

BoHao (Steven) Li

**Joining the Aotearoa New Zealand Constitutional Debate:
Constitutional Environmental Rights in our Future 'Constitution'**

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Abstract

In 2013, the Constitutional Advisory Panel invited New Zealanders to think about our vision of what New Zealand should look like in the future and to consider how our constitutional arrangements would support that vision. In response, New Zealanders have suggested the inclusion of an environmental protection regime in our future constitutional landscape. The author supports this prevailing opinion. This paper will use the experiences gained from international and regional human rights and environmental law treaties and other countries' constitutions to explore the best model to achieve that goal. This comparative law analysis will identify the key theoretical and legal issues that must be addressed by Parliament to ensure the successful implementation and enforcement of an environmental protection regime through the courts. While international developments are important, any environmental constitutional framework must reflect New Zealand's unique and distinctive history, environment, people, and cultural values. With this in mind, this paper will tentatively canvass a new environmental constitutional framework and lay foundations for further legal research and public debate.

Key Words

Anthropocentric Approach

Constitutional Environmental Rights

Ecocentric Approach

Environmental Human Rights

I Introduction

Human is both creature and moulder of her environment, which gives her physical sustenance and affords her 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 her environment in countless ways and on an unprecedented scale. Both aspects of human's environment, the natural and the man-made, are essential to her well-being and to the enjoyment of basic human rights the right to life itself.¹

The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.²

Despite most States having enacted remedial measures, the pace of environmental deterioration has continued to escalate. The global community acknowledges that stronger environmental law regimes are needed if 'sustainable development' is to be attained.³

Since the late twentieth century there has been a growing global recognition that damage to the natural environment threatens the quality of life for present and future generations.⁴ American environmental historian, William Cronon, has observed that the process of ecological change as the concomitant of human activity is longstanding and well understood, but rarely has it occurred with as much "dramatic sadness" and "conscious intention" as in nineteenth century New Zealand.⁵ New Zealanders' concern for our environment's future was a focal point in the latest nationwide constitutional dialogue.

In 2013, the Constitutional Advisory Panel (the Panel) invited New Zealanders to consider a vision of what New Zealand might look like in the future and to deliberate how the

¹ *Stockholm Declaration on the Human Environment* A/Conf.48/14/Rev.1 (1973) (Stockholm Declaration), Proclamation One. This declaration was adopted by 114 States.

² Stockholm Declaration, Proclamation Two.

³ Rio Declaration on Environment and Development A/Conf.151/26 (1992) (Rio Declaration).

⁴ Ronald Engel and Brendan Mackey "The Earth Charter, Covenants, and Earth Jurisprudence" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 313 at 313 and Neil Popović "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1995) 27 Colum Hum Rts L Rev 487.

⁵ William Cronon "Foreword" in Herbert Guthrie-Smith *Tutira: The Story of a New Zealand Sheep Station* (Random House, Auckland, 1999). See also Kenneth Cumberland *Landmarks* (Reader's Digest, Sydney, 1981).

constitutional arrangements would support such a vision. The preservation and protection of New Zealand's natural environment was a strong theme across the public response. Some submitters proposed affirming human rights to a clean and healthy environment (the anthropocentric approach) and/or affirming the rights of nature itself (the ecocentric approach). As will be discussed, the author endorses both approaches, working in conjunction with each other, as a constitutional tool for environmental protection.

This paper will undertake a comparative law analysis surveying the theoretical approaches and practical experiences of environmental protection law at the international, regional and national levels.⁶ A comparative approach is essential in environmental law because environmental protection is a global issue and legislators often choose to draw on the experiences of other countries' environmental protection regimes. Part I examines the theoretical framework for environmental protection. Part II explores experiences gained overseas to identify the key legal issues that must be addressed by Parliament to ensure the successful implementation and enforcement of an environmental protection regime through the courts. Part III cautiously canvasses a new environmental constitutional framework that reflects New Zealand's unique and distinctive history, environment, people and cultural values. Of course, the final content of any constitutional arrangement will require further legal research and full public deliberation.

II *Is Environmental Protection that Important?*

Scientists and academics warn us that we must recognise that the natural environment is fundamentally vital to humanity's quality of life and survival.⁷ We depend on the environment and all of its resources for our basic needs, including food, water, energy and air.⁸ There is a wealth of literature indicating that we, as humans, achieve various mental

⁶ This paper will not focus on subnational constitutions in federal nations, for example the United States of America. For more information on the United States, see generally Harry Pettigrew "A Constitution Right of Freedom from Ecocide" (1971) 2 *Envtl L* 1, Carole Gallagher "The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present" (1997) 9 *Fordham Env'tl LJ* 107, James May (ed) *Principles of Constitutional Environmental Law* (American Bar Association, Chicago 2011), *Tanner v Armco Steel Corporation* 340 F Supp 532 (SD Tex 1972) at 535, *Gasper v Louisiana Stadium and Exposition District* 418 F Supp 668 (ED La 1976) at 716, *Stop H-3 Association v Dole* 870 F 2d 1419 (9th Cir 1989), *Amlon Metals v FMC Corporation* 775 F Supp 668 (SDNY 1991) at 671, *Flores v Southern Peru Group Corporation* 414F 3d (2d Cir 2003) at 256-262 and *Aguinda v Texaco Incorporation* 142F Supp 2d (SDNY 2011).

⁷ Stephen Schneider "The Greenhouse Effect: Science and Policy" (1989) 243 *Science* 771.

⁸ David Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, Vancouver, 2012) at 10.

benefits (such as stress recovery and learning development) from natural environments, including gardens, fresh air and light.⁹ Human activity is placing such an immense strain on the planet's fragile ecosystems that the Earth's ability to sustain present and future generations can no longer be taken for granted.¹⁰ For those who are still not convinced of the impact of environmental degradation on the wellbeing of humans and nature, consider the following data:

1. Worldwide, 13 million deaths (23 percent of all deaths) could be prevented each year by making our environment healthier.¹¹
2. Climate change already causes an estimated 150,000 deaths and five million illnesses per year.¹² The World Health Organisation projects a doubling of these figures by 2030.¹³
3. In the least developed countries, one third of deaths and diseases are a direct result of modifiable environmental factors. These are factors that are realistically amendable to change using available technologies, public policies and preventative health measures.¹⁴
4. Biological diversity is disappearing more rapidly than at any time since the extinction of the dinosaurs 65 million years ago.¹⁵ Globally, biodiversity loss and damage to ecosystems is estimated to cost trillions of dollars every year.¹⁶

⁹ Bjorn Grinde and Grindal Patil "Biophilia: Does Visual Contact with Nature Impact on Health and Well-being?" (2009) 6 Int'l J Envtl Research and Public Health 2332 at 2337, Richard Louv *Last Child in the Woods: Saving our Children from Nature Deficit Disorder* (Algonquin Books of Chapel Hill, Chapel Hill, 2008) at 206-208 and Terry Hartig, Marlis Mang and Gary Evans "Restorative Effects of Natural Environmental Experiences" (1991) 23 Environmental and Behaviour 3 at 20-21.

¹⁰ *Living Beyond Our Means: Natural Assets and Human Well-being* (World Resources Institute, Washington, 2005) at 3.

¹¹ Glen McLeod and Peter Newman "Climate Change Law and the Real World" in Wayne Gumley and Trevor Deya-Winterbottom (eds) *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Thomas Reuter, Sydney, 2009) 40 at 45. See also Annette Prüss-Üstün and Carlos Corvalán *Preventing Disease through Healthy Environments: Towards an Estimate of the Environmental Burden of Disease* (World Health Organisation, Geneva, 2006) at 6, 9 and 82.

¹² J Patz and others "Impact of Regional Climate Change on Human Health" (2005) 438 Nature 310.

¹³ A McMichael and others (eds) *Climate Change and Human Health: Risks and Responses* (World Health Organisation, Geneva, 2003).

¹⁴ *Human Rights and the Environment: Final Report and Recommendations* (The Asia Pacific Forum of National Human Rights Institutions, September 2007) at 6.

