HUMAN RIGHTS AND THE ENVIRONMENT

By Justice Susan Glazebrook[1]

> *Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. 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, the right to life itself.*[2]

> *Nature is an eternal storehouse of great mysteries and enchanting beauties. She is a sincere friend who embalms man when his heart is wounded. She is a great philosopher who answers many a question of men. So spell bound the men become by her overall beauties that he finds tongues in trees, books in brooks, sermons in stones and good in everything. Nature is a thing of beauty and being in the company of Nature means a joy forever.*[3]

Introduction

There are those who would challenge the coupling in the title to this paper of "human rights and the environment". Are they right to do so? The first part of this paper will examine whether there is already a human right to an environment of quality and, if not, whether existing human rights adequately address environmental issues. The next question, should both these questions be answered in the negative, is whether there should be a right to an environment of quality and whether such a right should be part of any regional human rights mechanism for the Pacific.

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[2] Declaration of the United Nations Conference on the Human Environment UN Doc A/Con/48/14/Rev.1 (1973) preamble at [1] (Stockholm Declaration).

[3] United Nations Educational, Scientific and Cultural Organization (UNESCO) *Small Islands Voice – Voices in a changing world* (2004) 16 Coastal region and small island papers <http://www.unesco.org> (last accessed 16 August 2008) at chapter four.

The second part of the paper examines a number of specific issues, starting with the dispiriting: climate change and the related topic of "environmental refugees". I then move to the more positive aspects for the Pacific, looking at indigenous rights, collective responsibility and the environment.[4]

Is there currently a right to an environment of a particular quality?

International Human Rights Instruments

There is no explicit right to environmental quality in the Universal Declaration on Human Rights (UDHR),[5] nor in the International Covenant on Civil and Political Rights (ICCPR).[6] There is mention of some environmental issues in other international human rights instruments but attached to particular issues. For example, in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[7] the environment is mentioned in relation to hygiene[8] and, in the United Nations Convention on the Rights of the Child (UNCROC),[9] the environment is discussed in terms of prevention of disease and malnutrition.[10]

Art 28 of the UDHR provides, however, that everyone is entitled to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised". This "order" can be seen as encompassing the environment.[11]

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[4] There are a number of other issues of concern to the Pacific that could have been addressed, including biodiversity and biosecurity, coral reef protection, energy, environmental remedies, fish stocks, tourism, trade and agriculture, disaster prevention, water, and waste disposal.

[5] United Nations General Assembly Resolution 217A (III) (10 December 1948).

[6] (1966) 999 UNTS 171.

[7] (1966) 993 UNTS 3.

[8] See art 12 of the ICESCR which states "[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of [the right to the highest attainable standard of physical and mental health] shall include those necessary for … (b) the improvement of all aspects of environmental and industrial hygiene …" Art 7(b) of the ICESCR also provides for safe and healthy working conditions. Art 11(1) of the ICESCR provides for the continuous improvement of living conditions. Both of these can be seen as requiring attention to the environment.

[9] (1989) 1577 UNTS 3.

[10] See art 24(2) which records the obligation of States Parties to " … pursue full implementation of [the right to the highest attainable standard of health] and, in particular, shall take appropriate measures … (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution." For a general discussion on environmental rights and human rights treaties see Churchill "Environmental Rights in Existing Human Rights Treaties" in Boyle and Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 89 - 108.

[11] United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Review of further developments in Human Rights and Environment, Final*

Environmental stress has, since the Brundtland report,[12] been recognised as a key catalyst for threats to the international order through civil unrest and threats to security – in both the traditional sense and also in terms of the effects of inadequate resources supplies.[13]

Customary International Law

As international human rights instruments do not include a right to the environment, the other possibility is that such a right is part of customary international law. This is derived from consensus among States and can be deduced from the practice and behaviour of States.[14] It requires both a general and consistent State practice as well as a sense of legal obligation (*opinio juris sive necessitatis*).[15] In assessing the degree of State practice, it is relevant to look at treaties, domestic legislation and case law, decisions of international organisations and international judicial bodies, the statements of ministers or diplomatic representatives and the opinions of government lawyers and, perhaps more controversially, international declarations.[16] There are two

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Report, Special Rapporteur Ksentini, UN Doc E/CN.4/Sub.2/1994 (6 July 1994) at [34] (Ksentini Report).

[12] United Nations *Report of the World Commission on Environment and Development: Our Common Future* UN Doc A/42/427 (1987) at chapter 11 (*Our Common Future – the Brundtland Report*).

[13] Report of the United Nations Secretary-General's High-level Panel on Threats, Challenges and Change *A More Secure World: Our shared responsibility* (2004) <http://www.un.org> (last accessed 1 August 2008); Dr King *Environmental Security from a Security and Defense Analysis Perspective* presented at NATO Security Science Forum on Environmental Security, Brussels, 12 March 2008 <http://www.nato.int> (last accessed 1 August 2008). The preamble to the Mauritius Strategy for the Future Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States UN Doc A/CONF.207/11 (14 January 2005) states at [10] that security for small island developing nations is a multidimensional concept involving environmental degradation, natural disasters, food security, water scarcity, small arms trafficking, narco-trafficking and terrorism.

[14] Art 38 of the Statute of the International Court of Justice defines international custom "as evidence of a general practice accepted as law". This is a separate category to what the Statute defines as "general principles of law recognized by civilized nations"– see Brownlie *Principles of Public International Law* (6ed 2003) at 6 - 12; and Shaw *International Law* (5ed 2003) at 68 - 88.

[15] Evidence that States have acted in a certain way because there is a sense of legal obligation to do so. See Brownlie at 6 - 12; Shaw at 68 – 88 and *North Sea Continental Shelf* (Merits) [1969] ICJ Rep 44 at [77].

[16] Shaw at 77 – 80 and Sands *Principles of International Environmental Law* (2ed 2003) at 144 – 147. Rodriguez-Rivera "Is the Human Right to Environment Recognized Under International Law? It Depends on the Source" (2001) 12 Colo J Int'l Envtl L & Pol'y 1 at 40 – 44 argues that international declarations and other soft law instruments can be used as evidence of State practice since many international actors do in fact comply with soft law instruments. Rodriguez-Rivera argues that the validity of using these declarations as evidence of state practice ought to be based on the degree to which international actors comply with soft law instruments. See conclusions along the same lines as Rodriguez-Rivera in de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (2002) at [3.2.1]. It is also argued by de Sadeleer at [3.2.2] that the bright line between soft law and hard law is becoming more indistinct as traditionally soft law obligations are being incorporated into treaties and non-binding instruments include obligations usually found in hard-law agreements.

approaches to determining the existence of *opinio juris*. Its existence is either presumed by the courts based on consistent practice, consensus in literature or on the previous determinations of the courts or other international tribunals;[17] or, according to the more strict approach applied in a minority of cases, positive evidence of the acceptance of the legal obligation is required.[18]

In order to see if there is a right to a quality environment at customary international law, I first examine international declarations, starting with the Stockholm Declaration,[19] which is generally seen as the beginning of modern environmental law.[20] This Declaration evidences a clear view, at that time, that there was a human right to an environment of quality. Principle One of the Stockholm Declaration states:[21]

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[17] In the *Gulf of Maine* case [1984] ICJ Rep 293 – 4 at [91] – [93] previous decisions of the International Court of Justice were the basis for consensus regarding international customary law.

[18] Brownlie at 8. In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 at [207] it was held that positive evidence that the State believed itself to be bound was required. Sir Hersch Lauterpacht, by contrast, suggested that State practice should be seen as arising from a sense of legal obligation unless proved otherwise – see discussion in Sands at 146 - 147. Dunworth suggests that a pedigree approach to international customary law ought to be applied which takes into account the extent to which the process by which the "rule" came about might be considered "democratic" – see Dunworth "Hidden Anxieties: Customary International Law in New Zealand" (2004) 2 NZJPIL 67 at 83.

[19] The Stockholm Conference was organised in response to emerging international concern due to several environmental disasters including the grounding of the oil tanker Torrey Canyon off the coasts of France, England and Belgium. The Conference, which produced the Stockholm Declaration, was notable for its inclusiveness of both developing and developed countries – see Kiss and Shelton *Guide to International Environmental Law* (2007) at 34 – 35.

[20] Asia Pacific Forum of National Human Rights Institutions *Human Rights and the Environment Background Paper (2007)* <http://www.asiapacificforum.net> (last accessed 7 April 2008) at *13 (APF Background Paper on Environment*). Hill, Wolfson and Targ "Human Rights and the Environment: A Synopsis and Some Predictions" (2004) 16 Geo Int'l Envtl L Rev 359 at 375 and Shelton "What Happened in Rio to Human Rights?" (1992) 3 Yb Int'l Env L 75.

[21] Principle one was not, however, acknowledged at the time to be an expression of international customary law – see Handl "Human Rights and Protection of the Environment" in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* (2001) at 307 where he cites UNGA Resolution 2996 (XXVII) (15 December 1972) regarding the International Responsibility of States in Regard to the Environment at 42 - 43. The General Assembly did not endorse principle one as part of customary international law but did state that principles 21 and 22 of the Declaration reflected international customary law. Principle 21 provides that States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. Principle 21 has been confirmed as a principle of international customary law – in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 241 (*Nuclear Weapons Case*). Principle 22 records that States shall cooperate to further develop the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. Since the expression of this principle, limited progress has been made. The Rio Declaration on Environment and Development UN Doc A/CONF.151/26 (12 August 1992)

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

However, that recognition did not last, at least in a pure form. The environment right became linked to that of the concept of sustainable development.[22] The most influential expression of the sustainable development approach to environmental rights is set out in the 1992 Rio Declaration, which states that human beings are at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life "in harmony with nature".[23] This focus on sustainable development came about because of a failure to reach a consensus on the inclusion of a clause on the right to environment during drafting of the Rio Declaration.[24] In fact, there seemed to be a marked reluctance to use the rights lexicon at all, except in referring to the sovereign right to exploit natural resources in principle two and the right to development in principle three.[25]

(Rio Declaration) principle 13 provides that " …states shall co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. Sands argues that this new slant shows the reluctance of States to agree to international principles which may lead to significant expenditure – see at 870.

[22] The World Commission for Environment and Development defined "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs." – *Our Common Future – the Brundtland Report* at chapter 2. However, the Brundtland Report did keep a full focus on the environment. *Our Common Future – the Brundtland Report* Annex 1 summary of proposed legal principles for environmental protection included a fundamental right to an environment adequate for health and well-being.

[23] Rio Declaration principle one, which was developed at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. This marked the twentieth anniversary of the Stockholm Conference, which produced the Stockholm Declaration.

[24] Shelton "What Happened in Rio to Human Rights?" at 82 also points out that the Working Group III of the United Nations Conference on Environment and Development considered a number of different suggestions for a right to environment. For example, in the Chairman's draft, principle one stated that "human beings are entitled to a healthy and productive life in harmony with nature." None of these proposals were adopted.

[25] Principle two provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental 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." Principle three provides that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".

In 2002 at the World Summit on Sustainable Development in Johannesburg this focus on sustainable development was affirmed in the Johannesburg Declaration.[26] An anthropocentric approach was also a feature, as poverty eradication and the need to protect and manage natural resources "for economic and social development" were overarching objectives.[27]

Between Stockholm and Johannesburg therefore, the human right to a quality environment became a right to sustainable development with a reduced focus on the environment. Sustainable development is a concept with great internal tension between the need for international accountability and respect for a State's sovereignty, which may itself lead to subjugation of environmental protection.[28] The environment has also been relegated to only one factor of many to be taken into account. The focus is on humans and global disparity between peoples and their development, rather than the environment in its own right.[29] The assumption seems to be that the environment is only there for (proper) human use.

This is not a complete picture. A parallel progression, built primarily on the statements contained in the Stockholm Declaration rather than on the Rio Declaration, emerged.[30] A connection between the environment and human rights was expressed in the Hague Declaration on the Environment 1989, where a fundamental duty to preserve the ecosystem was recognised and also the right to live in dignity in a viable global environment.[31] In 1990 the United Nations General Assembly observed that environmental protection is indivisible from the achievement of full enjoyment of human rights by all.[32] This comment heralded the recognition of the right of all

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[26] World Summit on Sustainable Development Johannesburg Declaration on Sustainable Development A/CONF.199/20 (4 September 2002) (Johannesburg Declaration).
[27] Johannesburg Declaration at [11].
[28] Taylor "From Environment to Ecological Human Rights: A New Dynamic in International Law? (1998) 10 Geo Int'l Envtl L Rev 309 at 335. This is made clear in principle two of the Rio Declaration where it was declared that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies …" Given the complexity and interconnected nature of the global environment, therefore this element of sustainable development may be at cross-purposes with concerted world-wide environmental protection – see Taylor (1998) at 336.
[29] See Johannesburg Declaration at [11] – [15].
[30] See World Charter for Nature which has a conservation focus rather than a human focus on environmental protection.
[31] Hague Declaration on the Environment 1989, 28 ILM 1308 at 1309. Signed by 24 heads of State.
[32] *Need to Ensure a Healthy Environment for the Well-Being of Individuals* UNGA Resolution 45/94 (14 December 1990).

individuals to "live in an environment adequate for their health and well-being".[33] Further in 1994 the Special Rapporteur to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities proposed a set of draft principles providing for a stand alone environmental right, described as the right "to a secure healthy and ecologically sound environment".[34] Those principles also recognised the interlinking of human rights, an ecologically sound environment, sustainable development and peace.[35]

These early expressions provided the foundation for more recent international discussions on environmental rights, which have focused on the indivisibility of the right to an environment of quality and fundamental human rights. In 2002, a Joint Expert Seminar was convened by the United Nations Commission on Human Rights and the United Nations Environment Programme, to assess progress in promoting and protecting human rights in relation to environmental questions since the 1992 Rio Declaration. The conclusions of the experts were that national and international developments reflect the growing interrelationship between approaches to guaranteeing human rights and environment protection.[36] The experts also observed that sustainable development requires that different societal objectives, such as economic, environmental and human rights, be treated in an integrated manner.[37] There was also recognition of the role of environmental protection as a pre-condition for the effective enjoyment of human rights.[38]

With regard to substantive rights, the experts agreed on the following points of action: that the link between human rights and environmental protection should be affirmed as an essential tool for the eradication of poverty and the achievement of sustainable development; and that the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed right or as a

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[33] UNGA Resolution 45/94 at [1].
[34] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994) (1994 Draft Principles). Ksentini Report at [7]. Handl at 307. Such a strong expression of the right was perhaps made because the Ksentini process began in 1989 before the Rio Declaration had come into being.
[35] See 1994 Draft Principles part 1 at [1].
[36] Office of the High Commissioner for Human Rights *Meeting of Experts on Human Rights and the Environment* (2002) <http://www.unhchr.ch> (last accessed at 4 August 2008) at [3] (*2002 Experts' Report*).
[37] *2002 Experts' Report* at [4].
[38] *2002 Experts' Report* at [5] and [12].

guiding principle of national and international law, ought to be supported.[39] The experts also emphasised the responsibility of private actors and the need to develop effective mechanisms to prevent and redress environmental degradation, including remedies for victims. Emphasis was also placed on marshalling existing human rights to assist in achieving environmental protection, with particular reference to the rights of indigenous peoples and other vulnerable groups.

The explicit recognition of the link between human rights and the environment, and the recognition of the increased support for the right to an environment of quality was not, however, incorporated into the Johannesburg Declaration. The focus was squarely on development.[40]

Sustainable development as a concept has also been embraced in the Pacific. It is included as one of the four goals in the Pacific Plan.[41] This Plan was endorsed by the leaders at the Pacific Islands Forum meeting in October 2005 as a framework for achieving the four key goals of enhancement and stimulation of economic growth, sustainable development, good governance and security for Pacific countries through regionalism. As is a natural result of the concept of sustainable development, however, the main concentration in the Plan is on development rather than the environment in its own right.

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[39] The experts also made recommendations regarding procedural rights and institutional arrangements – *2002 Experts' Report* at [18].

[40] In the Johannesburg Declaration at [5] the representatives at the conference assumed " … a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels." At [6] of the Declaration a declaration was made assuming responsibility "to one another, to the greater community of life and to our children". Environmental issues were, however, relegated to a secondary status due to the emphasis on development – see Kiss and Shelton at 44.

