challenge, Vol. 3], (Florence, Baden-Baden: European University Institute 1991), pp. 1-41.

5. Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity, (New York: United Nations University Press, 1989), "Appendix B".

6. ICJ, "Chamber for Environmental Matters", in EPL, Vol. 23/6 (1993), p. 243.

7. Amedeo Postiglione, "An International Court for the Environment?", in EPL, Vol. 23/2 (1993), p. 70.

8. Ibid., p. 76.

9. Robert Jennings (Sir), "Need for Environmental Court?", in EPL, Vol. 22/5/6 (1992), p.314.

10. Paul Stein, "Australian: A Unique Experiment in Environmental Dispute Resolution", in EPL, Vol. 23/6 (1993), p. 277.

11. Ibid., p. 278.

12. Ibid., p. 279.

13. Maguelonne Dejeant-pons, "The Right to Environment in Regional Human Rights Systems", in K.E. Mahoney and P. Mahoney (eds.) Human Rights in the Twenty-first Century: A Global Challenge, (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 603.

14. WCED, Our Common Future, (Oxford/New York: Oxford University Press, 1987), pp. 348-351.

15. This was the UNEP Group of Legal Experts chaired by the former UNEP Executive Director, Dr. M.K. Tolba. Its first meeting, convened in Malta in 1990, held four rounds of discussions. The first round centred on the origin, content, rationale and implications of the concept of the common concern of mankind. The second round focused on the sharing of burdens in environmental protection. The third round emphasized the relationship between environmental protection and human rights protection. The last round of discussions concentrated on the alternative to a convention - either on Climate or Biological Diversity - to be adopted by UNCED(1992). For details, see Attard, infra note 16, pp. 19-26.

16. David J. Attard (ed.) The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues, (Nairobi: UNEP, 1991), p.32.

17. B.G. Ramcharan, "The Concept and Dimension of the Right to Life", in B.G. Ramcharan (ed.), The Right to Life in International Law, (Dordrecht: Martinus Nijhoff Publishers, 1985), p.6.

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