¹⁵ E Chivian and A Bernstein (eds) *Sustaining Life: How Human Health Depends on Biodiversity* (Oxford University Press, Oxford, 2008).

¹⁶ *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature Synthesis Report* (United Nations Environment Programme, Nairobi, 2010).

New Zealand is no exception to these statistics, and our environmental track record has not always lived up to our “clean and green” image.¹⁷ There has been significant environmental damage since the late 1700s. Between 1860 and 1910, seven million hectares of lowland forest were cleared.¹⁸ 32 percent of indigenous land and freshwater bird species and 18 percent of seabird species have become extinct following human settlement.¹⁹ While the concerted effort of government and the community over recent decades has led to some improvements, 1,000 indigenous species of New Zealand flora and fauna are currently under threat. This data illustrates that, while New Zealand’s environmental quality usually compares favourably with other countries, the deterioration in our environment from 1800 to today have nonetheless been profound. If New Zealand is dedicated to maintaining its “clean and green” image, an effective legal, political and social response is required to enhance our environmental protection regime.²⁰ Notably, the Panel recorded strong public support for an environmental protection regime in our future constitution.

III The Panel’s Report

New Zealanders have recently been engaged in a nationwide conversation about our constitutional framework. The substantive matters for consideration include whether New Zealand should have a written and entrenched constitution, the appropriate mechanism for environment protection (if any), and the content of the New Zealand Bill of Rights Act 1990 (the NZBORA).²¹

The preservation and protection of New Zealand’s natural environment and resources was a recurring theme across the conversation. Some submitters took a rights-based approach,

¹⁷ See generally Derek Seymour “New Zealand a great place to live? Yeah Right” *Stuff* (online ed, Auckland, 23 January 2013) and Nikki Preston “Clean, green image of New Zealand ‘fantastical’” *The New Zealand Herald* (online ed, Auckland, 19 November 2012).

¹⁸ Les Molloy *Soils in the New Zealand Landscape: The Living Mantle* (2nd ed, New Zealand Society of Soil Science, Lincoln, 1998) at 226.

¹⁹ *New Zealand Biodiversity Strategy* (Department of Conservation and Ministry for the Environment, Wellington, 2000) at 4.

²⁰ See generally PA Consultants *Valuing New Zealand’s Clean Green Image* (Ministry for the Environment, Wellington, August 2001) and Karen Price, Lisa Daniell and Laura Cooper “New Zealand Climate Change Laws” in Wayne Gumley and Trevor Deya-Winterbottom (eds) *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Thomas Reuter, Sydney, 2009) 80 at 89.

²¹ *Consideration of Constitutional Issues: Terms of Reference* (Constitutional Advisory Panel, Terms of Reference, May 2012) at [11].

suggesting that the NZBORA should be amended to reflect environmental goals. Options suggested included:²²

- a. Affirming the rights of nature itself, for example by placing obligations on the State and citizens to protect Papatūānuku, Mother Nature or the biosphere (the ecocentric approach);
- b. Affirming a human right to a clean and healthy environment (the anthropocentric approach);²³ and
- c. Referring to environmental protection as part of a right to intergenerational equity.

Other submitters proposed similar aims but with different enforcement mechanisms, such as:²⁴

- a. A general constitutional requirement to pursue sustainable development;
- b. Reforming existing legislation with the aim of strengthening environmental protection; and
- c. Making kaitiakitanga (guardianship) a core constitutional principle.²⁵

The Panel recommended the Government to explore in more detail the options for amending the NZBORA to improve its effectiveness, including:²⁶

- a. Adding economic, social, cultural, property and environmental rights. Affirming these rights in the NZBORA would ensure Parliament will be required to consider whether (and, if so, how) decisions and legislation affect and fulfil those rights;
- b. Improving Executive and Parliamentary compliance with the standards in the NZBORA. Some submitters expressed concerns that it is currently too easy to pass legislation that is inconsistent with the NZBORA;

²² *New Zealand's Constitution: A Report on a Conversation* (Constitutional Advisory Panel, November 2013) at 51, 90 and 94.

²³ See also House of Lords and House of Commons Joint Committee on Human Rights *A Bill of Rights for the UK?* (Twenty-ninth Report of Session 2007-2008, HL Paper 15, HC 145, 2009) at 57-59.

²⁴ *New Zealand's Constitution: A Report on a Conversation*, above n 22, at 51.

²⁵ See generally Waitangi Tribunal *A Report into Claim Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 235-286 and Margaret Orbell *The Nature World of the Māori* (Bateman, Auckland, 1996) for a discussion of kaitiakitanga.

²⁶ *New Zealand's Constitution: A Report on a Conversation*, above n 22, at 16, 48 and 50.

- c. Giving the judiciary powers to assess legislation for consistency with the NZBORA;²⁷ and
- d. Entrenching all parts of the NZBORA. The Panel noted that, although there is no broad support for a supreme constitution, there is considerable support for entrenching elements of our constitutional framework.²⁸

Environmental law, a field covering a vast range of topics, interacts with many competing interests: theoretical, legal (human and nature rights), scientific, political, property, economic, cultural and social attitude.²⁹ It is beyond this paper's scope to address all of those interests, particularly how those interests should be balanced against each other. Furthermore, this paper does not discuss the issues of entrenchment or affording the judiciary the power to declare legislation inconsistent with the NZBORA.³⁰ Rather, this paper will focus on the key theoretical and legal issues that must be addressed by Parliament to ensure the successful implementation and enforcement of a constitutional environmental protection regime through the courts. Modern developments in environmental law illustrate that ensuring the enforceability of any environmental protection regime is more important to addressing environmental issues than the mere creation of new laws.³¹

IV A Theoretical Framework for Environmental Protection: Conceptualising Humanity's Relationship with Nature

Scholars believe environmental law was first developed to serve only human interests and thus ignored the interests of nature.³² For example, Principles One and Two of the 1972

²⁷ See generally I Stotzky "Lessons Learned and the Way Forward" in S Gloppen, F Gargarella and E Sklaar *Democratisation and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass, London, 2004) 198 and R Hirschl "The Political Origins of Judicial Empowerment through the Constitutionalisation of Rights: Lessons from Four Polities" (2000) 25 L and Soc Inq 91.

²⁸ If New Zealand's constitution is to have entrenched elements, see generally Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" (1984–1985) 1 AJHR A6 at 5–7.

²⁹ Ernst Brandl and Hartwin Bungert "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad" (1992) 16 Harv Envtl L Rev 1 at 4. See also Sebastian Ko "Comment Legal Treatment of Complexity: The Unwieldiness of Environmental Law" (2013) 21 Envtl Liability Law Pol'y and Practices 68.

³⁰ See generally Andrew Butler "Judicial Indications of Inconsistency" (2000) 1 NZ L Rev 43.

³¹ Domenico Amirante "Environmental Courts in Comparative Perspectives: Preliminary Reflections on the National Green Tribunal in India" (2012) 29 Pace L Rev 441 at 443.

³² Paul Gormley "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: the Expansion of Human Rights Norms" (1999) 3 Geo Int'l Env L Rev 85, Susan Emmenegger and Axel Tschentscher "Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental

Stockholm Declaration on the Human Environment, the first global instrument focusing on human interactions with nature, suggest that human benefit is the primary reason for respecting nature:

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

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

This exclusive focus on human interests was consolidated 20 years later at the 1992 United Nations (UN) Conference on Environment and Development (Earth Summit) in Rio de Janeiro when the participating States declared: “*human beings are at the centre of concerns* for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”³³ This human-centred approach to environmental protection is known as the anthropocentric approach.³⁴

A An Anthropocentric Approach: Humans have Rights

An anthropocentric approach, in its strictest form, conceptualises humanity’s relationship with nature according to nature’s aesthetic, economic or social value to human beings.³⁵ This approach is influenced by Locke’s theory of property; according to Locke unused natural

Law” (1994) 6 Geo Int’l Envtl L Rev 545 at 550-555 and Myrl Duncan “The Rights of Nature: Triumph for Holism or Pyrrhic Victory?” (1991) 31 Washburn LJ 62 at 62 and 68.