[41] Pacific Islands Forum Secretariat *The Pacific Plan: For Strengthening Regional Cooperation and Integration* (2007) <http://www.pacificplan.org> (last accessed 5 August 2008). Some of the objectives of the plan are to: increase sustainable trade (including services and investment); develop National Sustainable Development Strategies; increase private sector participation in, and contribution to, development; develop and implement national and regional conservation and management measures for fishing, waste management, implementation of the Pacific Islands Energy Policy and the Pacific Regional Action Plan on Sustainable Water Management; reduce poverty; improve natural resource, environmental management and health; recognise and protect cultural values, identities and traditional knowledge; and improve transparency, accountability, equity and efficiency in the management and use of resources in the Pacific. Members are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

Sustainable development has been considered by the International Court of Justice (ICJ) in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (the Danube Dam case).[42] This concerned the construction of a system of locks on the Danube River, pursuant to a 1977 treaty between Hungary and Czechoslovakia. The primary purposes of the development were electricity generation, ease of navigation and protection against flooding in the Bratislava to Budapest section of the Danube. Work on the project began in 1978 but, by 1989, Hungary had become concerned about the ecological dangers of the project, including threats to ground water and wetlands. Slovakia wanted the development to continue and undertook a variation of its own, diverting the river through its territory to service a power station. Both Hungary and Slovakia in argument referred to sustainable development. Simplistically, Hungary stressed the environmental aspects of sustainable development, and Slovakia the development aspects.[43]

The majority of the Court held that there was a new "concept" of international law – sustainable development – that had to be taken into account by the parties in any interpretation of the 1977 Treaty and the obligations under the Treaty. The Court sent the parties away to negotiate in accordance with the treaty provisions and the new concept. While the majority recognised the "concept" of sustainable development in international law, it stopped short of saying that it was a norm of customary international law.[44] The majority said (at [140]):

> Owing to new scientific insights and to a growing awareness of the risks for mankind – for future and present generations – of pursuit of such interventions [with nature] at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This

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[42] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 (*Gabčíkovo-Nagymaros Project* case). See Taylor "The Case Concerning the *Gabčíkovo-Nagymaros* Project: A Message from the Hague on Sustainable Development" (1999) 3 NZ J Envtl L 109 for a full discussion of the case.

[43] Sands at 469 – 477.

[44] The concept of sustainable development was given practical legal consequences by the WTO Appellate Body in *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (15 May 1998) (98-1710) (the *Shrimp/Turtle* case). The Appellate Body characterised sustainable development (as contained in the Preamble to the WTO Agreement) as a concept which "has been generally accepted as integrating economic and social development and environmental protection" – (1999) 38 ILM 121 at [129] at n 107.

> need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

Vice-President Weeramantry, in a separate opinion, recognised sustainable development (and particularly the aspect relating to the protection of the environment) as a norm of customary international law.[45] Indeed he said that it was "one of the most ancient ideas in the human heritage."[46] Vice-President Weeramantry saw the protection of the environment as being very much a question of human rights. He said that it was:[47]

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

Reference was also made to the value systems of various cultures which revealed the universal love of nature, the desire for its preservation and the need for human activity to respect the requisites for its maintenance and continuance.[48] As pointed out by Vice-President Weeramantry, the value systems of the Pacific region are especially in tune with environmental protection:

> [the] Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce, and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died.

An earlier decision of the ICJ, the Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, is also of significance. In that case, the ICJ recognised the importance of the environment in rather poetic terms.[49] It said (at [29]):

> The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.

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[45] See Separate Opinion of Vice-President Weeramantry in the *Gabčíkovo-Nagymaros Project* case at 104. Or perhaps, seeing Vice-President Weeramantry did not discuss the second aspect needed for the formation of customary international law, legal obligation, he considered it a "general principle of law recognised by civilised nations" under art 38(1)(c) of the Statute of the International Court of Justice. See discussion in Taylor (1999) at 118.

[46] See *Gabčíkovo-Nagymaros Project* separate opinion of Vice-President Weeramantry at 110.

[47] See separate opinion of Vice-President Weeramantry at 91 - 92.

[48] See separate opinion of Vice-President Weeramantry at 108 – 109.

[49] [1996] ICJ Rep 226.

However, the Court was not talking about a general human right to the environment. It was talking about the obligation of States to ensure that activities within their jurisdiction and control, respect the environment of other States.

Other indications that may evidence the existence of international customary law are the norms expressed in regional agreements and domestic constitutions. Some regional instruments do guarantee explicitly a right to the environment. The African Charter on Human and Peoples' Rights (African Charter) guarantees all "peoples"[50] the right to a "general satisfactory environment favourable to their development" [51] and the San Salvador Protocol to the American Convention on Human Rights[52] guarantees the right to a healthy environment and requires States to "promote the protection, preservation and improvement" of the environment.[53] In ASEAN's new charter the ninth article requires the promotion of sustainable development in order "to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples".[54]

There are also numerous constitutional provisions throughout the world which treat the environment as a right. Globally, by 2005, approximately 60 per cent of all States

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[50] The term is undefined in the Charter (African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217) but the collective nature of the term is an interesting precedent for any Pacific regional mechanism, given the strong community values in the Pacific. It is interesting, however, that the environmental right in the African Charter is confined to "peoples" and not to communities or individuals. Other rights in the African Charter are not so confined. For example, all individual rights covered in ICCPR and ICESCR are also covered in the African Charter.

[51] African Charter art 24. Note the linking of the right to the environment with development. It is not a stand alone environmental right.

[52] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988, OAS Treaty Series 69 art 15 (Protocol of San Salvador). Like most of the economic and social rights in the Protocol, the right to the environment is, however, non-justiciable – see *APF Background Paper on Environment* at 27.

[53] Art 11(2). Here I note the obligation to "improve" the environment. This links the environment right to improvement of the human quality of life, including presumably through the repair of man-made environmental degradation but also through improvements in sanitation for example. While this can be seen as human centred, it must be an essential component of any human right to the environment as long as it is, as in this case, coupled with the obligation to protect and preserve the environment. This formulation would have resonance in the Pacific also.

[54] Charter of the Association of Southeast Asian Nations (2007) <http://www.aseansec.org> (last accessed 14 August 2008). The link of the environment to culture as well as to a high quality of life is also something that is likely to appeal to the framers of any Pacific mechanism. I note in this regard the Constitution of the Commonwealth of the Northern Mariana Islands, which provides in art I s 9 for a right to clean and healthful public environment in all areas, including the land, air, and water. Art XIV provides for the protection of marine resources, uninhabited islands and the preservation of places and things of cultural and historical significance.

had constitutional provisions protecting the environment.[55] Out of 109 constitutions which did recognise some protection for the environment, 56 recognised explicitly the right to a clean and healthy environment, 97 made it the duty of governments to prevent harm to the environment and 56 recognised the responsibility of citizens and residents to protect the environment.[56] For example, the South African Constitution guarantees a right to an environment that is "not harmful to … health or well-being".[57] The Belgian Constitution puts it less negatively. It recognises the entitlement of "everyone to the protection of a healthy environment".[58] The Philippines Constitution is my personal favourite, not just because of the evocative language but because of the recognition of the need for a balanced ecology and the emphasis on nature. It guarantees that the "State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature".[59]

Turning to the Pacific, the Palau Constitution charges Parliament with the responsibility of taking positive action to attain the objective of "conservation of a beautiful, healthful and resourceful natural environment".[60] Under the Papua New Guinea Constitution, non-binding National Goal Four relates to sustainable development, and includes both the preservation of the environment for future generations but also preservation for its sacred, scenic and historical qualities.[61] The basic social obligations under the Constitution also oblige all persons to safeguard the

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[55] *APF Background Paper on Environment* at Annex 3 page 187. Out of 193 national constitutions, 109 recognised some right to a clean and healthy environment and/or the State's obligation to prevent environmental harm.

[56] See Earthjustice *Environmental Rights Report Human Rights and the Environment* Materials for the 61st Session of the United Nations Commission on Human Rights (2005) <http://www.earthjustice.org> (last accessed 14 August 2008) at 37 – 38.

[57] Constitution of the Republic of South Africa 1996, s 24.

[58] Constitution of Belgium 1970, art 23.

[59] Constitution of the Republic of the Philippines 1987, art II s 16.

[60] Constitution of the Republic of Palau 1979, art VI. Furthermore the Constitution states that "[h]armful substances such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste materials therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau without the express approval of not less than three-fourths (3/4) of the votes cast in a referendum submitted on this specific question" – see art XIII s 6.

[61] Constitution of the Independent State of Papua New Guinea 1975, National Goal four "We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations. We accordingly call for (1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and (2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and (3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees."

national wealth, resources and environment in the interests not only of the present generation but also of future generations.[62]

Similarly, in Vanuatu, duties of individuals are stressed. The Constitution provides that every person has the fundamental duty to themselves, their descendants and others to safeguard the national wealth, resources and environment.[63] The new Draft Federal Constitution of the Solomon Islands places a duty on the State to recognise its responsibility to future generations in safeguarding the environment and the biodiversity of the Solomon Islands and encouraging sustainable resources utilisation and management and also a duty on Solomon Islanders to "protect the environment and to conserve natural resources".[64] The Draft Constitution also accords environmental rights to indigenous Solomon Islanders both in relation to the environment as a whole and with regard to their customary lands and resources. There is also a right for all persons to an environment that is not harmful.[65]

Despite the large number of constitutional provisions protecting the environment, it can be seen that there is wide diversity of descriptions of environmental rights (and duties) in constitutional provisions. This arguably makes it difficult to discern how any right might be constituted and thus establish the degree of consensus necessary for constituting international customary law.[66] Further, in many of the constitutions, the provisions relating to the environment are simply non-justiciable guiding principles, albeit often backed up by national laws.

Moving on to treaties, there have been over 350 multilateral treaties since 1972 that deal with aspects of the environment and more than 1000 bilateral ones.[67] Examples

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[62] See National Goal five – Basic Social Obligations at [d]. This is an interesting precedent as it explicitly recognises duties placed on individuals and inter-generational rights.
[63] Constitution of the Republic of Vanuatu, art 7(d).
[64] Draft Federal Constitution of the Solomon Islands ss 10 and 11 (Draft Constitution). See Solomon Islands Development Administration Planning programme website (which was a UNDP project) for text of the Draft Constitution <http://www.peoplefirst.net.sb> (last accessed 21 August 2008).
[65] Under s 17 indigenous Solomon Islanders are accorded the right to the conservation, restoration and protection of the total environment and the productive capacity of their customary lands and resources. Section 177 of the Constitution states that "[e]very person has the right to an environment that is not harmful to his or her health or well being". The explicit recognition of indigenous peoples is likely to be a model for any Pacific mechanism but care will have to be taken to ensure the rights of minorities are not overshadowed.
[66] I consider, however, that the differences can be exaggerated. The basic concept is common to most formulations of the right.
[67] Rodriguez-Rivera at 6 – Treaty numbers correct as at 2001.

of the types of conventions that might be thought to be of particular relevance to the Pacific are those on biological diversity and conservation,[68] prevention of desertification,[69] hazardous waste,[70] trade in endangered species,[71] highly migratory fish stocks and wild animals,[72] control of drift net fishing,[73] the prevention of marine pollution[74] and conventions on regional environmental conservation as a whole.[75] In

[68] Convention on Biological Diversity 1992, 1760 UNTS 79. Pacific parties include Australia, Cook Islands, Fiji, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Vanuatu. See also Convention on Conservation of Nature in the South Pacific 1976 (Apia Convention).

[69] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994, 1954 UNTS 3. Parties include Australia, Cook Islands, Fiji, France, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, United States of America.

[70] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, 1673 UNTS 126 (Basel Convention). Parties to this Convention include Australia, Cook Islands, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, New Zealand, Papua New Guinea and Samoa. See also the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region 1995, 2161 UNTS 93 (Waigani Convention). Parties to this Convention include American Samoa, Australia, Cook Islands, Fiji, French Polynesia, Guam, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, New Caledonia, New Zealand, Niue, The Commonwealth of Northern Mariana Islands, Republic of Palau, Papua New Guinea, Pitcairn, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Wallis and Futuna, Western Samoa.

[71] Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973, 993 UNTS 243 (CITES). Parties include Australia, Fiji, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, and Vanuatu.

[72] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 3. Parties include Australia, Cook Islands, Fiji, Federated States of Micronesia, Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands and Tonga. Convention on the Conservation of Migratory Species of Wild Animals 1979, 1651 UNTS 333 (CMS). Convention for the Conservation of Southern Bluefin Tuna 1993, 1819 UNTS 360. Parties include New Zealand and Australia. Convention on the Conservation Management of Migratory Fish Stocks in the Western and Central Pacific Ocean 2000, Honolulu, signed 5 September 2000. Parties include Australia, Cook Islands, Fiji, France (extends to French Polynesia, New Caledonia and Wallis and Futuna), Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, New Zealand (including Tokelau), Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, United States of America and Vanuatu.

[73] Convention on the Prohibition of Fishing with Long Driftnets in the South Pacific 1989, 1899 UNTS 3. Parties include Australia, Cook Islands, Fiji, Kiribati, Federated States of Micronesia, Nauru, New Zealand, Tokelau, United States of America.

[74] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, 1046 UNTS 120. Parties include Cook Islands, New Zealand, Niue and Tokelau Islands. See also the International Convention for the Control and Management of Ships' Ballast Water and Sediments BMW/CONF/36 <http://www.imo.org> (last accessed 12 August 2008) (Ballast Water Convention). Parties include Kiribati and Tuvalu.

[75] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (Noumea Convention). Parties include Australia, Cook Islands, Fiji, France, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Niue Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, United Kingdom, United States of America, Vanuatu.

the main, however, these treaties are regulatory and are not couched in terms of human rights.[76]

There are also numerous international and regional environmental programmes and declarations, which may evidence customary norms (although again they are not usually seen as human rights initiatives). For example, the United Nations facilitates the Mauritius Strategy for the sustainable development of small island developing States,[77] which aims to create a framework to achieve the "millennium goals" which include ensuring environmental sustainability.[78] The United Nations Educational, Scientific and Cultural Organisation (UNESCO), in implementing the Mauritius Strategy, is involved in waste water management and coastal and marine resource management in the Pacific, and the UNESCO Pacific Renewable Energy Project.[79] Other programmes are run by the United Nations Environment Programme such as the Global Programme for Action for the Protection of the Marine Environment from Land-based Sources of Pollution.[80] Other international organisations provide an emergency assistance fund for natural disasters to member States,[81] facilitate

[76] There may nevertheless be affinities between environmental protection treaties and international human rights law. Sands notes, at 112 – 120, the level of involvement of scientists, NGO's, business and other organisations in the process of treaty making in the environmental area. He comments that the involvement of wider groups is unusual in the international arena, apart from in the human rights field.

[77] The small island developing States in the Pacific are Fiji, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Other small island developing States in the Pacific who are not UN members are American Samoa, Cook Islands, French Polynesia, Guam, New Caledonia and Niue. See United Nations Division for Sustainable Development <http://www.un.org> (last accessed 10 August 2008).

[78] Issues addressed in the Mauritius Strategy include climate change and sea-level rise, natural and environmental disasters, management of wastes, coastal and marine resources, fresh water resources, land resources, energy resources, tourism resources, biodiversity, transportation and communication, science and technology, graduation from least developed country status, trade, sustainable capacity development, sustainable production and consumption, health, knowledge management and information for decision-making, and culture.

[79] See UNESCO website <http://www.unesco.org> (last accessed 20 August 2008).

[80] See UNEP website <http://www.unep.org> (last accessed 10 August 2008).

[81] See International Monetary Fund website <http://www.imf.org> (last accessed 10 August 2008). Member countries include Australia, Fiji, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, New Zealand, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu.

programmes relating to plant genetic resources[82] and create programmes to conserve and protect water resources.[83]

In terms of purely regional initiatives, an example is the South Pacific Regional Environment Programme (SPREP). This was established originally as a small programme attached to the South Pacific Commission in the 1980s, and is now the Pacific region's major intergovernmental organisation charged with protecting and managing the environment and natural resources of the Pacific.[84] It was created to serve as the facilitator for regional environmental action and to signal the deep commitment of the Pacific islands governments to sustainable development. SPREP's mandate is to promote cooperation in the Pacific islands region and to provide assistance in order to protect and improve the environment and to ensure sustainable development for present and future generations.[85]

Projects co-ordinated by SPREP include those relating to climate change, coastal management, the coral reef initiative, dealing with hazardous waste, the strategic action programme for international waters, protecting against invasive species, the mangrove taskforce, preventing marine pollution, marine turtle conservation and the national biodiversity strategy action plan.[86] The agreement establishing SPREP speaks of the importance of protecting the environment and conserving the natural resources of the South Pacific region and the responsibility of preserving the natural heritage of the region for the benefit and enjoyment of present and future generations.[87] This terminology can be seen as supporting the existence of a human right to the environment, at least in the Pacific region.

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[82] The Global Crop Diversity Trust – see <http://www.croptrust.org> (last accessed 10 August 2008) has helped to create the Pacific Regional Conservation Strategy in association with the Pacific Agricultural Plant Genetic Resources Network and the Asia Pacific Forest Genetic Resources Programme (in partnership with Biodiversity International). See Biodiversity International website <http://www.biodiversityinternational.org> (last accessed 10 August 2008).

[83] Global Water Partnership website <http://www.gwpforum.org> (last accessed 10 August 2008).

[84] See the SPREP website <http://www.sprep.org> (last accessed 10 August 2008).

[85] Members of SPREP are American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Guam, Kiribati, Republic of Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, United States of America, Vanuatu and Wallis and Futuna.

[86] See the SPREP website <http://www.sprep.org> (last accessed 10 August 2008).

[87] Agreement Establishing the South Pacific Regional Environment Programme signed at Apia 16 June 1993 <http://www.sprep.org> (last accessed 16 August 2008) preamble.

There are also, both around the Pacific and throughout the world, numerous national laws protecting aspects of the environment. While these might be seen as showing both State practice and the fact that States accept a legal obligation with regard to the protection of the environment, such laws are normally regulatory in nature, rather than being couched in human rights terms. There are obviously also numerous judicial decisions domestically on environmental issues but they too are not usually couched in human rights terms.

More common are laws giving participation rights with regard to decisions about the environment (a vital part of any right). This trend is supported by international declarations. As pointed out by Professor Shelton, the Rio Declaration constructed the link between human rights and environmental protection in the field of procedural rights (access to information and participation rights) and also in terms of ensuring access to judicial and administrative proceedings and the development of effective redress and remedies.[88] In particular, the Rio Declaration reached out to secure the participation rights of women, youth, indigenous peoples and local communities.[89] The momentum behind procedural rights culminated in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) which is open for signature to any State.[90]

Instruments in the Asia Pacific region have also fostered procedural rights in the environmental context. For example, the Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (Bangkok Declaration) affirmed "the right of individuals and non-governmental organizations to be informed of environmental problems relevant to them, to have the necessary access to

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[88] See principle ten of the Rio Declaration. See also Shelton *Human Rights and Environment Issues in Multilateral Treaties Adopted Between 1991 and 2001 (Background Paper No. 1)* Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14 – 16 January 2002, Geneva at 1 – 2 (Shelton *UNEP-OHCHR Background Paper No 1*). World Charter for Nature at [23] also contains participatory rights and rights of redress. See Cameron and Mackenzie "Access to Environmental Justice and Procedural Rights in International Institutions" in Boyle and Anderson 129 – 152 for a discussion of international participation of NGOs in environmental matters.

[89] Principles 20, 21, 22 respectively – see Shelton *UNEP-OHCHR Background Paper 1* at 2.

[90] 2161 UNTS 450. The Aarhus Convention concentrates on access to information, public participation and access to justice. See the *APF Background Paper on Environment* at 48 – 54 and Asia Pacific Forum of National Human Rights Institutions *Human Rights and the Environment: Final Report and Recommendations (2007)* <http://www.asiapacificforum.net> (last accessed 12 August 2008) (*APF Final Report on Environment*) at 15.

information, and to participate in the formulation and implementation of decisions likely to affect their environment."[91]

In the Pacific, however, a lack of resources has led to limitations on effective citizen participation and environmental decision-making, eliciting concerns that "participatory tokenism" is increasing.[92] Programmes such as the South Pacific Action Committee for Human Ecology and Environment have been instrumental in filling this participation gap by educating communities about biodiversity and sustainable development.[93]

Assessment

So, is there a right to an environment of quality? There is no doubt, of course, that there is a body of international environmental law contained in numerous treaties and that some aspects are expressed as customary international law.[94] The question is whether there is, as part of international human rights law, a human right to an environment of a particular quality, either under human rights treaties or under customary international law.[95]

Despite the general desirability of the development of such a right, the struggle to gain credence as a universally accepted right has been hampered by the fact that the right to environment is generally seen as falling within the perhaps less well accepted[96]

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[91] Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and Pacific (Bangkok Declaration).

[92] Jeffery "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice" (2005) 9(2) Journal of South Pacific Law 1 at 3.

[93] Jeffery at 8.

[94] Such as the duty not to harm the rights of other States in terms of the environment (the no appreciable harm principle) – see Shaw at 760 – 761 and de Sadeleer at 62. Other norms have been touted as principles of customary international law such as the precautionary principle, polluter pays principle, the preventative principle – see de Sadeleer at 25, 66, 92, 97. However the precautionary principle and the polluter pays principle do not yet enjoy universal support as part of international customary law. See *EC Measures Concerning Meat and Meat Products (Hormones)* (13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R at [123] (Appellate Body Report, WTO) where it was held that whether the precautionary principle had been accepted as a principle of customary international law was less than clear. Other principles suggested in *Our Common Future – the Brundtland Report* at annex 1 included inter-generational equity; conservation and sustainable use; environmental standards and monitoring; prior environmental assessment; prior notification, access and due process; and sustainable development and assistance. Even if these are not principles of international customary law they may, however, be "concepts" in the sense recognised by the majority of ICJ in the *Danube Dam* case.

[95] Rodriguez-Rivera at 6. Ksentini Report at [7].

[96] Less well accepted at least with regard to their justiciability.

economic, social and cultural rights. It has also been hampered by the fact that it is premised primarily on soft law instruments.[97] As a result, most commentators consider that there is insufficient support for the existence of such a right, either in international human rights instruments or in customary international law.[98]

While I think the matter is closely balanced, I agree with this assessment. One of the main difficulties, in my view, is that any right to the environment has become intermingled with the right to development, which is itself a so-called "third generation right",[99] with consequent uncertainty as to its existence as a stand-alone right.

In general, however, procedural rights enjoy greater support than any substantive right, in part because of their comparability with civil and political rights.[100] It may even be that procedural environmental rights, such as the right to receive information and to participate in decision-making processes, can be characterised as a refinement

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[97] Handl at 303 and Rodriguez-Rivera at 40 – 41. As noted above soft law is not recognised by legal traditionalists as sufficient evidence of international customary norms.

[98] Handl at 313. Shelton in her 1992 article "What Happened in Rio to Human Rights?" agreed. She said, at 81, that "while there are a growing number of texts guaranteeing a right to environment, at present the state practice and *opinio juris* necessary to call a right to environment customary international law is lacking." In an article written in 1996 Professor Merrills stated that, although an articulation of environmental rights may have begun, that does not mean that a right to an environment of a particular quality has as yet emerged – see Merrills "Environmental Protection and Human Rights: Conceptual Aspects" in Boyle and Anderson 25 at 39. See also Professor Boyle's comments in "The Role of International Human Rights Law in the Protection of the Environment" in Boyle and Anderson 43 at 50 – 51 where he said that, given the inherent uncertainty surrounding attempts to postulate environmental rights in qualitative terms, it is difficult to say that there is international consensus on the topic. See also Hill, Wolfson and Targ at 400. Even Special Rapporteur Ksentini merely stated that there is an *evolving* right to a healthy and flourishing environment at [4] – [5] of the Ksentini Report. See also de Sadeleer at 263 where the author states that post-modern law is characterised by the *emergence* of a new generation of human rights including the right to environmental protection. By contrast, see, however, Segger and Khalfan (eds) *Sustainable Development Law Principles, Practices, & Prospects* (2004) at 71 – 72 where a right to a healthy environment was argued as existing. Shaw at 756 points out that many now agree that a right to a clean environment exists but does not comment on the validity of this view. For more discussion see *APF Background Paper on Environment* and *APF Final Report on Environment*.

[99] Third generation rights or "solidarity" rights (which include peace, development and a good environment) are generally accorded to groups rather than individuals and may contain an element of redistributive justice among States. See Boyle, in Boyle and Anderson 43 at 46. See also Rosas "The Right to Development" in Eide, Krause and Rosas *Economic, Social and Cultural Rights: A Textbook* (2ed 2001) at 119 - 120. The terminology "third generation" is somewhat odd, suggesting that such rights are separate from and perhaps less important than first and second generation rights. Instead, they can be seen as the foundation, without which all other rights are under threat. In my view the categorisation of rights is best avoided as detracting from the principle of the indivisibility of all rights.

[100] Rodriguez-Rivera at 16; Handl at 318.

of established political or civil human rights.[101] As participation rights become more widespread, it may be more promising to postulate a right to participation as constituting customary international law than to argue for the substantive right.[102]

Do existing human rights cover the environment?

The right to life and the right not to be arbitrarily deprived of life may provide a foundation for the right to an environment of quality. This right is contained in UDHR,[103] ICCPR,[104] UNCROC,[105] the African Charter,[106] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[107] and is also guaranteed in other regional charters and most constitutions around the world.[108] It is considered to be a non-derogable right.[109]

The right to life has been regarded as a negative right *not* to be deprived of life, and courts have traditionally been reluctant to expand this right.[110] However, in a number

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[101] Handl at 318 and 321 points to art 25 of the ICCPR which provides that "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (a) To take part in the conduct of public affairs, directly or through freely chosen representatives …" The freedom of expression right in the ICCPR, art 19, has been touted as necessary for the right to participate – see *APF Background Paper on Environment* at 49 - 50. However it is more controversial as to whether art 19 includes a duty to provide information.

[102] Handl argues at 318 - 328 that the rights to information, participation and access to remedies are gaining recognition as generally protected international entitlements as these rights rest on currently justiciable rights of international human rights law and are pivotal in the "trilateral relationship of human rights, democracy and environmental protection". See also Sands at 118, the *APF Final Report on Environment* at 12 and Douglas-Scott "Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit?" in Boyle and Anderson 109 at 112.

[103] Art 3.

[104] Art 6.

[105] Art 6.

[106] Art 4.

[107] 213 UNTS 221 s 1, art 2.

[108] The right to life is a principle of the common law as well as being contained in human rights instruments – see New Zealand Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37 1997) at 8, para 26. It is also a fundamental principle in civil jurisdictions. In Europe, for example, the rights which form the ECHR, are said to be inspired by constitutional traditions common to member states – *Internationale Handelsgesellschaft mbH v Einfur und Vorratsstelle für und Futtermittel* [1970] ECR 1125 (Case 11/70).

[109] See Shaw at 256, where it is said that the fact that the right to life is non-derogable suggests that the right may form part of *jus cogens*. See art 6(1) of the ICCPR "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Art 4(2) of the ICCPR provides that there can be no derogation from art 6, even in times of civil emergency.

[110] See Starmer "Positive obligations under the Convention" in Jowell and Cooper (eds) *Understanding Human Rights Principles* (2001) 139 – 159 and *X and Y v Federal Republic of Germany* Application 7407/76, European Commission of Human Rights, Strasbourg, 13 May 1976 where it was held that the right to life did not support nature preservation. However, the European Court of Human Rights has commented that the use of the right to life to protect against environmental damage has not been ruled

of jurisdictions, the right to life has begun to be interpreted widely as including the right to pollution-free water and freedom from air pollution, and to include positive obligations on the State to act to remedy threats to life.[111]

In terms of other established rights, the right to privacy and family life has been used in Europe, somewhat strangely in my view, to counter noise and industrial pollution.[112] The right to freedom of expression has been used to support the right to information on environmental matters and the right to judicial review has also been used to support participatory rights in environmental decisions.[113] The right to health,[114] culture,[115] property,[116] freedom from discrimination[117] and a number of other rights, may also be relevant.[118]

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out – see *Öneryildiz v Turkey* (2005) 41 E.H.R.R. 20 at [72]. The Human Rights Committee has also said that the right to life must not be interpreted narrowly – see United Nations Human Rights Committee *General Comment No. 6: The Right to Life* UN Doc HR/GEN/1/Rev1 (30 April 1982) at [5], where it was stated that "it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics". In the *APF Background Paper on Environment* at 56 this was seen as broadening the right to life beyond imminent threats to more multifarious and less immediate threats to the right to life. See also Churchill, in Boyle and Anderson 89 at 90 - 91.

[111] The Indian courts for instance have expanded the right to life to include the right to a healthy/clean environment see *Charan Lal Sahu v Union of India* AIR 1990 SCF 1480 and *Kumar v State of Bihar* (1991) 1 SCC 598. See also *Farooque v Bangladesh* (1997) 49 Dhaka Law Reports (AD) p 1. See the discussion in Razzaque *Background Paper No 4 Human Rights and the Environment: the national experience in South Asia and Africa* Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002) <http://www.unhchr.ch> (last accessed 12 August 2008). The right to life has also been extended in Paraguay beyond physical survival to include a right to dignified existence, health, food and access to clean water – see *Indigenous Community of Yakye Axa v Paraguay* 6 February 2006 Judgment on the Merits at [160] – [167].

[112] See *Arrondelle v United Kingdom* Application No. 7889/77 Report of 13 May 1983, 26 DR 5 where the construction of an airport and motorway was argued to be a nuisance and *Powell & Rayner v United Kingdom* Application No. 9310/81 172 Eur Ct HR (ser A) (1990) where it was argued that noise from Heathrow airport breached their rights to privacy, home and property. The Court, however, held that there was no violation as the interests of the individuals had to be balanced against the competing interests of the community as a whole. See Taylor (1998) at 341.

[113] See *APF Background Paper on Environment* at 49 – 52 and Taylor (1998) at 343 – 345.

[114] United Nations Committee on Economic and Social Rights *General Comment 14: The right to the highest attainable standard of health: art 12 of the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C.12/2000/4 (11 August 2000) refers expressly to the underlying determinants of health as including a 'healthy environment'. See also *Yanomami v Brazil* Case No. 7615 (5 March 1985), OAS Doc OAE/Ser.L/VII.66.doc.10.rev.1,24 (1985).

[115] The right to culture is protected by art 27 of the ICCPR. Environmental damage which prevents the exercise of cultural activities may violate the right to culture. See *Ominayak and the Lubicon Lake Band v Canada*, Communication No. 167/1984 UN Doc CCPR/C/38/D/167/1984 (10 May 1990) at [33]. In *Länsman v Finland*, Communication No. 671/1995 UN Doc CCPR/C/58/D/671/1995 (22 November 1996) an Indigenous group in Finland brought a complaint alleging that a government contract allowing a private company to engage in logging in their traditional lands would disrupt their traditional reindeer herding activities. Once again, the UN Human Rights Committee acknowledged that social and economic activities may be a part of culture – see at [10.2].

The question is whether these existing rights provide adequate protection. The first point is that the focus is not specifically on the environment specifically. This in itself is a limitation. As Professor Shelton notes, resource management, nature conservation and biological diversity can be difficult to bring under the human rights rubric in their own right.[119] There are other limitations. For example, the right to life has been interpreted as needing a risk that is actual or imminent, with the applicant personally affected.[120] There will usually also be difficulties with the issue of causation and proof in environmental matters.[121]

In relation to the so-called "second generation"[122] economic, social and cultural rights, where the environment might more naturally fit (eg threats to health due to

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[116] The right to own property is expressed in art 17 of the UDHR. Art 21 of the American Convention on Human Rights also provides for a right to own property. This right was used in the Inter-American Court of Human Rights in the case of *The Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Judgment of 31 August 2001, Inter-Am Ct HR (Ser C) No. 79 to hold that logging licences on the land of indigenous peoples violated their right to property. See *APF Background Paper on Environment* at 41 – 42.

[117] See *Mary and Carrie Dann v United States*, Inter-American Commission on Human Rights, Report No. 75/02, Case 11.140 (27 December 2002) where the State permitted gold prospecting on the lands of the indigenous peoples without a valid public purpose, giving notice to the indigenous peoples and providing compensation. This was held to constitute discrimination.

[118] Merrills, in Boyle and Anderson 25 at 39. The Ksentini Report, at [161] – [234], discussed the link between environmental rights and the right to self-determination and sovereignty over resources, the rights to life, health, food, safe and healthy work conditions, and housing, freedom of association and cultural rights. See also Dias (President for International Centre for Law in Development) "Human Rights, Environment and Development in South Asia: the Importance of International Human Rights Law" (2000) 6 ILSA J Int'l & Comp L 415 at 418; Qazilbash "Human Rights Environment and Development in South Asia" (2000) ILSA J Int'l & Comp L 423 at 424; Handl at 305, Rodriguez-Rivera at 18 and Taylor (1998) at 339 – 340.

[119] Shelton "Human Rights and the Environment: Jurisprudence of Human Rights Bodies" (2002) 32/3-4 Environmental Policy and Law 158 at 162. This article provides an interesting survey of decisions, recommendations and comments of global and regional human rights bodies on environmental matters.

[120] *Aalbersberg. v the Netherlands*, Communication No. 1440/2005 UN Doc CCPR/C/87/D/1440/2005 (14 August 2006) at [6.3]. See *APF Background Paper on Environment* at 61 and 89 and *APF Final Report on Environment* at 19. It may be difficult to prove imminent or actual harm exists until after the harmful effects have actually occurred.

[121] Shelton, in *Remedies in International Human Rights Law* (1999) at 231 and 239, states that the burden of proof is usually on the claimant and the standard of proof is often high. Shelton opines that failure to prove causation is one of the most important factors in rejecting claims for pecuniary damage even where prima facie a causal link is present. Further, environmental damage may emanate from many different sources or may be generated by multiple acts which makes proof more difficult – see de Sadeleer at 53.

[122] As noted earlier, I do not like this categorisation of rights. Classifying economic, social and cultural rights as second generation implies that they are somehow of secondary importance. Economic, social and cultural rights are included in the UDHR alongside civil and political rights and the preamble to the UDHR refers to the "recognition of inherent dignity and of the equal and inalienable rights of all members of the human family". Further, the obligations as to human rights set out in arts 55 and 56 of the United Nations Charter 1945 do not distinguish between the different rights. Art 55(c) refers to the duty of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Art 56 requires

environmental damage), there are issues with justiciability.[123] Further, economic, social and cultural rights are subject to progressive implementation in light of resources.[124] This may limit severely the usefulness of such rights in the environmental field.

Should there be a right to a quality environment?

I turn now to the question of whether there should be a specific right to an environment of quality. The arguments against such a right include:

(a) There should not be a proliferation of new rights;[125]

(b) There are difficulties in linking any such new right with other rights;

(c) There is a lack of concentration on the environment for its own sake;[126]

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member States to take joint and separate action, in co-operation with the UN, for the achievement of the purposes in art 55.