³³ Marc Pallemarts “The Future of Environmental Regulation: International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process” (1996) 15 J L & Com 623 at 642 (emphasis added).

³⁴ Nicolas de Sadeleer *Environmental Principles: From Practical Slogans to Legal Rules* (Oxford University Press, Oxford, 2002) at 277. See also Joshua Bruckerhoff “Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights” (2007) 86 Tex L Rev 615.

³⁵ William Aitken “Human Rights in an Ecological Era” (1992) 1 Envtl Values 191 at 196, Tim Hayward “Ecological Thoughts: An Introduction” (Polity Press, Cambridge, 1995) at 58-62 and Andrew Dobson *Green Political Thought: An Introduction* (Routledge, London, 1990) at 63.

resources (such as land) have little or no value.³⁶ According to Berry, the anthropocentric approach:³⁷

... is a perspective centred exclusively on the human needs and finds other modes to be inferior. This attitude results in unlimited plunder and exploitation of other life forms. Other life forms are given no intrinsic value of their own: *they only have value through their use by the human, no inherent right to their own life.*

Doubts have been raised about whether environmental protection can always be effectively addressed within the anthropocentric framework.³⁸ Environmental violations invariably involve other species' rights. Anthropocentric guidelines, solely focused on human rights, cannot deal with such issues. The following factual scenario demonstrates the anthropocentric approach's limitation with regard to environmental degradation:

The Waikato River is the longest river in New Zealand. The River is home to at least 19 types of native fish.³⁹ The large catchment area of the River is fertile farmland where intensive agriculture is present. The mismanagement of fertiliser application and effluent disposal practices in dairy farming is a major cause of the River's increased nitrogen level.⁴⁰ Increasing nitrogen levels can stimulate the growth of algae, damage aquatic life and contribute to toxic algal blooms.⁴¹ The rapid growth of toxic algal blooms in the River had previously led to public health and drinking water issues.⁴²

The usefulness of the anthropocentric approach is limited by legal and social constraints. First, in terms of legal limitations, the anthropocentric approach focuses on the people

³⁶ Keith Hirokawa "Some Pragmatic Observations about Critical Critique in Environmental Law" (2002) 21 Stan Env'tl LJ 225 at 233-235.

³⁷ Jules Cashford "Dedication to Thomas Berry" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 3 at 3 (emphasis added).

³⁸ Prudence Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 Geo Int'l L Rev 309 at 351-352 and Dave Foreman *Confessions of an Eco-Warrior* (Harmony Books, New York, 1991) at 1-3.

³⁹ "What lives in the Waikato River" Waikato Regional Council <www.waikatoregion.govt.nz>.

⁴⁰ Aaron Leaman and Elton Smallman "Waikato River in 'Serious Decline'" *Stuff* (online ed, New Zealand, 9 August 2013) and Gareth Morgan and Geoff Simmons "Dairy doing Dirty on our Environment" *The New Zealand Herald* (online ed, Auckland, 15 January 2014).

⁴¹ Bill Vant *Trends in River Water Quality in the Waikato Region 1993-2012* (Waikato Regional Council, Technical Report 20, August 2013).

⁴² *The Health of the Waikato River and Catchment Information for the Guardians Establishment Committee* (Environment Waikato, Waikato, March 2008) at 33.

affected by environmental degradation rather than the fact of degradation.⁴³ The Waikato River and its aquatic life have no rights to remedy the pollution problem. The pollution can only be remedied when an individual can prove the pollution invades his or her human rights, for example the right to health and water. When accepted human rights standards have not been violated, an environmental human rights claim is precluded, thus leaving environmental degradation unremedied. In other words, remedies for environmental degradation are entirely contingent on the violation of a *human* right, which is often factually difficult to establish in a court of law. Additionally, even where environmental human rights have been violated, the court's remedial power exclusively benefits the claimant. The legal relief awarded by the court will only take into account the claimant's injury. No relief may be ordered for addressing the environmental harm to the River and the aquatic life.⁴⁴

Second, in terms of social limitations, the success of an environmental human rights claim depends on someone who is competent and willing for legal standing to be established. There are several social and economic factors that preclude a claimant whose rights to health and water have been affected from bringing a proceeding to vindicate his or her rights. The claimant could themselves be the polluter. He or she may be economically dependent on the neighbouring polluting farmers,⁴⁵ or might live in poverty, and thus be unable to afford to bring a legal proceeding.⁴⁶ To ameliorate the "poverty problem", some countries have allowed public interest litigation, recognising non-government organisations' (NGOs) standing to vindicate environmental human rights on behalf of the poor.⁴⁷ However, the success of this mechanism presupposes that the poor are able to communicate their grievance to NGOs, which is often not the case. A further social limitation is that there is nothing stopping a claimant from acting to the detriment of the River and the aquatic life. For example, if the court issues an injunction to stop the pollution at the claimant's behest, there is nothing stopping the claimant from selling out the River and the aquatic life by deciding not to enforce the injunction for an agreed price.⁴⁸

⁴³ Neil Popović "Pursuing Environmental Justice with International Human Rights and State Constitutions" (1996) 15 Stanford Env'tl LJ 338 at 345.

⁴⁴ See also Christopher Stone "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 Southern California L Rev 450.

⁴⁵ See *People ex Ricks Water Co v Elk River Mill & Lumber Co* (1895) 107 Cal 221.

⁴⁶ See generally George Pring and Catherine Pring "Specialised Environmental Courts and Tribunals: Improved Access to Justice for Those Living in Poverty" (paper presented to the International Union for the Conservation of Nature, November 2008).

⁴⁷ See generally *Dhungel v Godawari Marble Industry* WP35/1992 (SC Nepal October 31, 1995).

⁴⁸ Stone, above n 44.

The above shortcomings could be addressed if the River and the aquatic life had their own legal rights, namely:⁴⁹

1. Their own legal standing to remedy the pollution problem;
2. Harm to the River and the aquatic life itself (independent of the harm to environmental human rights) would trigger the court's remedial powers. Historically, environmental litigation has confirmed that minimal financial resources are required to factually prove that an individual or a company is discharging toxic waste into a river. On the other hand, it is extremely difficult to prove that such dumping did or will increase the incidence of harm (such as cancer) to the (human) claimant;⁵⁰ and
3. The court's remedial powers would directly benefit the River and the aquatic life through rehabilitation orders.

This example supports the view that the environment itself ought to be protected. The anthropocentric approach misses the mark.⁵¹ In order to address this issue, scholars have advocated for the ecocentric approach: that is, nature itself ought to have legal rights. In Nash's words, "the extension of legal rights to nature represents the logical evolution of rights."⁵²

*B An Ecocentric Approach: Humans and Nature have Rights*⁵³

Professor Stone popularised the ecocentric approach.⁵⁴ This approach shifts today's western ideology of dominating, controlling and using the Earth solely for the benefit of humanity, to

⁴⁹ See generally Cormac Cullinan "If Nature had Rights what would we need to Give Up?" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 230.

⁵⁰ James May and Erin Daly "Vindicating Fundamental Environmental Rights Worldwide" (2009) 11 *Or Rev Int'l L* 365 at 411.

⁵¹ Marc Pallemmaerts "International Environmental Law from Stockholm to Rio: Back to the Future?" in Philip Sands (ed) *Greening International Law* (Earthscan, London, 1994) 1.

⁵² R Nash *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, Madison, 1989).

⁵³ Similar concepts to the ecocentric approach includes: Aldo Leopold's Land Ethic, Ecofeminism, Deep Ecology. See generally Aldo Leopold *A Sand County Almanac and Sketches Here and There* (Oxford University Press, Oxford, 1989), Michael Zimmerman *Contesting Earth's Future: Radical Ecology and Postmodernity* (University of California Press, California, 1997) and Bill Devall and George Sessions *Deep Ecology: Living as if Nature Mattered* (Gibbs Smith, Utah, 1985). See also Carolyn Merchant "Environmental Ethics and Political Conflict: A View from California" (1990) 12 *Env'tl Ethics* 45.