[123] For a discussion of justiciability specifically in the environment context see Du Bois "Social Justice and the Judicial Enforcement of Environmental Rights and Duties" in Boyle and Anderson 153 – 175. It is often argued that the key reason why the justiciability of "second-generation" economic, social and cultural rights is less certain than for civil and political rights is that civil and political rights merely demand non-interference by the State whereas "second generation" rights may require significant state intervention and expenditure – see Taylor (1998) at 319 – 320. It is said that the enforcement of economic, social and cultural rights would require courts to engage in resource allocation, which is an illegitimate encroachment on the powers of government by an unelected body. This is a false dichotomy in my view. The protection of civil and political rights often requires positive action on the part of the State and possibly significant expenditure; for instance where a court orders the improvement of prison conditions or makes orders regarding legal aid. For further discussion on the justiciability of economic, social and cultural rights see APF *Reference on the right to education: Final Report* (2007) <http://www.asiapacificforum.net> (last accessed 13 August 2008) at 74. See *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 (CA) which discusses causation difficulties in the medical context.

[124] Art 2 of the ICESCR. See Boyle, in Boyle and Anderson 43 at 46.

[125] See discussion in Taylor (1998) at 346.

[126] Boyle, in Boyle and Anderson 43 at 51. See also Handl at 315. For a fuller discussion of this point see Redgwell "Life, the Universe and Everything: A Critique of Anthropocentric Rights" in Boyle and Anderson 71 – 87. The author acknowledges (at 71 – 2) that international environmental law has also been criticised as anthropocentric but counters that contemporary environmental law does take account of the intrinsic value of the environment, including ecosystems and species. She also, in that chapter, discusses the animal rights movement and the wider approach of giving all natural objects rights, on a level of equality with human rights. Indeed, under one approach, benefit to humans should be irrelevant. See World Charter for Nature Preamble. The anonymous reviewer of this paper also raised the issue of whether all living creatures, including plants, as well as all natural objects, such as rivers and mountains, should have rights to be balanced against any human rights. This is a fascinating question but one that will, given the already inordinate length of this paper, have to be left to another day.

(d) It might devalue and confuse existing international environmental law;[127]

(e) It may lead to ambiguity regarding the identity of the rights holder;[128]

(f) The focus on individual rather than collective rights and responsibilities is inappropriate in the environmental area;

(g) The focus on rights rather than responsibilities is inappropriate in the environmental area;

(h) There is general difficulty in characterising the right;[129]

(i) Human rights bodies are not appropriate organs to supervise environmental protection obligations;[130]

(j) The creation of a right to environment would result in duplication of remedies; and

(k) It would not add to environmental protection measures.[131]

(l) It draws attention away from the root causes of environmental degradation.

Now, a confession. I did not think that a specific right should be recognised until I took part in the consideration of this issue by the Advisory Council of Jurists (ACJ) of the Asia Pacific Forum of National Human Rights Institutions (APF).[132] The

[127] *APF Background Paper on Environment* at 86.
[128] Merrills, in Boyle and Anderson 25 at 37 – 38.
[129] *APF Background Paper on Environment* at 86 – 88 and Handl at 313 - 315.
[130] Professor Boyle discusses this point which was originally raised by Handl in Boyle, in Boyle and Anderson 43 at 49. See also Handl at 313.
[131] This was an issue raised for consideration by the anonymous reviewer of this paper. The argument posed was that, if a right to the environment is not based on human needs but includes the protection of the environment for its own sake, then it adds nothing to the body of law for the protection of the environment (albeit consisting of a set of duties and regulations rather than a right).
[132] See *APF Background Paper on Environment*. The Asia Pacific Forum of National Human Rights Institutions (APF) was established in 1996 and its prime purpose is to support the establishment and strengthening of national human rights institutions. The Advisory Council of Jurists (ACJ), a body of jurists from the region, advises the APF on the interpretation and application of international human rights law. Since its establishment in 1998, the ACJ has considered a wide range of human rights

arguments in favour of having a specific right to an environment of quality convinced me and I was happy to endorse the ACJ's recommendation that national human rights institutions should advocate for a right to a quality environment.[133]

Addressing first the counter arguments:

(a) *There should not be a proliferation of new rights:* I agree that a proliferation of new rights could, in some circumstances, devalue existing rights. However, an unwillingness to adapt existing instruments and expand rights to meet changing circumstances would have the same effect. New rights should not be added if they are trivial but a right to an environment of quality can effectively be seen as one of the foundation stones on which all other rights depend.

(b) *There are difficulties in linking any such new right with other rights:* There will always be difficulties balancing rights when they apparently conflict but that is the nature of human rights law. All rights are indivisible and those who are in decision-making roles are always engaging in an exercise of weighing rights. If a right is not articulated, however, it may not be considered at all. Equally, if an issue is seen as being outside a human rights framework, it may become too important and overshadow human rights altogether.[134] In any event, given the fundamental importance of the environment as a foundation for other rights, there may well be less difficulty with balancing than there is with some other rights.

(c) *There is a lack of concentration on the environment for its own sake:* The concern is that the protection of the environment for its own sake would give way to the right for humans to use and abuse the

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related issues: the death penalty, child pornography, terrorism, prohibitions on torture and trafficking, the application of the right to education, human rights and the environment and is currently considering a reference on human rights and corporate responsibility. See APF website <http://www.asiapacificforum.net> (last accessed 13 August 2008).

[133] *APF Final Report on Environment* <http://www.asiapacificforum.net>.

[134] As Professor Joseph suggested at the Samoa Conference has become the case with trade – see Joseph "Human Rights and the WTO Issues for the Pacific" Strategies for the Future Protecting Rights in the Pacific.

environment to the detriment of other species and to the ecosystem. Any right to the environment would, however, have to include the right to biodiversity and the responsibility for the general protection of biodiversity and the ecosystem for its own sake.[135] Rights do not have to be related only to physical needs and desires of humans. They can and should also relate to spiritual, cultural and aesthetic needs and desires.[136]

(d) *It might devalue and confuse existing international environmental law:* Any right to the environment should support international environmental law and not be incompatible or inconsistent.[137] Indeed, the content of the right would be moulded by international environmental law and vice versa.[138] It would also mean, as said earlier, that the environment would take its place as a right to be weighed against other rights and not be overlooked.

(e) *It may lead to ambiguity regarding the identity of the rights holder:* There is no doubt that the right to a quality environment cannot be seen merely as an individual right. It must also be a right enjoyed by communities and peoples. This, however, strengthens rather than devalues it as a right.[139] In any event, the interests of the individual,

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[135] The 1994 Draft Principles included as principle six that all persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna and the essential processes and areas necessary to maintain biological diversity and ecosystems. See also the preamble of the World Charter for Nature where it was stated that "[e]very form of life is unique, warranting respect regardless of its worth to man …".

[136] This concept is of course not at all alien to Pacific cultures. Indeed, it would be taken for granted.

[137] See de Sadeleer at 275 where the author states that what he calls "environmental directing principles" such as the polluter-pays, prevention and precaution principles, may strengthen constitutional provisions that recognise environmental protection. See also *APF Background Paper on Environment* at 85 – 89.

[138] As pointed out by Anderson, in "Human Rights Approaches to Environmental Protection: An Overview" in Boyle and Anderson 1 at 2, there are natural affinities between organisations such as Greenpeace and Amnesty International since both aim to reduce the reserved domain of domestic jurisprudence protected under art 2(7) of the United Nations Charter. Anderson nevertheless (at 3) realises the tension inherent in meeting the needs of a growing population with limited environmental goods which may pull the other way. Boyle, in Boyle and Anderson 43 at 45 – 57, also stresses the growing recognition of the need to internationalise the global environment based on notions of common concern and interest and the recognition of the global interdependence of many environmental issues. He cites in particular the Convention on Biological Diversity as one example of this. Tying in the environment with the human rights framework may help to accelerate that trend.

[139] It is notable that, although Professor Boyle does not consider that a right to an environment of quality is needed at international law because this is already covered by existing international

communities and people will, if the right is properly constituted to include the environment for its own sake, almost always coincide (which is not necessarily the case with a number of other rights).

(f) *The focus on individual rather than collective rights and responsibilities is inappropriate in the environmental area:* The fact that there is an individual right does not mean that there is not a community right,[140] especially in respect of the so-called third generation rights like the right to the environment and the right to sustainable development. Indeed, they may be best understood as community or collective rights.[141] The preambles of both the ICCPR and ICESCR[142] and also art 29 of the UDHR recognise the notion of duties to the collective.[143]

(g) *The focus on rights rather than responsibilities is inappropriate in the environmental area:* It is of course important to require everybody, including States, businesses, individuals and communities, to promote and protect the environment. In a number of contexts, concern is increasingly being expressed that the concentration on individual rights detracts from a focus on responsibilities and obligations. However, rights are not one-sided. Rights do impose requirements on individuals and communities to respect rights, as well as obligations on States to ensure that happens.[144]

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environmental law, he does concede that such a right may be necessary at national level to articulate to whom the right is owed: Boyle, in Boyle and Anderson 43 at 64 – 65.

[140] Sir Paul Reeves "Collective Human Rights of Pacific Peoples" in Tomas and Haruru (eds) *Collective Human Rights of Pacific Peoples* (1998) 11 at 15.

[141] Professor Thaman "A Pacific Island Perspective of Collective Human Rights" in Tomas and Haruru 1 at 3 – " …we need to approach the issue of collective human rights for Pacific peoples with a commitment to, and understanding of, cultural diversity and its implications for collective problem solving. We need to talk not only about the role of 'custom' but also Pacific notions of community and group viability and consider an approach to human rights that recognises the duties and obligations of the individual to the group, as well as vice versa.

[142] "Realizing that the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

[143] Art 29(1) of the UDHR recognises explicitly that everyone has "duties to the community in which alone the free and full development of his [or her] personality is possible".

[144] Principle 21 of the 1994 Draft Principles required all persons individually and collectively to protect and preserve the environment. In the preamble to the UDHR it is stated that the Member States have

(h) *There is general difficulty in characterising the right:* The right to the environment may need to be more fully textured than some other rights. For example, it must include the environment for its own sake, embrace communities, take into account inter-generational equity and stress responsibilities (of States, businesses, communities and individuals). Nevertheless, there is no reason why this cannot be encapsulated in the articulation of the right. The difficulties in terminology have, in my view, been exaggerated. The basic concepts are well understood. The application to particular situations will be a matter of interpretation for supervisory institutions and courts, in the same way as for other human rights.[145]

(i) *Human rights bodies are not appropriate organs to supervise environmental protection obligations*: It may well be that current human rights bodies lack expertise relating to the environment. Equally, existing environmental bodies may lack human rights expertise. This may suggest the need for a combined body, which would provide a welcome opportunity to rationalise existing structures, both in the human rights and environmental fields. The current multiplicity of international bodies can be seen as an inefficient use of resources and better synergies may be garnered by consolidating relevant expertise in one specialised body. A suggestion along similar lines was made with regard to environmental bodies in Chapter 38 of Agenda 21 (*Environment and Development Agenda)* where it was

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pledged to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms". See also the UN Charter art 1(2) where one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". The UN Charter also states that States must respect equal rights – see arts 55 and 56. See also United Nations Human Rights Council (John Ruggie) *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Protect, Respect and Remedy: a Framework for Business and Human Rights* UN Doc A/HRC/8/5 (7 April 2008) and *APF Final Report on Environment* at [1.2] where it discusses the responsibilities of States.

[145] See comments of Boyle, in Boyle and Anderson 43 at 50 – 51.

recommended that a new commission should be created to ensure efficient implementation of the Rio Declaration.[146]

(j) *The creation of a right to environment would result in duplication of remedies*: At present, remedies for human rights violations are not particularly coherent.[147] Those in the environmental field are arguably better but by no means comprehensive. A right to environment may herald a welcome and necessary strengthening in human rights remedies generally. When developing new remedies relating to human rights and the environment, there will be the opportunity to ensure that they are complementary rather than inconsistent with or duplicative of existing environmental remedies and that the latter are, at the same time, strengthened (particularly with regard to victims of environmental degradation).

(k) It would not add to environmental protection measures. At the risk of appearing trite, the immediate response is that every little bit helps. The more considered response rests partly in terminology and is partly systemic. As to terminology, there is likely to be more willing compliance if a person considers him or herself as enjoying a right rather than being subjected to regulation. In terms of systemic issues, as discussed below, framing environmental protection as a right also draws it into the more general rights framework, with consequent advantages for environmental protection.

(l) *It draws attention away from the root causes of environmental degradation*: To the contrary. As humans are the cause of environmental degradation, a human rights approach, properly coupled with an emphasis on individual, collective, business and State responsibility, should provide impetus for addressing root (human) causes.

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[146] *Agenda 21 2002, Environment and Development Agenda* <http://www.un.org> (last accessed 22 August 2008) at [38.11].

Other factors in favour of having a right to a quality environment include:

(a) *A specific right would give greater prominence to the environment*:[148] It would help the dialogue and make it more personal by giving it a "human" face.[149] Without relating it back to people, "the environment" can, contrary to the words of the ICJ,[150] seem something of an abstraction. The importance of winning the hearts and minds of people and thus of the role of rhetoric in protecting the environment cannot be overemphasised. Such a right would also provide a focus on the rights of indigenous peoples and recognise the importance of the environment for such peoples, culturally, spiritually and economically.[151]

(b) *A specific right would address the needs of the vulnerable more clearly*:[152] The poor and the developing nations are more at risk from environmental degradation.[153] Having a right to a quality environment

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[147] See Shelton *Remedies in International Human Rights Law* at 1 where the author stated that despite "revolutionary advances … human rights law has yet to develop a coherent theory or consistent practice of remedies for victims of human rights violations."

[148] Professor Marks suggests that the value of the right to development lies primarily in its rhetorical force – see Marks "Human Right to Development: Between Rhetoric and Reality" (2004) 17 Harv Hum Rts J 137 at 156. The United Nations Development Programme *Human Rights and Human Development* 2000 <http://www.undp.org> (last accessed 21 August 2008) recognised at 22 that, since the process of human development often involves great struggle, the empowerment involved in the language of claims can be of great practical importance. Similar comments can be made about any right to the environment. Anderson says that the power of an explicit environmental right lies in its ability to trump individual greed and short-term thinking – see Anderson, in Boyle and Anderson 1 at 21. He also suggests, at 22, that it may stimulate political activism in the environmental area and provide a rallying ground for NGOs.

[149] Australian Human Rights and Equal Opportunity Commission (HREOC) *Human Rights and Climate Change: Background Paper* (2008) <http://www.humanrights.govt.au> (last accessed 13 August 2008) at 12 (*HREOC Climate Change Paper*).

[150] See the comments in the *Nuclear Weapons* case at 241 quoted above.

[151] See principles 13 and 14 of the 1994 Draft Principles. Declaration on the Rights of Indigenous Peoples UN Doc A/RES/61/295 (2 October 2007) art 25. International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 (ILO Convention (No. 169)). Agenda 21 chapter 26 "Recognizing and Strengthening the Role of Indigenous People and Their Communities" also focuses on participation rights of indigenous peoples.

[152] The 1994 Draft Principles required special attention to be given to vulnerable persons and groups – see principle 25.

[153] Dupont and Pearman *Heating Up the Planet: Climate Change and Security* Lowy Institute Paper 12 (2006) at 27; World Bank *Not if but when: Adapting to natural hazards in the Pacific Islands Region A Policy Note* (2006) <http://www.web.worldbank.org> (last accessed 18 August 2008); Scott (Overseas Development Institute) *Chronic Poverty and the Environment: a Vulnerability Perspective* CPRC Working Paper 62 (2006) <http://www.chronicpoverty.org> (last accessed 18 August 2008) (*Chronic Poverty and the Environment: a Vulnerability Perspective*) and United Nations Development

would concentrate attention on their plight. However, it would at the same time be necessary to ensure that any environmental protection measures that were taken were not unduly onerous on those who could afford it least, both between and within States.[154] Between States, this is encapsulated in the principle of common but differentiated responsibility.[155] The underlying rationale for this principle was expressed by Dr French as recognising the historical responsibility of developed countries for current environmental degradation; recognising the respective capacities of developing and developed worlds to remedy problems; taking into account specific needs and circumstances of developing worlds and emerging principles regarding the need for States to assist each other to achieve a sustainable environment.[156]

(c) *It would empower participants to participate in decisions affecting the environment*: Participation and information rights were an important part of the 1994 Draft Principles, Agenda 21 and also the 2002 principles set out in the United Nations Experts' Report.[157] Increased participation would encourage transparency and accountability in policy decisions. Further, serious damage to the environment is often

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Programme Human Development Report 2007/2008 *Fighting climate change: Human solidarity in a divided world: Links between Natural Disasters, Humanitarian Assistance and Disaster Risk Reduction – a Critical Perspective* Human Development Report Office Occasional Paper <http://www.undp.org> (last accessed 18 August 2008) (Human Development Report *Human solidarity)*.