⁵⁴ Stone, above n 44. See also *Sierra Club v Morton* (1972) 405 US 727 (SC) at 742-754 and Laurence Tribe "Ways Not to Think about Plastic Trees: New Foundations for Environmental Law" (1974) 83 *Yale LJ* 1315.

the creation of a new human governance system that mutually enhances the relationship between humans and all other members of the Earth community.⁵⁵

The ecocentric approach is based on the understanding that all life forms and elements of the biosphere have equal worth independent of their value to human interests and that they should be recognised and protected as rights-holders alongside humans.⁵⁶ Berry insists that “rights” originate from existence itself, not from humans, which means that rights cannot belong exclusively to humans. The Earth is the primary law-giver, not the human legal system.⁵⁷ Thus, rights are not for humans to give away, award or withhold from other beings on Earth.⁵⁸ Every component of the Earth community has three rights: the right to exist (such as freedom from disturbance during reproductive and migratory cycles), a basic condition of wellbeing (such as a ban on destroying habitats through the pollution of rivers), and the right to fulfil its role in the ever-renewing processes of the Earth community (such as creating the right conditions for bees to pollinate).⁵⁹ The rights of each being are limited by the right of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.⁶⁰

Human acts or laws that infringe the rights of other beings violate the fundamental relationship of interdependence that constitutes the Earth community (the Great Jurisprudence) and are consequently illegitimate and “unlawful”.⁶¹ Humans must therefore adapt their legal, political, economic and social systems to be consistent with the Great Jurisprudence and follow these guidelines to live in harmony with nature. Human governance systems must at all times take into account the rights of the whole Earth community and must.⁶²

⁵⁵ Cormac Cullinan “A History of Wild Law” in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 12 at 12 and Linda Sheehan “Earth Day Revisited: Building a Body of Earth Law for the Next Forty Years” in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 236 at 237 and 242.

⁵⁶ Stone, above n 44, at 456. See also Bruckerhoff, above n 34, at 618 and Noralee Gibson “The Right to a Clean Environment” (1990) 54 Sask L Rev 5.

⁵⁷ Liz Hosken “Reflections on an Inter-cultural Journey into Earth Jurisprudence” in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 25 at 25 and 26.

⁵⁸ Cashford, above n 37, at 8.

⁵⁹ At 9-10.

⁶⁰ Cullinan, above n 56, 12 at 13.

⁶¹ See also Sheehan, above n 55, at 242 and Duncan, above n 32, at 65.

⁶² Cullinan, above n 55, at 13-19 and Duncan, above n 32, at 66-67.

1. Determine the lawfulness of human conduct by whether or not it strengthens or weakens the relationships that constitute the Earth community, which includes the predator-prey relationship;⁶³
2. Maintain a dynamic balance between the rights of humans and those of other members of the Earth community on the basis of what is best for Earth as a whole (such as prohibiting humans from deliberately destroying the functionality of major ecosystems);⁶⁴ and
3. Recognise all members of the Earth community as subjects before the law, with the right to the protection of the law through an effective remedy for human acts that violate their fundamental rights.⁶⁵

Humans, as stewards of nature, acting as guardians to defend nature's needs, must ensure a legal arrangement that allows both humans and other members of the Earth community to thrive.⁶⁶ Scholars critical of the ecocentric approach have complained that no human can effectively judge nature's needs.⁶⁷ Stone's response was that natural objects can communicate their needs to us in ways that are sufficiently clear. For example, the guardian of a smog-endangered stand of pines could claim with confidence that their client wanted the smog stopped.⁶⁸ With the advance of science and technology, humanity can judge with increasing accuracy whether a natural object's health and wellbeing is being detrimentally affected.

An ecocentric approach offers three practical benefits:

1. It shifts the burden of proof in legal proceeding.⁶⁹ An individual or corporation seeking to alter or destroy any aspect of nature would have to justify why this action should be permitted, instead of those wishing to prevent destruction having to prove why nature should be conserved.

⁶³ Ian Mason "One in All: Principles and Characteristics of Earth Jurisprudence" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 36 at 40.

⁶⁴ At 36-39.

⁶⁵ See generally *KM Chinnappa v Union of India* AIR 2003 SC 724.

⁶⁶ Carolyn Merchant *The Death of Nature: Women, Ecology and the Scientific Revolution* (Harper and Row, San Francisco, 1980) at 246-252. See generally Merchant, above n 53, at 55-56 and 62-65.

⁶⁷ Joe Schwartz "The Rights of Nature and the Death of God" (1989) 97 Public Interest 3 and 7.

⁶⁸ Stone above n 44, at 471.

⁶⁹ Cullinan, above n 55, at 21.

2. The Earth's balance is in peril and in need of protection.⁷⁰ This is where rights for nature can provide a greater equilibrium to the human/nature relationship.⁷¹ Environment law generally has been likened to development law.⁷² Placing environmental protection as the dominate rationale for environmental law will address the current automatic preference for the rights of human beings, particularly corporations, over the rights of all others.⁷³ Shifting away from the accretions of anthropocentrism affirms the principle that each component of the Earth community is dependent on other community members for its own nourishment and survival.⁷⁴ Until our governance system is in harmony with nature, human behaviour will continue to undermine our relationship with other sources of life.⁷⁵ This is clearly to our detriment. As indigenous shamans say, when we violate Mother Earth, we ourselves become sick and dehumanised.⁷⁶
3. Influencing the decision-making process. Stone observed that natural objects have counted for little in their own right, both in law and in popular movements.⁷⁷ Even where special measures have been taken to conserve nature, the dominant motive has been to conserve nature wisely for the utilitarian benefit of humankind.⁷⁸ The word "resource" in the title of New Zealand's Resource Management Act 1991 (the RMA) implies that we predominately value the Earth for its economic value.⁷⁹ The RMA is primarily aimed at the management of the environment for human interests, "managing the use, development and protection of natural and physical resources in a way, or at a rate which enables people and communities to provide for their economic well-being and for their health and

⁷⁰ See also Thomas Berry "Rights of the Earth: We Need a New Legal Framework which Recognises the Rights of All Living Beings" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 227 at 227.

⁷¹ Begonia Filgueria and Ian Mason "Wild Law: Is there any Evidence of Earth Jurisprudence in Existing Law?" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 192 at 200.

⁷² Nicole Rogers "Where the Wild Things Are: Finding the Wild in Law" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 184 at 186.

⁷³ Cullinan, above n 55, at 13.

⁷⁴ See also Mason, above n 63, 38-39 and Alan Boyle "The Role of International Human Rights Law in the Protection of the Environment" in Alan Boyle and Michael Anderson (ed) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 43 at 52.

⁷⁵ See also Tamaqua Borough Council Legal Ordinance <www.celdf.org> and Draft Universal Declaration for Rights of Mother Earth 2010.

⁷⁶ Hosken, above n 57, at 32-33.

⁷⁷ Stone, above n 44, at 463.

⁷⁸ Filgueria and Mason, above n 71, at 196.

⁷⁹ At 195.

safety...”.⁸⁰ Describing nature in the “right” terms will influence and even steer our policy and decision-making process. A society that speaks of the “legal rights of nature” would be more inclined to enact environmentally friendly laws.⁸¹

In reflection of Stone’s view that all elements of nature have equal value, international and domestic environmental law instruments have increasingly recognised the intrinsic value of nature and the interconnectedness of humans and nature.⁸² For example, the World Charter for Nature 1982 proclaims that “every form of life is unique, warranting respect regardless of its worth to man ... the continued existence of all forms of life shall not be compromised”.⁸³ Despite the fact that the RMA’s primary aim is to further human interests, it notably also recognises the “intrinsic value of ecosystems”.⁸⁴ The 2008 Ecuadorian Constitution goes even further by granting alienable substantive rights to nature and commits the State and citizens to live in harmony with nature.⁸⁵ Such provisions reflect the idea of the Earth as a communion of subjects enjoying equality before the law. In April 2009, the UN General Assembly adopted a resolution proposed by Bolivia proclaiming 22 April as “International Mother Earth Day”.⁸⁶ Bolivian President Evo Morales expressed the hope that, just as the twentieth century has been called the century of human rights, the twenty-first century will be known as the century of the rights of Mother Earth.⁸⁷ These developments have arguably changed the debate from whether or not it is theoretically possible to recognise rights for nature to whether or not doing so would be legally effective.