[154] HREOC in their Climate Change Paper pointed out (at 14 – 15) that adaptation measures to respond to climate change are likely to exacerbate already existing social disparities of vulnerable groups. For instance, the pricing of carbon into energy will mean that costs will rise and, as the magnitude and frequency of natural disasters increases, the cost of insurance and infrastructure will increase. HREOC also comments that the effects of climate change in the Pacific will be disproportionate and affect those who contributed least to global warming the most.

[155] The Rio Declaration recognised the concept of "common but differentiated responsibility" in principle seven. Developed countries acknowledged "the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

[156] French "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" (2000) 49 ICLQ 35 at 46. There is also a focus on capacity building for developing countries – see Mauritius Strategy at [6].

[157] See *2002 Experts' Report* at [18] where the recommendations expressed the need to: increase public awareness regarding environmental protection especially in the corporate sector; ensure greater certainty and consistency at the national and international levels respecting procedural (participatory) rights by adopting new mechanisms to implement principle ten of the Rio Declaration, facilitating rights to information, effective participation in decision-making and access to justice and other

linked to repression of affected groups and denial of access to information.[158] On the other hand, procedural rights alone may not suffice. Without being attached to an explicit right to environment, participation rights may exist in somewhat of a vacuum.[159]

(d) *It would allow the environment to be balanced as a separate right against other rights, rather than being isolated in its own legal framework*: For example, it would allow a proper rights-based balancing of the relationship between biofuels and food supply.[160] It would also give it some priority over non-rights-based objectives.

(e) *Having a separate right would also allow the environment right to be balanced explicitly and properly against the right to sustainable development*: In my view, it is better to have two separate rights (ie both sustainable development and the environment) and then weigh them against one another when they are apparently in conflict. This allows a proper focus on the environment for its own sake as well as on its relationship with human development. Given that the concentration must be on long term sustainable development in any development right, this should mean that the two rights are not often in conflict. Two separate rights, however, enable any residual conflicts to be identified rather than masked.[161]

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remedies in national and international fora; and create greater awareness of the need to avoid merely pro forma provisions on participation. See also the Aarhus Convention.

[158] See discussion by Anderson, in Boyle and Anderson 1 at 5.

[159] Participation rights may still result in a concentration on the short rather than long term. Anderson, in Boyle and Anderson 1 at 10 says that democracies may even be structurally predisposed to unfettered consumption. See also *APF Background Paper on Environment* at 52.

[160] Concentration on biofuels may mean that the world's food supply will be at risk. This will obviously have more of an impact on those in developing nations than on those in developed nations. See Asia Pacific Forum Newsletter "Food Shortages a 'silent tsunami'" (May 2008) <http://www.asiapacificforum.net> (last accessed 18 August 2008). At the Food and Agriculture Organization of the United Nations the Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy 2008 was made – see <http://www.fao.org>. This Declaration linked the right to food to sustainable development – see at [7(f)].

[161] The aim of a stand alone environment right must be to preserve the environment, both for its own sake and for the long term development of current and future generations. That is not such a clear cut focus of a development right, even couched as a sustainable development right, hence the possible conflict.

For those who still need convincing of the need for a right to environment, I refer to the following data:[162]

(a) Worldwide, 13 million deaths (23 per cent of all deaths) could be prevented each year by making our environment healthier.[163]

(b) For children under fourteen, over one third (36 per cent) of all disease is caused by an environmental factor such as unsafe water or air pollution. There are more than four million environmentally caused deaths of children each year.[164]

(c) Better environmental management could prevent 42 per cent of deaths from malaria,[165] 41 per cent of deaths from lower respiratory infections[166] and 94 per cent of deaths from diarrhoeal disease.[167] These are three of the world's biggest childhood killers.

(d) The overall economic benefits of halving the proportion of people without sustainable access to safe drinking water by 2015 (one of the Millennium Development Goals) would outweigh the investment costs by a ratio of 8:1.[168]

Suggested content of the right

In 1985, LAWASIA initiated a programme to encourage the development of a regional human rights body in the Pacific. A seminar was held in Fiji in April 1985 and a drafting committee appointed to produce a draft Charter. This was duly produced and consultation on the draft took place at a number of other seminars. A final draft was produced in 1990.[169] The initiative did not progress further, however,

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[162] World Health Organisation *Preventing Disease through Healthy Environments: Towards an Estimate of the Environmental Burden of Disease* (2006) <http://www.who.int> (last accessed 18 August 2008) (WHO Report).
[163] WHO Report at 82.
[164] WHO Report at 6, 9 and 82.
[165] WHO Report at 10.
[166] In developing countries. The figure is 20 per cent in developed countries – see WHO Report at 9.
[167] See WHO Report at 9.
[168] WHO Report at 67.
[169] "Appendix 1: Report on a proposed Pacific Charter of Human Rights prepared under the auspices of LAWASIA, May 1989" (1992) 22(3) VUWLR Monograph 4 at 99.

largely due to it not being seen as a priority by governments in the region. Given the amount of work that was done on the draft Charter, it is reasonable, however, to assume that it may provide a base for any Pacific Charter that might now be considered.

The draft Charter included a right to development as well as a right to environment. Article 22 contained the development right: [170]

> *Article 22 Right to Economic, Social and Cultural Development*
>
> 1 All peoples 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 humankind.
>
> 2 Parties shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The environment right was in art 24:[171]

> *Article 24 Right to a Safe Environment*
>
> All peoples shall have the right to a clean, healthful and safe environment favourable to their development.

In my view, the draft environment article suffers from a number of defects. It defines the right to environment in terms of human needs, rather than also for its own sake.[172] Further, it links the environment right to that of development, which is already a separate right in the draft Charter. This makes it impossible to balance the environment for its own sake against the right to development.

Both the right to development and the right to an environment in the draft Charter could be improved by explicitly recognising inter-generational equity. Indeed, art 22 would be improved by being expressed in the modern way as a right to sustainable

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[170] This article was taken directly from the African Charter.

[171] Art 24 of the African Charter "All peoples shall have the right to a general satisfactory environment favorable to their development." The words chosen for the draft Pacific Charter (as against those in the African Charter) were chosen because they were thought clearer. The addition of the word safe was borne out of the Bhopal disaster and the experience in the Pacific of nuclear testing.

[172] This is not to suggest that it is inappropriate to relate the right to human needs. That is one of the reasons for having it as a right – so people can relate to it. The human needs must, however, be balanced with express recognition of the right to biodiversity and a balanced ecosystem.

development.[173] I also think the rights in both arts 22 and 24 should be expanded to apply not only to peoples but also to communities and individuals and, perhaps even to families, given the importance of kinship in the Pacific. The explicit recognition of the relationship with land and resources of indigenous peoples and their rights in relation to the environment would also be essential, as would the recognition and protection of the rights of minorities.

The draft art 24 also does not explicitly contain a duty for individual and collective action to protect, promote and improve the environment.[174] It is true that there are, in the draft Charter, specific provisions related to duties of individuals, expanding on the notion of personal responsibility contained in art 29 of UDHR,[175] but these are not specifically directed towards the environment nor, indeed, towards the promotion and protection of any of the other Charter rights. Neither do they place obligations on communities and businesses. Draft arts 27 – 29 provide:

> *Article 27 Duties Towards Family, Society and Communities*
>
> 1 Individuals shall have duties towards their families and society, the Parties and other legally recognized communities and the regional and international community.
>
> 2 Individuals shall exercise their rights and freedoms with due regard to the rights of others, collective security, morality and common interest.
>
> *Article 28 Duty to Respect Other Individuals Without Discrimination*
>
> Individuals shall have the duty to respect and consider their fellow beings without discrimination, and to develop and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.
>
> *Article 29 Certain Specific Duties of Individuals*

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[173] Rio Declaration principle three states that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

[174] There needs to be some care with the concept of improving the environment. It should certainly, as noted earlier, include remedying environmental degradation. It should also include improvements in terms of better sanitation for example but any such measures need to limit any resulting damage to the environment. It must also recognise the need to preserve biodiversity and a balanced ecosystem – ie the protection of the environment and flora and fauna for their own sake. The other limbs of "protect and promote" must always be given at least equal, if not greater, weight.

[175] Art 29 of the UDHR states that "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

> Individuals shall have the duty:
>
> 1 To preserve the harmonious development of the family and to work for its cohesion and respect.
>
> 2 To work to the best of their abilities and competence, to use their skills and abilities for the betterment of their communities, and to pay taxes imposed by law in accordance with their means in the interests of society.
>
> 3 To preserve and strengthen positive Pacific cultural values in their relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the well-being of society.

These should be expanded to deal specifically with the duty on individuals, families and communities and (in particular) businesses to promote, respect, preserve, protect and fulfil all of the rights in the Charter (and in particular the environmental right). The other issue that it would be essential to deal with in any Charter would be participation and procedural rights with regard to decisions relating to the environment.[176] Procedural rights include: the right to information concerning the environment,[177] including all information necessary to enable effective public participation in environmental decision-making,[178] and the right to participate in planning and decision-making activities (this includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions).[179] Participation rights are of prime importance in the context of

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[176] Ksentini Report at [70]. Principle ten of the Rio Declaration provides that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Principle 20 deals with participation of women and principle 22 on participation of indigenous peoples. Procedural rights are "fundamental to the ability of people to protect themselves from environmental harms." – see *APF Final Report on Environment* at 15. The ACJ stated that procedural rights must be available to all people without discrimination; the subject matter and scope of procedural rights should be construed expansively; procedural rights should be accessible and effective and must be consistently enforced; if procedural rights are refused by the State reasons should be provided; to the degree possible, States should provide the necessary resources to ensure that environmental procedural rights are implemented and enforced – see *APF Final Report on Environment* at 56 - 57.

[177] Art 15 of the 1994 Draft Principles. Art 9(1) of the draft Charter sets out a general right to receive information and the right to "express and disseminate their opinions". The ICCPR in art 19(2) in comparison gives the right to "receive and impart" information.

[178] Art 15 of the 1994 Draft Principles

[179] Art 18 of the 1994 Draft Principles. Art 13(4) of the draft Charter provides for the right to participate effectively in decision-making affecting the citizen in relation to economic and social development in the country. There is no equivalent to art 13(4) of the draft Charter in the ICCPR. Art 13(1) provides a right to participate freely in the government of their country, either directly or through freely chosen representatives. This mirrors art 25(a) of the ICCPR.

environmental rights and must include the right to judicial or administrative remedies for environmental harm or threat of such harm.[180]

Many of these procedural rights are covered in a general manner in the draft Charter but it would be preferable for there to be procedural rights in the draft Charter targeted towards environmental rights, given the importance of procedural rights to securing any such substantive rights. Furthermore the participation rights of indigenous peoples and minorities ought to be dealt with specifically in the Charter.[181] There is also no specific remedies clause in the draft Charter, and this is a major shortcoming, which ought to be remedied, at least in the environmental area.

As noted above, the ACJ considered in its final report on human rights and the environment whether any additional value would be gained from having a specific right to environment.[182] The ACJ concluded that it would. The content of the right to environment as devised by the ACJ provides some answers to the criticisms relating to the draft Charter. The ACJ recommended that any definition of a human right to environmental quality must address:[183]

> The right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity.

This definition of the right acknowledges several elements which were lacking in the draft Charter: the focus not only on individuals but on communities and peoples, the inclusion of the intrinsic value of the environment for its own sake and also the notion of guardianship and the need to preserve the environment for future generations. The ACJ also suggested that individuals, communities and non-State actors ought to have the right to full information about environmental issues, the right to participate in decision-making and the right of access to remedies.[184] This covers all the procedural rights set out in the 1994 Draft Principles and the 2002 recommendations of the United Nations Meeting of Experts.

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[180] Art 20 of the 1994 Draft Principles. Art 7 of the draft Charter relates to access to justice rights. There is no specific remedies clause in the draft Charter. This is a major shortcoming.
[181] See the Aarhus Convention on participation rights and see *APF Final Report on Environment* at 15.
[182] *APF Final Report on Environment* at 35.
[183] *APF Final Report on Environment* at 38.
[184] *APF Final Report on Environment* at 38.

I now move to a discussion of a number of specific topics of particular concern or interest in the Pacific, starting with climate change.

Climate change

Climate change is a function of global warming, which is in turn related to greenhouse gases. Greenhouse gases, including water vapour, carbon dioxide, nitrous oxide, chlorofluorocarbons, ozone and methane, allow the sun's energy through to the earth's surface but, instead of allowing the radiation to be retransmitted out to space, they absorb thermal radiation.[185] The process occurs naturally, causing a warming of the atmosphere and allowing sufficient heat to be retained to sustain current life on Earth.[186] However, the theory is that the rate of increase in temperature is being exacerbated by human-induced increases in greenhouse gases.[187] In turn, this is causing changes in the world's climate.

The Intergovernmental Panel on Climate Change (IPCC),[188] in its 2007 Report, assessed the probability that human activities are causing global warming as very likely (over 90 per cent likelihood). The Panel also found that the rate of warming was almost twice as fast in the last 50 years as in the last 100 years, with the warmest 11 years since 1850 experienced in the last 12 years.[189] It projects that the world's average temperature could in future rise by 0.2ºC per decade.[190] Further, sea levels rose more from 1993 to 2003 than in the previous 30 years.[191] Emissions of carbon dioxide, seen as the main cause of global warming, have increased annually between

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[185] New Zealand National Institute of Water and Atmospheric Research (NIWA) *Climate Change, Global Warming and Greenhouse Gases* <http://www.niwa.cri.nz> (last accessed 18 August 2008).
[186] NIWA *Climate Change, Global Warming and Greenhouse Gases*.
[187] The Intergovernmental Panel Climate Change Fourth Assessment Report *Climate Change 2007 Synthesis Report: An Assessment of the Intergovernmental Panel on Climate Change* <http://www.ipcc.ch> (last accessed 18 August 2008) (*IPCC Fourth Assessment Report 2007*).
[188] The *IPCC Fourth Assessment Report 2007* is based on the work of some 2,400 scientists and 193 member governments of the IPCC – see Annex V to the *IPCC Fourth Assessment Report 2007*.
[189] *IPCC Fourth Assessment Report 2007* at [1.1].
[190] *IPCC Fourth Assessment Report 2007* at [3.2]. The *Stern Review on the Economics of Climate Change* states that, if pre-industrial levels of greenhouse gases are doubled, the mean global temperature of the Earth will rise between 2 - 5ºC. The Report states that this level of greenhouse gases is likely to be reached between 2030 and 2060 if no action is taken to reduce emissions. It also states that several new studies suggest up to a 20 per cent likelihood that the increase in temperature will exceed 5ºC. The *Stern Review* was commissioned by the British government. It released a 700 page report on 20 October 2006 – see <http://www.hm-treasury.gov.uk> (last accessed 19 August 2008) (*Stern Review*). Sir Nicholas Stern is Head of the Government Economic Service and Adviser to the Government on the economics of climate change and development.
[191] *IPCC Fourth Assessment Report 2007* at [1.1].

1970 and 2004 by 80 per cent.[192] These emissions come mainly from burning fossil fuels[193] and deforestation.[194] There have also been significant increases in other greenhouse gas emissions such as methane and nitrous oxide.[195]

There does seem to be consensus that the Earth's average temperature is increasing but some still argue that this is part of a natural cycle rather than being related to human-induced increases in greenhouse gases.[196] I think it is fair to say that those who believe in the natural cycle theory are becoming more and more isolated in the scientific community.[197] Whether it is a natural cycle or not, however, the Pacific will have to deal with the effects and so, to a degree, the debate as to cause is irrelevant, except that, if it is a natural cycle, the outlook may be more bleak because if the cause is human-induced there at least remains a prospect of reducing greenhouse gas emissions.

Effects

The projected effects of climate change[198] that are of particular relevance to the Pacific (in no particular order) include:

- It is projected that there will be changes in rainfall patterns.[199] This in turn will affect food supply and drinking water, which is already an issue in a number of Pacific Island nations. While earlier reports were that rainfall would increase in Pacific Island States, it is now thought that it is

[192] *IPCC Fourth Assessment Report 2007* at [2.1].
[193] See *Stern Review* at [1.2].
[194] *IPCC Fourth Assessment Report 2007* at Figure [2.1].
[195] *IPCC Fourth Assessment Report 2007* at Figure [2.3]. Emissions of ozone depleting substances have declined significantly, however, due to the Montreal Protocol on Substances that Deplete the Ozone Layer 1987, 1522 UNTS 28.
[196] See Sunstein *Worst Case Scenarios* (2007) at 182 and 218.
[197] IPCC Third Assessment Report *Change Climate Change 2001: Synthesis Report Summary for Policymakers* <http://www.ipcc.ch> (last accessed 21 April 2008) at 31 (*IPCC Third Assessment Report 2001*). It was stated that it is now "virtually certain" that increasing carbon dioxide concentrations over the twenty-first century are mainly due to fossil fuel emissions. "Virtually certain" means greater than 99 per cent chance that the statement is true – see page 5 of the report.
[198] Of course there is also debate as to likely effects and the severity of these.
[199] Increases in temperature cause changes in rainfall because warmer air retains more moisture. Also the uneven increase in temperature due to climate change around the globe will result in changes in weather patterns – see *Stern Review* at [1.5].

likely to decrease (at least in summer).[200] It is also thought that there will be a change in the pattern of rainfall.[201] This will mean more floods in the wet season and drought in the dry season.