⁸⁰ Resource Management Act 1991, s 5. See also Filgueira and Mason, above n 71, at 197 and Sheehan, above n 55, at 236 and 239.

⁸¹ Stone, above n 44, at 488-49. See also Catherine Redgwell “Life, the Universe and Everything: A Critique of Anthropocentric Rights” in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 71 at 84-85 and Michael Anderson “Human Rights Approaches to Environmental Protection: An Overview” in Alan Boyle and Michael Anderson (ed) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 1 at 15.

⁸² See also Boyle, above n 74, at 52.

⁸³ World Charter for Nature, A/RES/37/7, 28 October 1982. See also IUCN, UNEP and WWF *Caring for the Earth: A Strategy for Sustainable Living* (IUCN, UNEP and WWF, Gland, 1991) and Earth Charter 2000 (formally recognised by over 4,800 organisations) Principle 1a <www.earthcharterinaction.org>.

⁸⁴ Resource Management Act 1991, s 7. See also Conservation Act 1987, s 2 and National Parks Act 1980, s 4. See generally *Port Gore Marine Farms v Marlborough District Council* [2012] NZ Environment Court 72 at [218], *Paokahu Trust v Gisborne District Council* Environment Court Auckland, A162/2003, 19 September 2003 and *West Coast Environment Network v West Coast Regional Council and Buller Council* [2013] NZ Environment Court 47 at [319] and [320] and Stephanie Curran “The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand” (2005) 9 NZJEL 51 at 52.

⁸⁵ Ecuadorian Constitution, Art 71 and Cullinan, above n 55, at 21. See generally Mary Whittemore “The Problem of Enforcing Nature’s Rights under Ecuador’s Constitution: Why the 2008 Environmental Amendments have No Bite” (2011) 20 Pac Rim L & Pol’y J 659 at 660.

⁸⁶ *International Mother Earth Day* A/RES/63/278.

⁸⁷ UN GA/10823 Sixty-Third General Assembly Plenary 80th Meeting 22 April 2009. See generally Begonia Filgueira and Ian Mason *Wild Law: Is There Any Evidence of Earth Jurisprudence in Existing Law and Practice?* (UK Environmental Law Association and the Gaia Foundation, London, 2009).

C *Reconciling the Anthropocentric and Ecocentric Approaches*

Scholars have questioned whether the anthropocentric and ecocentric approaches can co-exist. Professor Shelton eloquently described the distinctions between the two approaches in the following way:⁸⁸

Some theorists [anthropocentric] suggest that environmental issues belong within the human rights category, because the goal of environmental protection is to enhance the quality of human life. Even environmental protection is often for the purpose of enabling human schemes to continue and is not for the protection of nature for its own sake. Opponents [ecocentric] argue, however, that human beings are merely one element of the complex global ecosystem, which should be preserved for its own sake and not for what the Earth can do for humans. Under this approach, human rights are subsumed under the primary objective of protecting nature as a whole.

The dominant rationale for environmental protection is the main difference between the two approaches. These rationales are not always in conflict, since the environmental harms (non-human rights abuses) often go hand in hand with human rights abuses.⁸⁹ The conflict arises when the rationales do not coincide (such as economic development and ecological protection) or when environmental harm does not affect human rights (such as where substantial environmental degradation occurs before human health is harmed).⁹⁰ The ecocentric approach addresses those conflicts by maintaining balance in the ecosystem rather than tipping the scale in favour of humans.⁹¹ Whether that balance is acceptable is ultimately a political question that must be addressed by the New Zealand public. There are competing rights in every field of law, but it should be recognised that both approaches ultimately contribute to a shared objective: environmental protection. For this reason, the author endorses both approaches. Working alongside each other, both can combine to achieve their shared objective.⁹²

⁸⁸ Dinah Shelton "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 *Stan J Int'l L* 103 at 104-105. See also Mason, above n 63, at 41 and 42 and Filgueria and Mason, above n 71, at 196.

⁸⁹ Tim Hayward *Constitutional Environmental Rights* (Oxford University Press, Oxford, 2005) at 34 and Fatma Ksentini *Human Rights and the Environment from Environmental Law to the Right to a Satisfactory Environment: Legal Foundations* E/CN.4/Sub.2/1994/9 at [248], [251] and [252].

⁹⁰ Redgwell, above n 81, at 87, Shelton, above n 88, at 117 and Anderson, above n 81, at 3 and 14.

⁹¹ Filgueria and Mason, above n 71, at 200 and Morton Horowitz *The Transformation of American Law: 1780-1860* (Harvard University Press, Cambridge (MA), 1977).

⁹² See also Shelton, above n 88, at 105. See generally Hirokawa, above n 36.

V Setting the Scene

When undertaking a human rights approach to resolving environmental claims, it is the injury to individuals or groups, not the environment, that matters.⁹³ Generally, an environmental human rights claim will only succeed upon satisfying four conditions:⁹⁴

1. The party who brought the claim has standing to sue;
2. The existence of environmental degradation (such as discharge of hazardous pollutants into the air, water and soil);
3. The State's action or omission results or contributes to that environmental degradation (such as granting permits to emit air pollutants or failure to prevent ecosystem destruction). In limited circumstances, a claim may be brought against a non-State actor (such as a corporation or individual) for such degradation; and
4. Environmental degradation violated an accepted human right that the State has an obligation to safeguard.

The next section of this paper ascertains how overseas countries have approached issues one, three and four above. These issues are essential to establishing an effective regime for environmental protection.

VI A Legal Framework for Environmental Protection

A Standing Requirement

Standing is the first issue in any litigation.⁹⁵ Standing is the set of legal rules (imposed by legislation or court practices) that determine who can initiate a lawsuit or participate in a court proceeding.⁹⁶ Laws on standing vary enormously among jurisdictions, and are often inconsistent and unpredictable.⁹⁷ Standing rules range from extremely narrow to very open.⁹⁸

⁹³ See generally *Friends of the Earth v Laidlaw Environmental Services* (2000) 528 US 167.

⁹⁴ Linda Malone and Scott Pasternak *Defending the Environment Civil Strategy Strategies to Enforce International Environmental Law* (Island Press, Washington, 2006) at 10.

⁹⁵ See generally *Lujan v Defenders of Wildlife* (1992) 504 US 555.

⁹⁶ Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at [19.2].

⁹⁷ See generally Svitlana Kravchenko and John Bonine *Human Rights and the Environment: Cases, Law, and Policy* (Carolina Academic Press, 2008).

In Europe, some countries have adopted restrictive standing rules.⁹⁹ In Austria, to appeal a government's decision, NGOs must have been in existence for at least three years, have a written mission to protect the environment, and must have participated in the initial government hearing to have standing. For an individual to have standing, they must show a government's action will have a direct economic and physical impact on themselves or their property, or impede their substantive rights.¹⁰⁰

In most Commonwealth jurisdictions, including New Zealand, in order to bring a civil action, the complainant has to have a "sufficient interest" in the matter which the court is being asked to hear.¹⁰¹ This test requires the complainant to show impairment of a right (such as the right to life or privacy) resulting from an environmental degradation or that he or she has a sufficient interest (such as geographical vicinity or economic vulnerability to the proceeding's outcome) in the proceeding to be granted standing.¹⁰² This test has been subject to criticism. In 1985 and 1995, the Australian Law Reform Commission found that Australia's "'sufficient interest' test can be uncertain, complicated, inconsistent and overly dependent on subjective value judgements. This can make the legal proceeding appear unfair, inefficient and ineffective. The current law on standing is therefore a door-keeper the courts do not need as protection and litigants cannot afford."¹⁰³ These comments are equally valid in New Zealand in the context of environmental law.¹⁰⁴

⁹⁸ P Vera, R Masson and L Kramer *Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters* (European Commission, Brussels, September 2007).

⁹⁹ Anna Sherlock and Françoise Jarvis "The European Convention on Human Rights and the Environment" (1994) 24 *European L Rev* 15. See also Case C-321/95P *Greenpeace Council v EC Commission* [1995] ECR I-1651 and Case T-585/93 *Greenpeace Council v EC Commission* [1995] ECR II-2205.

¹⁰⁰ Catherine Pring and George Pring *Greening Justice Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, Washington, 2009) at 37. See also *Manual on Human Rights and the Environment* (Council of Europe Publishing, Strasbourg, 2012) at 175-180.

¹⁰¹ See generally "An Everyday Guide to the Resource Management Act" Ministry for the Environment <www.mfe.govt.nz>, *Laws of New Zealand* Resource Management (online ed) at [258], *Laws of New Zealand* Administrative Law (online ed) at [153] and Nolan, above n 96, [19.7].

¹⁰² See generally Nolan, above n 96, at [19.8]-[19.11].

¹⁰³ Australian Law Reform Commission *Standing in Public Interest Litigation* (ALRC Report No 27, 1985) and Australian Law Reform Commission *Beyond the Doorkeeper - Standing to Sue for Public Remedies* (ALRC Report No 78, 1995). See also New South Wales' Environmental Planning and Assessment Act 1979, s 123 and Peter McClellan "Access to Justice in Environmental Law: An Australian Perspective" (speech at the Commonwealth Law Conference, London, 11-15 September 2005).

¹⁰⁴ See generally Nolan, above n 96, at [19.8]-[19.11]. See also *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 and *Transit New Zealand v Auckland Regional Council* NZ Environment Court Auckland A 91/2000, 17 June 2000 for a restrictive approach. Contrast *Meadow 3 Ltd v Queenstown Lakes District Council* NZ Environment Court Christchurch C 1/2008, 16 January 2008 for a liberal approach.

In Asia, Africa and parts of the Americas, countries have abandoned the traditional “sufficient interest” requirement. The focus has shifted from who is bringing the proceeding to whether there has been a breach of statutory duty. The advantage of this approach is that it gives opportunities to NGOs and civil society at large to address environmental degradation before the courts where the aggrieved persons are financially or socially disadvantaged or difficult to identify. In Trinidad and Tobago, “any individual or group of individuals expressing a general interest in the environment or a specific concern with respect to the alleged violation of environmental law” is deemed to have standing to bring a direct action against the offender alleging a violation of the Environmental Management Act 2000 (Trinidad and Tobago).¹⁰⁵ In Chile, India and Sudan, any person can lodge a claim where there has been environmental degradation without needing to prove that he or she had a direct connection to such damage.¹⁰⁶ In the Philippines, the Supreme Court Rules of Procedures for Environmental Cases explicitly identify future generations as having standing to sue.¹⁰⁷ This rule also expressly grants any Filipino citizen permission to sue in the interest of protecting the environment, on the basis that humans are stewards of nature.¹⁰⁸ In effect, it is the environment which is vindicated in the action.

Upon meeting the standing requirement, the claimant must prove his or her rights have been harmed by the environmental degradation. Environmental protection and human rights are distinct fields of law.¹⁰⁹ The objective of environmental law is to conserve and protect the environment itself.¹¹⁰ It does not focus on the impact of environmental degradation on the

¹⁰⁵ Environmental Management Act 2000 (Trinidad and Tobago), s 69.

¹⁰⁶ Barry Hill, Steven Wolfson and Nicholas Targ “Human Rights and the Environment: A Synopsis and Some Predictions” (2003) 16 Geo Int’l Env’tl L Rev 359 at 388, *Comunidad de Chañaral v Codeco División el Saldor* (1988) Chilean Supreme Court and *S P Gupta v Union of India* (1982) AIR SC 149. For more information on the Indian Jurisdiction, see generally S Geetanjoy “Implications of Indian Supreme Court’s Innovations” (2008) 4 L Env’tl & Dev J 3 and M Ramesh “Environmental Justice: Court and Beyond” (2002) 3 Indian Env’tl L 20.

¹⁰⁷ Supreme Court Rules of Procedures for Environmental Cases 2010, s 5 “citizen suit”. See generally *Minors Oposa v Factoran* GR No 101083 224 SCRA 792 (SC July 30, 1993) (Philippine) at 794.

¹⁰⁸ Supreme Court Rules of Procedures for Environmental Cases 2010, s 5. See generally “Annotation to the Rules of Procedure for Environmental Cases” <www.lawphil.net>.

¹⁰⁹ *Promotion and Protection of Human Rights Science and Environment* E/CN.4/2002/WP.7 at [10] and Ole Pedersen “European Environmental Human Rights and Environmental Rights: A Long Time Coming?” (2008) 21 Geo Int’l Env’tl L Rev 73 at 73.

¹¹⁰ Richard Lazarus “Restoring What Environmental about Environmental Law in the Supreme Court” (2000) 47 UCLA L Rev 703 and Robin Churchill “Environmental Rights in Existing Human Rights Treaties” in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 89 at 108.

human community.¹¹¹ Consequently, at the start of the twentieth century, human rights law has been developed to address environmental degradation on human beings.¹¹² This development ("environmental human rights") can be separated into two stages.¹¹³ At first, existing human rights were judicially reinterpreted to apply to environmental degradation. This was followed by the slow development of an independent new human right to safeguard against environmental degradation.

B Reinterpreting Existing Human Rights to Address Environmental Concerns

At the international, regional and national levels, human rights instruments drafted in the early twentieth century do not contain provisions explicitly addressing environmental protection.¹¹⁴ When these instruments were adopted, the drafters did not foresee the enormity of ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations.¹¹⁵ Nonetheless, international bodies and domestic courts have begun to recognise the critical connection between environmental degradation and the sustenance of the rights under these instruments through the reinterpretation of existing rights, including:¹¹⁶ the right to life, health,¹¹⁷ water,¹¹⁸ an adequate standard of living,¹¹⁹

¹¹¹ Popović, above n 43, at 339-340 and 345. See also *Kyrtatos v Greece* (2003) ECHR 2003-VI at [52] and *Metropolitan Nature Reserve v Panama* Case 11,533 Inter-Am Comm'n HR Rep No 88/03 OEA/Ser.L/C/II.118.

¹¹² *Promotion and Protection of Human Rights: Science and Environment* E/CN.4/2004/87 at [21]-[23].

¹¹³ See generally Shelton, above n 88. See generally May and Daly, above n 50, at 367-368 for a history of the environmental human right development at the international, regional and national level.

¹¹⁴ The main international and regional legally binding and non-binding human rights instruments are: Universal Declaration of Human Rights 1948, Charter of the United Nations 1945, United Nations Covenant on Civil and Political Rights 1966, United Nations Covenant on Economic, Social and Cultural Rights 1976, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, European Social Charter 1961, American Convention on Human Rights 1969, the American Declaration of the Rights and Duties of Man 1948 and African Charter on Human and Peoples' Rights 1987.

¹¹⁵ Svitlana Kravchenko "Environmental Rights in International Law: Explicitly Recognised or Creatively Interpreted?" (2012) 7 Fla A & M U Lev 163 at 166, W Gormley *Human Rights and the Environment: The Need for International Cooperation* (AW Sijthoff, Netherlands, 1976) and Kennedy Cuomo "Human Rights and the Environment: Common Ground" (1993) 18 Yale J Int'l L 227 at 227.

¹¹⁶ See Appendix One for sources of international law applicable to environmental human rights.

¹¹⁷ See generally *Human Rights and the Environment as Part of Sustainable Development* E/CN.4/2005/96 at 14-15, *Marangopoulos Foundation for Human Rights v Greece* Complaint No 30/2005 and *Manual on Human Rights and the Environment*, above n 100, at 9 and 117-121.

¹¹⁸ See generally UNCESCR *General Comment 15: The Right to Water* UN Doc E/C.12/2002/11 (20 January, 2003) at 2 and 3, Human Rights Council Resolution A/HRC/15/L.24, 24 September 2010 "Human Rights and Access to Safe Drinking Water and Sanitation" and Jakarta Declaration on Millennium Development Goals in Asia and the Pacific: the Way Forward 2015, August 5, 2005.