- Storms and extreme weather patterns such as cyclones are already occurring increasingly and with greater ferocity.[202] This is obviously an issue for the Pacific given the economic and social cost of those disasters, including threats to food supplies.

- It is projected that global warming will lead to a rise in sea level. Glacial ice melting in Greenland and of the ice sheets in Antarctica[203] will contribute to this rise. The IPCC predicts that there could be a rise in sea

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[200] In 2001, in Mimura and others, "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* Contribution of the Working Group II to the Fourth Assessment Report to the IPCC Cambridge University <http://www.ipcc.ch> (last accessed 21 April 2008) at 845 ("Small Islands" in *Climate Change 2007: Impacts Adaptation and Vulnerability*) an increase in rainfall in the 2050s of 0.3 per cent and 0.7 per cent for the 2080s was predicted in the Pacific. By contrast, in 2007 reductions in summer rainfall in the Pacific were forecast – "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 689. The IPCC in 2007 stated that under most climate change scenarios, water resources in small islands are likely to be seriously compromised as many islands already have limited water resources and will be harmed if rainfall reduces. Turning to Australia and New Zealand, it is predicted that regional decreases in rainfall in south-west and inland Australia and eastern New Zealand are likely to make agricultural activities particularly vulnerable – see Hennessy and Fitzharris and others "Australia and New Zealand" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* Contribution of the Working Group II to the Fourth Assessment Report to the IPCC Cambridge University <http://www.ipcc.ch> (last accessed 19 August 2008). In Australia changes in rainfall patterns are thought likely to cause up to 20 per cent more droughts by 2030 and up to 80 per cent more droughts by 2070 in South Western Australia – see *HREOC Climate Change Paper* at 56. Friends of the Earth International predict that, as a result of climate change, more than 100,000 people in northern Aboriginal communities will face serious health risks from malaria, dengue fever, and heat stress, as well as loss of food sources from floods, drought and more intense bushfires – see *HREOC Climate Change Paper* at 7.

[201] The change in pattern of rainfall is not thought to be dramatic (an increase or decrease of approximately ten per cent) but where islands are struggling with scarce water resources a decrease of ten per cent may be of major significance: "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 694.

[202] Based on a range of models, it is likely that future tropical cyclones (typhoons and hurricanes) will become more intense, with larger peak wind speeds and more heavy precipitation associated with ongoing increases of tropical sea-surface temperatures – see *IPCC Fourth Assessment Report 2007* at 46. Since 1950, natural disasters have directly affected more than 3.4 million people and led to more than 1,700 reported deaths in the Pacific region (excluding Papua New Guinea). Ten of the 15 most extreme events reported over the last half century occurred in the last 15 years. The number of hurricane-strength cyclones in the Southwest Pacific has also increased to a current average of four events a year. Significant wave heights of recent cyclones have exceeded even climate change model predictions. Cyclones are expected to increase in intensity by about 5–20 per cent by the end of the century. See *Not if but when: Adapting to natural hazards in the Pacific Islands Region* at viii and 6 .

[203] In January British researchers found annual ice loss in Antarctica had increased by almost 80 billion tonnes in a decade – see Easton "Antarctica has warmed before" Dominion Post New Zealand (13 May 2008) at 1.

level of between 18 and 59 cm.[204] Sea-level rises could significantly reduce land surface of many South Pacific islands[205] and there is a real prospect of a loss of islands or parts of islands in Kiribati,[206] Tuvalu, Marshall Islands, Tonga and Papua New Guinea,[207] (and maybe the loss of the whole of the territory of some countries). The highest point in Tuvalu for instance is less than three metres above sea level.[208] An island may, of course become uninhabitable before the total submergence of the island, as the island may no longer sustain the population due (for example) to damage to reefs, the consequential depletion of fishing stocks, and fresh water supplies being contaminated by salt water.[209] The submergence or destruction of a geographical landmass due to climate

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[204] *IPCC Fourth Assessment Report 2007* at Table [3.1] (or in imperial terms 7 – 23 inches).

[205] The report on "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 696 and 855 – 856 predicted that with a one-metre rise in sea level, 10.3km² of the land in the Tongatapu island in Tonga would be lost. Yap Island in the Federated States of Micronesia is predicted to lose nine to 96 metres if the sea level rises one metre and on Majuro Atoll, in the Marshall Islands, land loss is expected to reach nearly 65 hectares of dry land from a one metre rise in sea level. Furthermore in some islands in Fiji the coasts have retreated by more than 30 metres in the past 70 years. It is also estimated that up to 8,000 Torres Strait Islanders (Islands situated off the coast of Australia) could lose their homes if sea levels rise by one metre – see *HREOC Climate Change Paper* at 7 - 8.

[206] The engulfment in 1999 of Tebua Tarawa and Abanuea, two uninhabited islands on Kiribati, was a siren sounding the charge of climatic change – see Jacobs "Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice" (2005) 14 Pac Rim L & Pol'y J 103 at 104.

[207] I refer to the short Greenpeace video about the Carterets, an atoll of the Autonomous Region of Bougainville, Papua New Guinea. This illustrates quite starkly the human effects of rising oceans – see *Islands Going Under* <http://www.greenpeace.org> (last accessed 19 August 2008). Looking at that video brings it home that climate change is a very real threat to real people trying to retain their traditional way of life. I note that they are projected to start evacuation of the Carterets in 2008 – "Papua New Guinea: The World's First Climate Change 'Refugees'" Worldpress.org (11 June 2008) and Working Group on Climate change and Development *Up in smoke? Asia and the Pacific: The threat from climate change to human development and the environment (fifth report)* (2007) <http://www.iied.org> (last accessed 19 August 2008) at 84 (*Up in smoke? Asia and the Pacific*).

[208] Asian Development Bank *Tiny Tuvalu Fights for Survival* (2007) <http://www.adb.org> (last accessed 19 August 2008).

[209] Warnock "Small Island Developing States of the Pacific and Climate Change: Adaptation and Alternatives (2007) 4 NZYIL 245 at 264 (Warnock) (Referring to speech of Hon Issac V Figir (Federated States of Micronesia) (Berlin 30 March) COP 11 reprinted in Climate Change Secretariat (UNFCCC) *Climate Change: Small Island Developing States* (2005) <http://www.unfccc.int> (last accessed 21 August 2008) at 24 where the Hon Issac V Figir said "I have no doubt that at current levels of emissions of greenhouse gases (or even at levels where there is only a nominal decrease in the level of emissions of greenhouse gases) submergence is a possibility. The primary point is, however, that a long, long time before that point is reached, our reefs could be dead, our fishes fleeing, our groundwater completely salinated, our food crops depleted and our islands made inhabitable. Needless to say, our economies destroyed." – see <http://www.unfccc.int> (last accessed 19 August 2008).

change will not only result in the loss of landmass but may also result in the loss of culture and history.[210]

- The mangrove loss due to sea level rises is predicted to be up to 50 per cent on some islands.[211] Many commercially important fish species breed and raise their young among mangrove roots. Mangroves are also sources of timber and medicines for local communities and protect shorelines from storms and tidal surges.[212]

- The warmer temperatures, increased nutrient loading and chemical pollution, damage from tropical cyclones and increased carbon dioxide concentrations will result in lower growth of coral and coral bleaching.[213] Coral bleaching makes coral more vulnerable to disease. Coral reefs may comprise less than 0.5 per cent of the ocean floor, but it is estimated that more than 90 per cent of marine species are directly or indirectly dependent on coral reefs.[214] The coral reefs in the Pacific also provide economic, cultural and social benefits (including food, pharmaceuticals and tourism), as well as providing protection to islands from the effects of cyclones. Coral reefs absorb as much as 90 per cent of the impact of wind-generated waves which protect islands from weathering.[215]

- The rising temperatures of the ocean will have an effect on fish stocks. Despite the clear need to protect the marine species of the Pacific, the United Nations Environment Programme has reported a reduction in fish stocks due to pollution, over-fishing, destruction of habitats (including

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[210] Warnock at 265.
[211] In "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 696, it is predicted that islands such as American Samoa are likely to experience a 50 per cent loss in mangrove area due to sea level rise and that there will be a 12 per cent reduction in mangrove areas in 15 other Pacific islands.
[212] *Up in smoke? Asia and the Pacific* at 82.
[213] "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 689. IPCC predictions for a temperature increase above 2°C means it is also highly likely that Australia's Great Barrier Reef will suffer severe coral bleaching – see *Up in smoke? Asia and the Pacific* at 35.
[214] United Nations Environment Programme *World Environment Day: Wanted! Seas and Oceans: Dead or Alive? Fifty Key Facts about Seas and Oceans* <http://www.unep.org> (last accessed 19 August 2008) at [19].
[215] Sylvan "How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea" (2006) 7 Sustainable Dev L & Pol'y 32.

coral reefs),[216] declining transboundary marine species and climate change.[217]

- There will be a rise in salination of water and soil. This will affect water supplies and the ability to grow food.[218] Water access and management issues include: scarcity, storage of water, water pollution and "saline intrusion" which may be heightened by sea level rise.[219] Further, environmental degradation has resulted in poor water quality, and, for more vulnerable populations, in reduced access to safe drinking water such as Fiji, Kiribati, Papua New Guinea and Vanuatu.[220]

- Global warming will cause a decline in biodiversity. Approximately 20 to 30 per cent of plant and animal species assessed by the United Nations Framework Convention on Climate Change (UNFCCC) Secretariat are likely to have an increased risk of extinction if the global temperature increases more than 1.5 – 2.5ºC.[221]

- It is also predicted that global warming will lead to an increasing prevalence of tropical or sub-tropical disease and change the distribution of disease vectors.[222] This would have obvious implications for Pacific Island health services.

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[216] Due to loss of coral reefs many smaller fish species will be threatened which will have flow-on effects up the food-chain to apex predators – "Small Islands" in *Climate Change 2007: Impacts, Adaptation and Vulnerability* at 689.

[217] United Nations Economic and Social Commission for Asia and the Pacific *State of the Environment in Asia and the Pacific 2005: Economic Growth and Sustainability* <www.unescap.org> (last accessed 5 April 2008) at 252 (ESCAP Report).

[218] Gillespie "Small Island States in the Face of Climatic Change: the End of the Line in International Environmental Responsibility" (2003/2004) 22 UCLA J Envtl L & Pol'y 107 at 114. See also Barnett "Food security and climate change in the South Pacific" (2007) Pacific Ecologist 32.

[219] United Nations *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States* UN Doc A/CONF.207/11 (10 – 14 January 2005) at [33] (*UN Report of Meeting for Implementation of Programme for Action for SIDS*).

[220] Kiribati, Papua New Guinea and Vanuatu have the highest unmet need for safe water – see ESCAP Report at 251.

[221] *IPCC Fourth Assessment Report 2007* at [3.3.1].

[222] It is predicted, for example, that Fiji could experience an increase in dengue fever cases of between 20–30 per cent. Further, outbreaks of cholera have been associated with inadequate water supplies during El Niño events in certain Pacific Island States – see *Up In Smoke? Asia and the Pacific* at 84. Globally it is predicted that 200 – 400 million more people could be at increased risk of malaria – see

- An indirect effect of climate change could be major threats to security and stability in the region as the economic and social effects of climate change are felt.[223]

Negative impacts of climate change will not occur everywhere or have the same impact even where they do. The extent of any negative impact depends both on exposure to climate change effects and the capacity to adapt. Exposure is partly determined by environmental factors, such as location in low lying areas, but it also depends on population density and infrastructure. The ability to adapt to climate change will, in turn, depend on the society's wealth, education, institutional strength and access to technology. High exposure and low adaptive capacity occur mostly in developing countries,[224] making them very vulnerable to the negative impact of climate change.[225] Most Pacific Island nations come within this group.[226]

It is generally agreed, however, that overall there will be a negative economic impact worldwide. Professor William Nordhaus, a leading economic expert on climate change, has estimated the cost of climate change at $4 trillion.[227] Some challenge this figure as too low because of the discount rate used and/or the fact that it may be based

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United Nations Development Programme Human Development Programme 2007/2008 *Fighting climate change: Human solidarity in a divided world* <http://www.undp.org> (last accessed 19 August 2008) at 10 (Human Development Report *Human solidarity*).

[223] *HREOC Climate Change Paper* at 8. See also German Advisory Council on Global Change *World in Transition: Climate Change as a Security Risk Summary for Policy Makers* (2007) <http://www.wbgu.de> (last accessed 19 August 2008) and Smith and Vivekanando (International Alert) *A Climate of Conflict: The Links Between Climate Change, Peace and War* (2007) <http://www.international-alert.org> (last accessed 19 August 2008) at 44. In that report, the authors identify 46 countries facing a high risk of armed conflict as a consequence of climate change. In the Pacific, the Solomon Islands are on that list. There is also a list of 56 countries facing a high risk of political instability as a consequence of climate change. The authors have Fiji, Kiribati, Papua New Guinea, Tonga, and Vanuatu on that list. I also refer to Dupont and Pearman *Heating up the planet: Climate change and security*.

[224] The effects in those States will also be disproportionately felt by the poor. See *Chronic Poverty and the Environment: A vulnerability perspective*.

[225] *Up in Smoke: Asia and the Pacific* at 21; ESCAP Report at 239; *HREOC Climate Change Paper* at 16 and "Small Island States" in *Climate Change 2001: Impacts Adaptation and Vulnerability* at [16.5.4] and also the Pacific Islands Framework for Action on Climate Change 2006 – 2015 – see SPREP website <http://www.sprep.org> (last accessed 19 August 2008) at II.

[226] The small island developing States in the Pacific are Fiji, Kiribati, Republic of Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. Other small island developing States in the Pacific who are not UN members are American Samoa, Cook Islands, French Polynesia, Guam, New Caledonia and Niue. See United Nations Division for Sustainable Development <http://www.un.org> (last accessed 10 August 2008).

[227] Sunstein at 214.

on wrong assumptions.[228] Other estimates of cost have been much higher. For example, the Stern review in the UK estimated the overall annual cost of climate change to be between five per cent and 20 per cent of global GDP, as compared to a cost of one per cent of GDP to avoid the worst effects.[229]

Response needed

Climate change is one of the more challenging issues for the Pacific as it is not merely a national issue, nor even merely a regional one. It is a global issue which needs a global solution. This has been recognised in the UNFCCC[230] and the Kyoto Protocol.[231] The Kyoto Protocol requires industrialised countries to reduce their emissions to specified targets in the period 2008 – 2012. A core principle of the UNFCCC is to protect the climate system "for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. [232]

Under the UNFCCC commitment, States have undertaken to stabilise greenhouse gas concentrations to prevent dangerous anthropogenic interference with the climate

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[228] Judge Richard Posner would argue that the debate is essentially irrelevant. His concern is with the dangers of abrupt warming (because of very rapid changes in both temperatures and sea levels) the evolution and migration of deadly pests and the possibility of a runaway greenhouse effect through melting tundras. At worst this could lead to catastrophic and irreversible results. Posner's argument is that making emissions cuts now gives flexibility to reduce warming in the future and may drive innovation. The cost of making cuts now is essentially an option fee. See discussion in Sunstein at 205 – 215. Sunstein himself argues for a principle of inter-generational neutrality which requires members of one generation to give equal weight to the interests of those who follow – see at 244 – 274 and 285.

[229] See *Summary of Conclusions of the Stern Review* <http://www.hm-treasury.gov.uk> (last accessed 19 August 2008) at vi. See Peskett "Climate Change and Development: Threat *and* Opportunity" in *Overseas Development Institute Annual Report 2007* <http://www.odi.org.uk> (last accessed 19 August 2008).

[230] United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107 (UNFCCC). The UNFCCC devised a framework for intergovernmental action against climate change. The Convention enjoys near universal membership, with 192 countries having ratified. The Convention obliges governments to set national strategies for reducing greenhouse gas emissions and building adaptive capabilities.

[231] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1998, 37 ILM 22. The Protocol established the first global mechanisms for the trading of carbon credits. It also sets binding targets for 37 industrialized countries and the European Community for reducing greenhouse gas emissions. These amount to an average of five per cent reduction against 1990 levels over the five-year period (2008-2012) – see <http://www.unfccc.int> (last accessed 19 August 2008). Australia, Cook Islands, Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu have all ratified or acceded to the Convention and all the same parties have ratified or acceded to the Protocol.

[232] See *HREOC Climate Change Paper* for measures in Australia at 13 – 14.

system.[233] This obligation has been given a concrete target by the provisions of the Kyoto Protocol, which requires reduction in emissions. No emissions targets have, however, been set for developing nations".[234] There remains a difficulty in mobilising the globe to take urgent and effective action to reduce emissions. One impediment to action may be that those likely to be most affected are not major emitters of greenhouse gases and those countries which are the greatest emitters are not projected to suffer as severely as others.[235]

The latest conference of the parties to the UNFCCC, held in Bali in 2007, resulted in the adoption of the Bali Road Map. This is a collection of decisions on issues that are crucial to achieving a "secure climate future".[236] The Bali Road Map includes the Bali Action Plan, which charts the course for a new negotiating process designed to tackle climate change, with the aim of implementing this by 2009 and creates a shared vision for long term co-operative action.[237] It establishes goals for enhanced national and international action including measurable, reportable and verifiable mitigation commitments and reduction objectives.[238] It recognises the need for consideration of economic and social consequences of response mechanisms and the need to devise ways to encourage multilateral bodies, public and private sectors and civil society to mobilise their resources to mitigate and reduce climate change. It also highlights the need to create positive incentives for reducing emissions from deforestation in developing countries.