¹¹⁹ See generally UNCESCR *General Comment No 12 E/C.12/1999/5* (12 May 1999) and *Human Rights and the Environment as Part of Sustainable Development*, above n 117, at 7.

private and family life (privacy), education,¹²⁰ safe and healthy working conditions, non-discrimination, property, food,¹²¹ development, use of the environment for cultural purposes,¹²² association, information,¹²³ participation, legal redress and so on.¹²⁴ Due to the extensive jurisprudence on the reinterpretation approach, not all cases will be discussed in this paper.¹²⁵ Instead, the following analysis will draw out the key legal principles articulated by different courts and commissions in linking the environment with the rights to life and privacy. These rights have been chosen because the right to life is incorporated into the NZBORA and the right to privacy is protected under the tort of privacy, albeit to a limited extent.¹²⁶

1 Right to life

The right to life is affirmed in the International Convention on Civil and Political Rights 1966 (ICCPR),¹²⁷ the European Convention on Human Rights 1950 (European Convention),¹²⁸ the African Charter Human and Peoples Rights 1981 (African Charter)¹²⁹ and the Inter-American Convention on Human Rights 1969 (American Convention).¹³⁰ All of these instruments are concerned with civil and political rights.¹³¹ These instruments predate the widespread international concern with environmental degradation which arose in the late 1970s, as reflected in the 1972 UN Conference on the Human Environment, and later in the 1992 Rio Earth Summit,¹³² the 2002 World Summit on Sustainable Development and the 2012 UN

¹²⁰ See generally United Nations Committee on the Rights of the Child *General Comment No 1: The Aims of Education* (2001) UN Doc CRC/GC/2001/1 (17 April 2001).

¹²¹ See generally United Nations Food and Agricultural Organisation Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (adopted in 2004) <www.fao.org>.

¹²² See generally *Lubicon Lake Band v Canada* Decisions of the Human Rights Committee, UN Doc CCPR/C/38/D/167/1984 (26 March 1990).

¹²³ See generally *The Right to Freedom of Expression and Opinion* E/CN.4.2004/62 and Rio Declaration, Principle 10.

¹²⁴ See generally Anderson, above n 81, at 8.

¹²⁵ See generally Earth Justice *Environmental Rights Report 2007 Human Rights and the Environment* (Earth Justice, Oakland, 2007).

¹²⁶ See generally *Laws of New Zealand Tort* (online ed) at [184]-[184b], Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (paper presented to the Human Rights Review Tribunal Annual Conference, Wellington, July 2012), *Rogers v TVNZ* [2007] NZSC 91, [2008] 2 NZLR 277 and *Human Rights and the Environment: Reference Paper* (The Asia Pacific Forum of National Human Rights Institutions, 2007) at 39.

¹²⁷ ICCPR, Article 6(1).

¹²⁸ ECHR, Article 2.

¹²⁹ ACHPR, Article 4.

¹³⁰ IACHR, Article 4.

¹³¹ Churchill, above n 110, at 90.

¹³² Rio Declaration, Principle 1.

Conference on Sustainable Development.¹³³ In light of this background, questions can be raised about this right's usefulness in addressing environmental concerns.

The right to life has traditionally been interpreted as the right to be free from arbitrary deprivation of life by the State (including forced disappearances, extrajudicial executions and other similar threats).¹³⁴ It is clear that this right prohibits the State from intentionally or negligently taking life, for example, if the State intentionally caused deaths through environmental degradation, such as polluting a drinking reservoir. What is not clear is whether the right covers *all* environmental harms.¹³⁵ First, most environmental harms are not intentionally directed at people or do not involve the use of lethal force by the State. Secondly, the right to life is traditionally conceived as a negative "freedom from" rather than a positive "rights to" right.¹³⁶ Finally, where immediate survival is not threatened, does the right to life encompass quality of life issues? For example, because air and water are necessary to sustain life, does the right to life imply a right to pollution-free air and water? These questions have generated a variety of responses by different governing bodies.

At the international level, the UN Human Rights Committee is the body responsible for hearing complaints concerning the violation of ICCPR rights, as well as overseeing and advising States on the implementation of the ICCPR (the reporting process).¹³⁷ Several cases before the Committee propose a number of applicable criteria in assessing complaints alleging a breach of the right to life based on environmental harms. These include:¹³⁸

1. The risk to life must be actual or imminent;
2. The applicant must be personally affected by the harm;
3. Environmental contamination with proven long-term health effects may be a sufficient threat, however, in this context, there must be sufficient evidence that

¹³³ *Promotion and Protection of Human Rights: Science and Environment*, above 112, at [40].

¹³⁴ *Osman v United Kingdom* (2000) 29 EHRR 245 at [115]. See generally Stefan Webber "Environmental Information and the European on Human Rights" (1991) 12 Hum Rts LJ 177.

¹³⁵ Justine Thornton and Stephen Tromans "Human Rights and Environmental Wrongs: Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law" (1999) 11 J Envtl L 35 at 54.

¹³⁶ Burns Weston "Human Rights" (1986) 6 Hum Rts Q 257 at 264.

¹³⁷ First Optional Protocol to the International Covenant on Civil and Political Rights 1966, Article 40.

¹³⁸ See generally Communication No 35/1978 UN Doc CCPR/C/12/D/35/1978, *E.W and others v the Netherlands* Communication No 429/1990 UN Doc CCPR/C/47/D/429/1990, *Aalbersberg and others v the Netherlands* Communication No 1140/2005 UN Doc CCPR/C/87/D/1440/2005, *Bordes and Temeharo v France* Communication No 645/1995 UN Doc CCPR/C/47/D/645/1995 (1996) and *E.H.P v Canada* Communication No 67/1980, UN Doc CCPR/C/17/D/67/1980.

harmful quantities of contaminants have reached, or will reach, the human environment; and

4. A hypothetical risk is insufficient to constitute a violation of the right to life.

Notably, the Committee has taken the view that the right to life in the ICCPR does involve States taking positive measures to protect lives.¹³⁹ Under the reporting process, the Committee has consistently sought information on measures taken in the environmental field (such as agrarian reforms and the regulation of the transportation and dumping of nuclear waste).¹⁴⁰ McGoldrick points out that there are doubts as to whether the State's positive obligation "is immediate or progressive".¹⁴¹

At the regional level, the European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights (IACHR) have found that there may be a violation of the right to life based on environmental harms. In 2004, the ECtHR found a breach of the right to life in an environment case, *Öneryildiz v Turkey*, which involved a clear loss of life.¹⁴² The applicant complained that a 1993 methane explosion at an improperly designed and maintained rubbish tip, in which nine members of the applicant's family died, was the result of the Turkish administrative authorities' negligence.¹⁴³ According to a 1991 expert report, the rubbish tip did not conform to Turkey's environmental regulation and was therefore causing damage to the environment and posed "[health] risks to humans and animals".¹⁴⁴ The report also warned of the possibility of a methane explosion which would cause "substantial damage" to neighbouring dwellings. Despite having knowledge of this report, administrative authorities took no measures to address the danger.¹⁴⁵ The ECtHR described the danger as

¹³⁹ Churchill, above n 110, at 90. See generally UN Human Rights Committee *General Comment No 6: The Right to Life* UN Doc HR/GEN/1/Rev1 (1994) at [1] and [5] and UN Human Rights Committee *General Comment No 14: Nuclear Weapons and the Right to Life* UN Doc HR/GEN/1/Rev1 (1984) at [4] and [6].

¹⁴⁰ Dominic McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, Oxford, 1991) at 329-330.

¹⁴¹ At 330 and 347.

¹⁴² *Öneryildiz v Turkey* XII Eur Ct HR 79 (2004). See also *Taşkın and others v Turkey* (2004) Eur Ct HR No 46117/99 at [4], [26] and [102].

¹⁴³ At [18].

¹⁴⁴ At [13], [15], [23] and [56].

¹⁴⁵ At [15], [16], [29], [33] and [60].

real and immediate.¹⁴⁶ In finding there was a violation of the right to life,¹⁴⁷ the Court reiterated that.¹⁴⁸

Article 2 (everyone's right to life shall be protected by law) does not solely concern deaths resulting from the use of force by the States but also lays down a *positive obligation on States* to take appropriate steps to safeguard the lives of those within their jurisdiction ... this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake ... negligent omission on the part of the State authorities come[s] within the ambit of article 2 ...