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[233] UNFCCC art 2.
[234] UNFCCC art 3.1.
[235] For example the United States and China, two of the most serious sources of greenhouse gases, are not projected to be among the world's largest losers from climate change – see New Zealand Ministry for the Environment "Climate Change: Our Climate is Changing and it is Going to Keep Changing" (2006) Gentle Footprints: Boots 'n' All <http://www.mfe.govt.nz> (last accessed 20 August 2008) at 3. Small islands emit less than one per cent of global greenhouse gases – see "Small Island States" in *Climate Change 2001: Impacts Adaptation and Vulnerability* at 690.
[236] See latest trade talks UNFCCC Bali Action Plan <http://www.unfccc.net> (last accessed 9 April 2008). See United Nations *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Thirteenth Session held in Bali 3 – 15 December 2007 Addendum Action Taken by the Conference of the Parties at its Thirteenth Session* UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008) <http://www.unfccc.int> (last accessed 19 August 2008) (*UNFCCC Bali Report*). There has of course been criticism of this Conference for not going far or fast enough – see for instance Greenpeace "Bali climate talks back from the brink, but missing substance" (15 December 2007) <http://www.greenpeace.org> (last accessed 21 August 2008).
[237] *UNFCCC Bali Report* at [1](a).
[238] *UNFCCC Bali Report* at [1](b).

Some, of course, say it is already too late for remedial measures to halt the effects of climate change so preparation and adaptation is essential. UNFCCC requires the implementation of national and regional adaptation programmes. The Bali Action Plan calls for enhanced adaptation by utilising vulnerability assessments, response strategies and increased capacity-building; taking into account the urgent and immediate needs of developing countries which are particularly vulnerable to the adverse effects of climate change.[239] Other adaptive measures include risk reduction strategies, disaster reduction strategies and economic diversification to build resilience. Another objective of the Plan is to enhance technology development and co-operation between nations and faster transfer of this technology to developing countries.[240]

The marshalling of financial and technical resources is also a priority of the Action Plan. These resources would be used to support action on mitigation, adaptation and technology co-operation, including concessional funding for developing countries.[241] Increased mobilisation of public and private sector funding and investment including climate-friendly investment choices is also supported. Under UNFCCC certain financing mechanisms have been set up to fund adaptation, in particular for developing nations. At the Bali conference, a special Board was set up to supervise the Least Developed Countries Fund.[242] These initiatives are welcome but they need to be carried through with urgency and expanded upon. It is essential that developed States provide urgent economic and technical assistance to other States in need of such help.[243] As stated by Archbishop Desmond Tutu, of South Africa:[244]

> No community with a sense of justice, compassion or respect for basic human rights should accept the current pattern of adaptation. Leaving the world's poor to sink or swim with their own meagre resources in the face of the threat posed by climate change is morally wrong. … We are drifting into a world of 'adaptation apartheid'.

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[239] *UNFCCC Bali Report* at [1](c) – especially the least developed countries and small island developing States.
[240] *UNFCCC Bali Report* at [1](d).
[241] *UNFCCC Bali Report* at [1](e).
[242] See UNFCCC website <http://www.unfccc.int> (last accessed 19 August 2008).
[243] As to the general obligation to provide assistance see the recent article by Gostin and Archer "The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law" (2007) 35 Journal of Law, Medicine and Ethics 526 - 533.
[244] Human Development Report *Human solidarity* at 166.

A strong co-ordinated regional approach is also essential. Action has been taken in the Pacific region through the Pacific Island Framework for Regional Action on Climate Change 2006 – 2015.[245] This framework focuses mostly on increasing the adaptability of the islands to the effects of climate change rather than reducing the greenhouse gas concentrations.[246] In implementing adaptation measures, individual nations and the region as a whole should endeavour to adopt "no regrets" measures, such as planting mangroves to stabilise coastal land. This can go a long way towards reducing vulnerability. Both top down action and community involvement are essential, and any action should be culturally appropriate.[247]

Disaster reduction and relief

Realistically, however, even if there is a major thrust to increasing adaptation measures, climate change will still mean more frequent disasters and there will likely be an increased need for measures to reduce the impact of disasters. In 2005, the United Nations World Conference on Disaster Reduction was held.[248] As a result of

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[245] See SPREP website <http://www.sprep.org> (last accessed 19 August 2008).

[246] Other initiatives include improving understanding of climate change, setting national sustainable development strategies and developing partnerships to combat climate change – see Pacific Island Framework for Regional Action on Climate Change at IV and principle two. One of the goals of the Framework is to reduce greenhouse gas emissions but it is pointed out that the Pacific islands contribute an insignificant amount to greenhouse gas emissions – Framework principle five. See also Sem "Climate Change and Development in Pacific Island Countries" in Powles (ed) *Pacific Futures* (2006) 164 for more general information on climate change in the Pacific.

[247] *Not if but when: Adapting to natural hazards in the Pacific Islands Region* at viii. At 28 of the report a major mangrove replanting programme by the Yadua community (a settlement on low lying land on Vitu Levu) in Fiji, is mentioned. The initial response had been to construct a sea wall but this had repeatedly collapsed. The mangrove solution was more long term but also much more likely to be effective. There are obligations under UNFCCC and the Kyoto to provide assistance (although many would say set at too low a level). See also the recommendations of the United Nations Economic and Social Council *Permanent Forum of Indigenous Issues Report on the Seventh Session (21 April – 2 May 2008)* Official Records Supplement No.23 <http://www.un.org> (last accessed 19 August 2008) at [6].

[248] United Nations *Report of the World Conference on Disaster Reduction* UN Doc A/CONF.206/6 (16 March 2005) at [2] (*Disaster Reduction Conference Report*). Red Cross and Red Crescent have also been instrumental in setting up a framework designed to reduce the risk and impact of disasters and to put in place proper measures to deal with the aftermath of those disasters. The work on this is still in progress and is not couched in terms of binding obligations. The Agenda for Humanitarian Action adopted by the International Conference of the Red Cross and Red Crescent aims to "reduce the risk and impact of disasters and improve preparedness and response mechanisms" by incorporating risk reduction as part of national development plans and poverty reduction strategies – see Red Cross and Red Crescent *Agenda for Humanitarian Action* 28th International Conference (2003) <http://www.icrc.org> (last accessed 21 April 2008) at 21 - 22. Professor Fidler, in "Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law" (2005) 6(2) Melb J Int'l L 458, notes the policy shift away from an attempt to deal with natural disasters through international law and treaties. He sees this as regrettable as it limits the possibility of strategic responses – see at 473.

this conference, the Hyogo Declaration and corresponding Hyogo Framework for Action 2005 - 2015 was adopted.[249] The Hyogo Declaration acknowledged the urgent need to build the capacity of disaster-prone countries such as small island developing States in limiting the impact of disasters by increasing bilateral, regional and international co-operation.[250] The Hyogo Framework sets out a unified, multi-hazard approach to disaster risk management for disaster prone countries such as small island developing States.[251] A gender perspective, as well as plans and policies which consider cultural diversity, age and the vulnerability of certain groups are integrated within the Framework.[252] Most importantly for the Pacific, small island developing States were identified as requiring particular attention due to their vulnerability, which is disproportionate to their ability to respond and rebuild after disasters.[253] The Priorities for Action also note that planning and rebuilding after a disaster provides an opportunity to rebuild in a way that increases resilience and reduces vulnerability to disasters.[254]

There remains the concern that disaster aid continues to concentrate on short-term relief rather than prevention and capacity building. The World Bank has expressed concern that, despite the fact that prevention is more cost effective than short-term disaster relief, there is a perverse incentive not to take preventive measures. This is because donors keep responding generously to immediate disaster relief, whereas funding for prevention is more constrained. A "wait and see" approach will, however, be more expensive and less effective in the long term than immediate preventive action.[255] If effective preventive action were taken this would certainly mitigate the effects of disasters but it will not eliminate totally the need for disaster relief.

Proper planning for disaster reduction and response remains essential, within countries, regionally and internationally. It should certainly be a priority in the Pacific region.

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[249] Hyogo Declaration (Resolution 1) and Hyogo Framework for Action 2005 - 2015 (Resolution 2) UN Doc A/CONF.206/6 (22 January 2005).
[250] Hyogo Declaration at [4].
[251] *Disaster Reduction Conference Report* at 8.
[252] *Disaster Reduction Conference Report* at 10.
[253] *Disaster Reduction Conference Report* at 10.

"Environmental refugees" [256]

During the course of any disaster, there will likely be (at least temporary) displacement of peoples. It also seems unlikely that cuts in emissions and climate change adaptation measures will avert the loss of parts of, and even some entire, islands in the Pacific. This will also obviously result in displacement of peoples. I turn to that topic next.

The extreme case would be where rising sea levels have caused all of the land mass of a State to disappear. This raises the very real question whether statehood would be retained in such a case. The Montevideo Convention on the Rights and Duties of States requires a State to have a permanent population, a defined territory, a government and the capacity to enter into relations with other States.[257] It is unclear what status a State or its citizens would possess at international law or what the scope of the right to self-determination would be if all a State's land mass were permanently lost under the sea. There is some precedent for States who have failed to meet one of the Montevideo criteria such as "effective government" to be regarded as continuing to exist as States.[258] In such cases, some rights, such as the right to non-interference,

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[254] *Disaster Reduction Conference Report* at 10. Hospitals, schools, water and power plants, communication facilities, disaster management sites are to be rebuilt or retrofitted to ensure they are protected as far as possible from hazards – see *Disaster Reduction Conference Report* at 16.

[255] See *Summary of Conclusions of the Stern Review* at vi.

[256] This is in inverted commas because of the uncertainties regarding the status of such persons as refugees. The better term is probably "environmentally displaced persons" but some still prefer the term "refugee" as it emphasises the lack of choice and distinguishes them from economically motivated migrants. In 2004 there were an estimated ten million environmental "refugees" worldwide – see Keane "The Environmental Causes and Consequences of Migration: A Search for the Meaning of 'Environmental Refugees'" (2004) 16 Geo Int'l Envtl L Rev 209. See also Brown *Climate change and forced migration: Observations, projections and implications* Background paper for the 2007 Human Development Report Office Occasional Paper United Nations Development Programme <http://www.undp.org> (last accessed 20 August 2008). In that report it is noted that Professor Myers of Oxford University projects that there will be 200 million climate migrants by 2050 and that this has become the accepted figure. If accurate, this means that one in forty-five persons in the world will have been displaced by climate change – see at 5. See also Myers "Environmental refugees in a globally warmed world" (1993) 43(11) Bioscience 752 and Piguet *Climate change and forced migration* New Issues in Refugee Research United Nations High Commissioner for Refugees (UNHCR), Research Paper 153 (2008) <http://www.unhcr.org> (last accessed 20 August 2008).

[257] *APF Background Paper on Environment* at 46 - 47. Montevideo Convention on the Rights and Duties of States 1933, 165 UNTS 19.

[258] See Brownlie at 71, where the author points out that Poland, Burundi and Rwanda were admitted to membership of the United Nations despite the fact that effective government did not exist. Shaw, at 179, states that Palestinian organisations did not have possession of the territory they claimed.

may be withheld until such time as the missing criterion is satisfied.[259] It is unclear how this would apply if all the defined territory of a State disappeared.

Moving to the plight of those who are displaced, the first question is whether such "environmental refugees" fall within the Convention Relating to the Status of Refugees (Refugee Convention).[260] The short answer is probably not, except in very unusual circumstances.[261] There have been some suggestions that the definition of "refugee" under the Convention ought to be changed to include environmentally displaced persons but this is probably not likely to occur in the short term.[262] In any event, the framework of the Refugee Convention, requires that the person be outside his or her country of origin and most rights under the Refugee Convention only inhere once a refugee is lawfully present in an asylum country.[263] This is not likely to be well suited to environmentally displaced persons.

Even if such displaced persons do not fall within the Refugee Convention, however, the sheer scale of possible displacement may force some other international solution. It would certainly be better if this could be properly planned in advance of a disaster scenario. The first priority must be to protect from displacement but, if unsuccessful,

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[259] See Brownlie at 71.

[260] Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

[261] An example of where individuals affected by environmental damage may fall within the Convention definition is the destruction of the marshes in southern Iraq in the early 1990s. This is often portrayed as a race-related campaign against the Marsh Arabs who were unwilling to support Saddam Hussein. For further discussion, see *APF Background Paper on Environment* at 48. See also Keane at 215 where he concludes that an environmental refugee does not fall within the Convention grounds and Black *Environmental refugees: myth or reality?* New Issues in Refugee Research Working Paper No. 34 provided for UNHCR <http://www.unhcr.org> (last accessed 19 August 2008) at 11. Aminzadeh "A Moral Imperative: the Human Rights Implications of Climate Change" (2007) 30 Hastings Int'l & Comp L Rev 231 at 257. Kozoll "Poisoning the Well: Persecution, the Environment, and Refugee Status" (2004) 15(2) Colo J Int'l Envtl L & Pol'y 271 at 279. Lopez "The Protection of Environmentally-Displaced Persons in International Law" (2007) 37 Envtl L 365. Harvard "Seeking Protection: Recognition of Environmentally Displaced Persons Under International Human Rights Law" (2007) 18 Vill Envt L J 65 at 75.

[262] Warnock at 269 - 274 and Keane at 215 who suggests that the Refugee Convention should be brought into line with the right to seek safety in art 14 of the UDHR; and Black at 11. See also the Cartagena Declaration on Refugees 1984 which noted at [3] the need to "consider enlarging the concept of a refugee" to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order". The Cartagena Declaration was adopted by a group of governmental experts and eminent jurists from the Central American region. It focused on the legal and humanitarian problems affecting Central American refugees. I also refer to Conisbee and Simms *Environmental Refugees: The Case for Recognition* New Economics Foundation (2003) <http://www.neweconomics.org> (last accessed 20 August 2008).

there must be plans for relocation in a way that does least damage to the way of life of displaced persons. There are significant issues that arise in any relocation to another country. These include risks of loss of culture and language and the traditional way of life, which is likely to be difficult to duplicate elsewhere.

Such issues will arise even with displacement within a State. In this regard, I refer to the United Nations Guiding Principles on Internal Displacement.[264] These principles cover the displacement of people as a result of natural or man-made disasters and include provisions relating to non-discrimination, ensuring that those displaced have the ability to earn their living and a guarantee of their right to culture.[265] The reality, however, is that, in a disaster scenario, the country itself is likely to be under major pressure. This applies in particular to small developing States. Even if generous aid is available, it may nevertheless not be of sufficient magnitude to deal properly with displaced persons.

In the Pacific region, whether all or only part of the land mass of any nation disappears, the reality is that there could be a large number of displaced persons and the capacity of their countries to accommodate them may be limited. Countries such as New Zealand and Australia[266] may find themselves as the focus of the hopes for a place to re-settle for those displaced in the Pacific by climate change.[267] A regional plan, made well in advance, to deal with displacement issues is clearly needed.

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[263] Hathaway *The Law of Refugee Status* (1991) at 29 and Hathaway *The Rights of Refugees Under International Law* (2005) at 160 - 161.

[264] United Nations Guiding Principles on Internal Displacement UN Doc E/CN.4/1998/53/Add.2 (17 April 1998).

[265] The *HREOC Climate Change Paper* at 14 also points to other human rights standards that should be met. For example, reference is made to the World Health Organisation paper (Howard and Bartram) *Domestic Water Quantity, Service Level and Health: Executive Summary* (2003) WHO/SDE/WSH/03.02 at 3 which states that the minimum daily requirement of fresh water per person is 7.5 litres.

[266] The current Australian government, when in opposition, developed a policy discussion document on climate change proposing, among other things, a more effective system for dealing with environmental "refugees". See Australian Labour Party *Our Drowning Neighbours: Labour's Policy Discussion Paper on Climate Change in the Pacific* – see reference in *HREOC Climate Change Paper*.

[267] Cook Islanders, Niueans and Tokelauans are covered in any event as they have the right to migrate to New Zealand and Australia as they are New Zealand citizens by birth – see New Zealand Human Rights Commission *Human Rights in New Zealand Today: New Zealand Action Plan for Human Rights Nga Tiki Tangata o Te Motu (2005 – 2010)* <http://www.hrc.co.nz> (last accessed 20 August 2008). Cook Islanders, Niueans and Tokelauans have free right of access to Australia by virtue of being New Zealand citizens – see Stahl *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* Australian Agency for International Development Paper (2007) <http://www.ausaid.gov.au> (last accessed 20 August 2008) at 40.

Conclusion on climate change

In conclusion, there is a need for urgent and concerted world action to reduce emissions.[268] There is also urgent need for expedited action on adaptation to climate change. Any adaptation measures must be environmentally friendly, culturally appropriate and introduced with the involvement and participation of the local community. In this regard, developed nations must provide assistance, both financial and technical, to States that need such assistance.

There is, however, also an urgent need to deal with the possibility that those actions are too little and too late or that any measures to reduce emissions are misplaced because global warming is a natural phenomenon. This means that disaster plans must be put in place, including for the prevention of the permanent displacement of peoples where possible. Where not possible, there must be a focus on their relocation in a manner sensitive to their culture and human rights. The recognition of a specific human right to a quality environment can only aid that process.

Indigenous peoples, collective rights and the environment

I move now to a topic which is slightly more cheerful in the sense that it covers issues over which there can be some control by individual nations and certainly by the Pacific as a region: indigenous peoples, collective rights and the environment.[269]

International recognition of indigenous rights

The unique relationship of indigenous peoples with the land and other natural resources has been recognised in several international instruments. International Labour Organisation Convention (No. 169),[270] art 4, places an obligation on States to

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[268] Lord Robert May, in the 2007 Lowy Lecture series, set out a number of other actions needed to halt climate change, including tackling population growth and reducing the average ecological footprint, including not building on flood plains, reducing deforestation, and creating more ecologically-efficient buildings – see May *Relations Among Nations On a Finite Planet* 2007 Lowy Lecture on Australia in the World <http://www.lowyinstitute.org> (last accessed 19 August 2008).

[269] For a general discussion, see Xanthaki *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007).

[270] ILO Convention (No. 169). Nineteen States have ratified the Convention. The only party from the Pacific that has ratified this Convention is Fiji. Therefore Convention (No. 169) has not gained the same level of acceptance as the Declaration on the Rights of Indigenous Peoples. Charters "The rights of indigenous peoples" [2006] NZLJ 335.

protect indigenous peoples' environment from exploitation. Article 13 recognises the crucial nature of the interconnectedness between the environment and indigenous culture. Article 15 of the Convention identifies the right of indigenous peoples to "participate in the use, management and conservation of resources" and art 23 recognises the importance of traditional activities, such as hunting and fishing. It provides that:

> … [S]ubsistence economy and traditional activities of the [indigenous] peoples … such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.

Two Pacific agreements have also recognised the rights to traditional harvest.[271] It is notable too that the Convention on Biological Diversity (CBD) instructs States parties to:[272]

> … respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity …

The Secretariat of the CBD has developed voluntary guidelines for conducting environmental impact assessments on land or resources owned by indigenous peoples.[273] It is suggested that a cultural impact assessment be undertaken whereby the possible impacts on all aspects of culture, (including sacred sites, customary use of biological resources, traditional knowledge, and customary law) should be considered.[274] National environmental impact assessment legislation should recognise indigenous rights to land and other resources including identification of particular species important for affected indigenous or local community as nutrition, clothing or building materials, medicine, and spiritual purposes.[275] In terms of social impact

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[271] Art VI of the Apia Convention articulates a general conservation objective for all endangered species with an exception for use of an endangered species in accordance with traditional cultural practices. The Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia 2001 also allows for a sustainable customary harvest by traditional communities and provided such practices do not undermine conservation efforts – Concluded under the Convention on the Conservation of Migratory Species of Wild Animals – see Conservation and Management Plan at [1.5] – see <http://www.cms.int> (last accessed 21 August 2008).

[272] Convention on Biological Diversity art 8(j).

[273] Secretariat of the Convention on Biological Diversity *Akwé: Kon Guidelines* (2004) <http://www.cbd.int> (last accessed 20 August 2008).

[274] *Akwé: Kon Guidelines* at 13.

[275] *Akwé: Kon Guidelines* at 16.

assessment, it is advocated that evaluation of changes to traditional economies ought to be examined.

The United Nations Human Rights Committee has recognised the link between the right to culture in art 27 of ICCPR and the use of land and sea resources, including fishing and hunting. In *General Comment No 23: the Rights of Minorities* the Committee stated that:[276]

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

More recently the Declaration on Rights of Indigenous Peoples,[277] although not binding, has articulated the connection between the right of self-determination for indigenous peoples and the use of land and resources. It also recognises indigenous peoples' relationship to their lands, waters, coastal seas and other resources. Article 25 provides that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibility to future generations in this regard.

Importantly, art 29 states that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. Article 32 states that indigenous peoples should have the

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[276] See also *Ominayak and the Lubicon Lake Band v Canada.* Public participation of indigenous peoples was considered by the UNHRC in *Apirana Mahuika v New Zealand* Communication No. 547/1993 CCPR/C/70/D/547/1993 (15 November 2000). This decision considered whether the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 constituted a violation of art 27 of the ICCPR (the right to enjoy culture). The settlement was held to be compatible with art 27 – see at [9.8]. United Nations Human Rights Committee *General Comment No. 23: The Rights of Minorities* UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) at [7].

[277] Declaration on the Rights of Indigenous Peoples. Parties to this resolution include Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Those against included Australia, Canada, New Zealand and the United States.

right to determine and develop strategies for the development or use of land and resources.

A number of international instruments have highlighted the right of indigenous peoples to participate in environmental decision-making. Under art 5 of the Declaration on Indigenous Peoples, indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while still retaining the right to participate fully in the political, economic, social and cultural life of the State. Article 18 also provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives as well as to maintain their own indigenous decision-making institutions.

Article 15 of the ILO Convention (No. 169) identifies an environmental right of indigenous peoples to "participate in the use, management and conservation of ... resources".[278] The Aarhus Convention has also highlighted the desirability of these rights with three broad themes: access to information, public participation and access to justice, all of which are expressed as rights.

Some commentators have criticised this focus on participation of indigenous peoples arguing that this obscures more important issues, such as property rights and self-determination.[279] This seems to be a valid concern, as the mere existence of a right to be heard will not necessarily be sufficient to assure rights are not breached. Individuals have differing abilities to access justice in terms of social, economic and educational attributes. Therefore, procedural rights are necessary but not sufficient of themselves. Substantive rights are also required, including (I would argue) a positive right to environment.

Pacific cultures and the environment

There is a very important spiritual and cultural connection to the environment in all Pacific cultures and a long history of recognition that resources are held on trust for future generations, a trust arising from the past. As noted above, the need to maintain

[278] ILO Convention (No. 169) art 15.
[279] Jeffery at 11.

and strengthen indigenous culture, customs and spiritual beliefs is increasingly being recognised at international law.[280] Since cultural practices and spiritual beliefs are often rooted in the indigenous peoples' relationship with the land, waters, coastal seas and other resources, environmental law and indigenous cultural rights are fundamentally connected.[281]

One homogenous characteristic of Pacific islands cultures is that territorial and resource "ownership" is based on collective customary interests.[282] In the South Pacific as at 1990, more than 90 per cent of land was held in customary tenure.[283] The desirability and utility of traditional communal land ownership was recognised by the United Nations in its report on Sustainable Development and Small Island Developing States and also in the Beijing Statement on Combating Desertification and Promoting Sustainable Development.[284] The virtues that result from customary management of resources include: more appropriate and workable regulations, increased reliability of data, increased compliance with regulations, minimisation of enforcement costs and enhanced commitment of stakeholders due to recognition of the right to self - determination.[285] As Vegter puts it:[286]

> As a form of relational property that creates obligations to current and future relationships, customary ownership curbs unsustainable practices and accommodates changing circumstances.

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[280] Gillespie at 69; *United Nations Report of the World Summit on Sustainable Development* UN Doc A/CONF.199/20 (4 September 2002) at [5] (World Summit Report) and Johannesburg Declaration at [25].

[281] See New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 17 (2006) at 66, para [5.27]. See also New Zealand Human Rights Commission and Pacific Islands Forum Secretariat *National Human Rights Institutions: Pathways for the Pacific States Pacific Human Rights Issues Series One* (2007) <http://www.hrc.co.nz> (last accessed 21 August 2008) at 24.

[282] Manus "Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law" (2005) 23 Wis Int'l L J 553 at 566. ESCAP Report at 252.

[283] Sutton "Custom, Tradition and Science in the South Pacific: Fiji's New Environmental Management Act and *Vanua*" (2005) 9(2) Journal of South Pacific Law 1 at 2.

[284] *UN Report of Meeting for Implementation of Programme for Action for SIDS* at 15 and Beijing Statement on Combating Desertification and Promoting Sustainable Development (2008) <http://www.un.org> (last accessed 20 August 2008) at 3.

[285] Food and Agriculture Organization of the United Nations *Creating legal space for community-based fisheries and customary marine tenure in the Pacific: issues and opportunities* (2004) <http://www.fao.org> (last accessed 20 August 2008) at 2 (FAO Report).

[286] Vegter "Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership" (2005) 14 Pac Rim L & Pol'y J 545 at 570.

This leads to the other theme that is a hallmark of Pacific cultures: collective responsibility and collective decision-making.[287] The Pacific tradition intrinsically links a healthy environment to the collective well-being of the people.[288] Further, the guardianship of resources for future generations is a key tenet of most Pacific value systems. Within Pacific cultures, therefore, the right to an environment of quality will find fertile ground, which may aid the rapprochement of jurisprudence regarding human rights and international and national environmental law.

Experience in the Pacific

One of the problems identified in the State of the Environment Report undertaken by the United Nations Economic and Social Commission for Asia and the Pacific was the failure to link national administrative systems with community level leadership.[289] Traditional knowledge and customs are, however, increasingly utilised as pivotal tools in developing environmental schemes and achieving sustainable development.[290] This is because traditional customary laws are habitually created in harmony with environmental sustainability. Statutory codification can help to strengthen traditional customary environmental structures and the enforcement powers of authorities, while the use of other types of formal recognition such as regulations or by-laws can be used to maintain the flexible quality of customary law that is needed to adapt to ever-changing environmental problems.[291]

To illustrate the effect of a misalignment of national frameworks with local indigenous communities, it is apposite to look at the experience of two Pacific Island nations where the differing treatment of customary ownership structures in environmental decisions might be seen as having led to different effects. I refer as one example to the linking of the Village *Fono* Act 1990 and the Fisheries Act 1988

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[287] The rights of minorities both participatory and substantive must not, however, be lost sight of.
[288] See Sir Paul Reeves, in Tomas and Haruru 11 – 16.
[289] ESCAP Report at 245.
[290] FAO Report at 9. Principle 22 of the Rio Declaration also states that "[I]ndigenous people and their communities … have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development". Jaksa "Putting the "Sustainable" Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability" (2006) 21 J Envtl L & Litig 157.
[291] FAO Report at 37.

in Samoa and the integration of decisions made by the *Fono* (or village counsel) on fishing within the national framework.[292] I then contrast this with the experience in Papua New Guinea with forestry.[293]

Looking at the two examples in more detail, in Samoa, traditional ways of living, or *Fa'a Samoa,* still hold a very strong place in society.[294] Most land is held according to customary title and this method of ownership is preserved by the Constitution of Samoa 1960.[295] The Village *Fono* is responsible for making decisions for the governance of the community.[296] Decisions must be reached by consensus which involves debate with all interested parties.[297] In terms of the environmental aspects of customary law, a strong spiritual connection with the environment and the land is part of Samoan culture.[298] Due to the need for sustainability, traditional Samoan conservation mechanisms were developed such as no-take zones where resources such as fish or shellfish were dwindling, with punishment for breach.[299] Some animals are also seen as sacred (*I'a sa*), and are protected.[300]

Management of the fisheries is shared. The Samoan government controls commercial fishing licences outside reef areas and devolves management of local fishing to the Village *Fono*.[301] In order to give formal recognition to customary law, the Director of the Department of Agriculture, Forests and Fisheries may "in consultation with fishermen, industry and village representatives [Village *Fono*], prepare and promulgate by-laws not inconsistent with this Act for the conservation and

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[292] There are similar structures in other Pacific islands.
[293] Armitage "Customary Land Tenure in Papua New Guinea: Status and Prospects" Queensland University of Technology Australia <http:/www.anu.edu.au> (last accessed 21 August 2008); Talao "Papua New Guinea Human Rights Report" Strategies for the Future: Protecting Rights in the Pacific; Kalinoe "Incorporated Land Groups in Papua New Guinea" [2003] MLJ 4 and Weiner "The Foi Incorporated Land Group: Group Definition and Collective Action in the Kutubu Oil Project Area, Papua New Guinea" <http://www.anu.edu.au> (last accessed 20 August 2008).
[294] FAO Report at 21.
[295] Customarily owned land cannot be alienated except by Act of Parliament – art 102 of the Constitution of the Independent State of Western Samoa; Techera "Samoa Law Custom and Conservation" (2006) 10 NZ J Envtl L 361 at 368.
[296] Techera at 364 – 365 and 368. The Village *Fono* Act 1990 was enacted to "validate and empower the exercise of power and authority by Village *Fono* in accordance with custom and usage of their villages". Long Title of the Village Fono Act 1990 and s 3.
[297] FAO Report at 22.
[298] Techera at 365.
[299] Techera at 365.
[300] Techera at 365 and 368. Village *Fono* Act s 5.
[301] Techera at 374.

management of fisheries".[302] Village by-laws include rules regarding: fish size, restrictions on particular types of fishing equipment, and no-catch restrictions during breeding season.[303] The use of by-laws seems to suit the dynamic and changing needs of the environment and also customary law itself.[304] Under these by-laws, the control of enforcement is often given to the Village *Fono* to impose fines as the Village *Fono* sees fit.

The amalgamation of customary law and practices with central fisheries law and policy to create a pluralist system has led to a strong participatory-based regime with greater legitimacy and more efficient enforcement of environmental controls.[305] This example shows the benefits to be gained in the Pacific of blending government control and traditional indigenous governance models.

A contrasting example, where customary ownership has been overlooked in favour of environmental exploitation, is the application of forestry law in Papua New Guinea. The majority of the indigenous peoples of Papua New Guinea depend on a subsistence lifestyle based on sustainable environmental practices.[306] Under customary law, which is recognised by the Constitution, the indigenous peoples of Papua New Guinea own 99 per cent of all forested land.[307] The Constitution requires the recognition of customary law, provided it does not conflict with the Constitution itself or principles of humanity.[308] There are also overriding principles in the Constitution of Papua New Guinea on sustainable development and the environment and various national environmental and planning Acts.

Poor governance and failure to enforce forestry laws, together with a failure to involve traditional owners have, however, led to environmental degradation of the unique biodiversity of Papua New Guinea and further impoverishment of the indigenous peoples.[309] Logging has contaminated food and water supplies, destroyed

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[302] Fisheries Act 1988, s 3(3)(d).
[303] FAO Report at 24.
[304] FAO Report at 31.
[305] Techera at 366; Hicks "Environmental Protection in the Age of Economics – The Niue Experience" (1998) 3(2) Journal of South Pacific Law 1.
[306] Vegter at 545.
[307] Vetger "Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership" (2005) 14 Pac Rim L & Pol'y J 545 at 546.
[308] FAO Report at 40.
[309] Vegter at 545.

cultural sites, as well as excluded the traditional land owners from informed participation in decision-making. Had there been a proper integration of indigenous communities into the process many of the worst excesses may have been avoided.[310]

The lesson from the contrasting experience of Samoa and Papua New Guinea is that there needs to be a strong national framework that is enforced and fair to all, including minorities. This should be married to local structures that ensure the participation of local indigenous communities, drawing strength and innovation from their traditional knowledge and relationship with the environment.

Conclusion

The environment is an important and pressing issue in the Pacific, particularly in light of the likely effects of climate change. Pacific Island nations have been referred to as the "canaries in the mine", the first to show the effects of climate change. Pacific islands are particularly prone to adverse climatic events and the effects of global warming – a problem which the islands themselves have not created.[311]

Given this, I would suggest that the right to a quality environment must be included in any regional human rights instrument. I would go further. It may even be that the region should start with a right to the environment and move on from there. There are capacity issues in most countries in the Pacific in "going it alone". Combined pressure is needed to convince the rest of the world to act to reduce greenhouse emissions. This points to a need for regional co-operation to apply this combined pressure.[312] The articulation of a human right to the environment in a regional mechanism would support that combined action.

A regional approach is essential too for adaptation measures and for the planning for disaster recovery and relief, including the responsibility for the relocation of displaced persons in the region and ensuring the promotion and protection of their rights,

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[310] Armitage at 1 and Talao "Papua New Guinea Human Rights Report".
[311] Cordonnery "Implementing the Pacific Islands Regional Ocean Policy: How Difficult is it Going to Be?" (2005) 36 VUWLR 723 at 724. Gillespie at 107.
[312] Small Island States have recognised the need to combine their efforts in combating and publicising the effects of climate change. This has been demonstrated by the creation of the Alliance of Small Island States (AOSIS) which acts as a lobby group for 43 small island developing States <http://www.sidsnet.org> (last accessed 20 August 2008).

including their economic, social and cultural rights. The articulation of a human right for the environment can only help to reinforce and support the moral imperative for regional and world action in that area.

In making the suggestion that the Pacific region begin with a right to the environment, it is important to remember that the right to environment fits in well with Pacific cultures, which recognise the cultural and spiritual value of the environment in its own right. Conservation for future generations is a key concept for Pacific peoples. Indeed, it is the foundation of many Pacific cultures. Issues of collective participation and responsibilities that arise with respect to any right to a quality environment also fit in very well with Pacific values. Indeed, the right to a quality environment can be seen as a quintessentially Pacific right. It is logical therefore, for it to take pride of place in any Pacific human rights mechanism.