The IACHR and the Inter-American Court of Human Rights have similarly found a violation of the right to life due to environmental pollution (such as contamination of water, soil and air). As stated by the IACHR: "the realisation of the right to life is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation *pose a persistent threat* to human life, the foregoing right is implicated."¹⁴⁹

At a national level, the Indian Supreme Court has formulated the most expansive interpretation of the right to life, holding that the right encompasses quality of life issues.¹⁵⁰ This liberal position was due to the fact that the Supreme Court justices were concerned that the Indian Government was not protecting human health and the environment in contravention of public interest.¹⁵¹ In the 1990s, in a series of public interest decisions, the Supreme Court recognised an implicit constitutional right to a healthy environment and held

¹⁴⁶ At [100]-[101].

¹⁴⁷ At [75] and [97]-[115].

¹⁴⁸ At [66], [71], [72] and [89]-[96]. See also *L.C.B v the United Kingdom* (1999) 27 EHHR 212 (ECHR) at 228 and *Paul and Audrey Edwards v the United Kingdom* [2002] 54 ECHR.

¹⁴⁹ Inter-America Commission of Human Rights *Report on the Situation of Human Rights in Ecuador* Doc OEA/Ser.L/V/II.96M doc 10 rev 1 (1997), *Yakye Axa v Paraguay* Judgment of 17 June 2005 Series C No 125 at [160]-[167] and *Sawhoyamaya Indigenous Community v Paraguay* Judgment of 29 March 2006 Series C No 146 at [148]-[151] (emphasis added).

¹⁵⁰ Other Asian countries have followed the Indian jurisprudence, see generally *Mohiuddin Farooque v Bangladesh* 48 DLR 413 (1996) (SC Bangladesh App Div (Civ)), *West Pakistan Salt Miners v Directors of Industries and Mineral Development* 1994 SCMR 2061 (SC Pakistan), *Kedar Bhakta Shrestha v HMG Department of Transportation Management* Writ No 3109 of 1999 (SC Nepal). See also Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment *Background Paper No 6* (Geneva, Switzerland, 14-16 January 2002) for a review of jurisprudence on the right to life in Latin America and Carl Bruch, Wole Coker and Chris VanArsdale *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd ed, Environmental Law Institute, 2007) for a review of the jurisprudence on the right to life in Africa.

¹⁵¹ Hill, Wolfson and Targ, above n 106, at 482. See generally Law Commission of India *Proposal to Constitute Environmental Courts* (186th Report of the Law Commission of India, September 2003).

that an adequate standard of life formed an essential element of the right to life.¹⁵² For example, in *Subhash Kumar v State of Bihar*,¹⁵³ the Court held that the right to life includes “the right of enjoyment of pollution free water and air for full enjoyment of life.”¹⁵⁴ In *Charan Lal Sahu v Union of India*,¹⁵⁵ in confirming the link between a healthy environment and the realisation of the right to life, the Court held that “it is the duty of the State to take effective steps to *protect* the right to life.”¹⁵⁶ In another case *M C Mehta v The Union of India*,¹⁵⁷ leather tanneries located on the Ganga River’s bank were polluting the River by discharging untreated wastewater. The water pollution had caused considerable damage to the life of people who used the River (such as water-borne diseases) and also to the River’s ecology. The Court held that, on the facts, the right to life and health have greater importance than economic development.¹⁵⁸

... a tannery, which cannot set up a primary treatment plant, cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure.

In New Zealand, the rights protected by the NZBORA were drawn from the ICCPR.¹⁵⁹ The NZBORA affirms the right to life in s 8, which states, that “no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.” Presently, no New Zealand cases have directly addressed the issue of whether the right to life includes an environmental element.¹⁶⁰ A full analysis of whether New Zealand courts will follow overseas jurisprudence is beyond this paper’s scope. The author encourages scholars to address this issue in future research. In short, it is the author’s view that claimants would face an arduous battle attempting to succeed with such an argument before the New Zealand Courts. First, the NZBORA was drafted to give effect to

¹⁵² Lavanya Rajamani “Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability” (2007) 19 J Envtl L 293.

¹⁵³ *Subhash Kumar v State of Bihar* (1991) AIR SC 420.

¹⁵⁴ At [1].

¹⁵⁵ *Charan Lal Sahu v Union of India* (1990) AIR SC 1480 at [2] and [41].

¹⁵⁶ See generally Bruch, Coker and VanArsdale, above n 150, at 24 and Anderson, above n 81, at 217.

¹⁵⁷ *M C Mehta v Union of India* [1987] 4 SCC 463.

¹⁵⁸ At 482.

¹⁵⁹ Susan Glazebrook “The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness” (paper represented to the South Australian State Legal Convention, Adelaide, 23-24 July 2004) at [2] and [8].

¹⁶⁰ *Human Rights and the Environment: Final Report and Recommendations*, above n 14, at 42-44.

civil and political rights only.¹⁶¹ Secondly, in a 2007 High Court decision, in light of the wording of s 8, the Court strongly doubted that the right to life include “things necessary to [sustain] life”.¹⁶² Finally, in response to a 2007 Asia Pacific Forum Human Rights and Environment questionnaire, the New Zealand Human Rights Commission wrote: “s 8 is directed not to the quality of life that a person enjoys ... s 8 is aimed at acts (or omissions) that produce fatality; anything short of fatality does not engage s 8.”¹⁶³ The New Zealand Courts are therefore unlikely to follow the Asian jurisprudence that the right to life encompasses quality of life issues, such as a general human right to a healthy environment.¹⁶⁴

2 *Right to privacy*

The European Convention protects the right to privacy.¹⁶⁵ This right is subject to interference on specific grounds (such as the community’s economic well-being) if provided by law and necessary in a democratic society.¹⁶⁶ The right to privacy has traditionally been interpreted as a right to be free from inference, such as an unauthorised entry into one’s home.¹⁶⁷ Notwithstanding this background, there have been several environmental cases brought under this right, the majority of which involve noise and air pollution.

In *Hatton v United Kingdom*,¹⁶⁸ the applicant complained that the noise levels of aircrafts landing at Heathrow airport were “intolerable”.¹⁶⁹ The Grand Chamber, overturning the initial finding of an article 8 breach, held that, when assessing whether a fair balance has been struck between the competing interests of the individual and the community:¹⁷⁰

The State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Since the social and technical aspects of environmental issues

¹⁶¹ At 143 and *New Zealand’s Constitution: A Report on a Conversation*, above n 22, at 49.

¹⁶² *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC) at 494-495. See generally Zoe Brentnall “The Right to Life and Public Authority Liability: The Bill of Rights, Personal Injury and the Accident Compensation Scheme” (2010) 16 Auck U L Rev 110.

¹⁶³ *Human Rights and the Environment Reference Paper* (The Asia Pacific Forum of National Human Rights Institutions, September 2007) at 145.

¹⁶⁴ See generally Glazebrook, above n 159, at [30].

¹⁶⁵ ECHR, Article 8(1).

¹⁶⁶ ECHR, Article 8(2).

¹⁶⁷ Dinah Shelton *Regional Protection of Human Rights* (Oxford University Press, Oxford, 2008) at 205.

¹⁶⁸ *Hatton v United Kingdom* (2002) 34 EHRR 1. See generally *Arrondelle v United Kingdom* (1982) 26 DR 5 and *Powell and Rayner v United Kingdom* (1990) 172 Eur Court HR (ser A).

¹⁶⁹ *Hatton*, above n 168, at [9]-[17].

¹⁷⁰ *Hatton v United Kingdom* (2003) 37 EHRR 28 at [96]-[104] and [122]-[123] (emphasis added).

are often difficult to assess, the national authorities are better placed than the Court itself to decide on the best policy to adopt in given circumstances. Therefore the State enjoys a *wide margin of appreciation* as to the measures which the State may adopt to tackle environmental factors. Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, *but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights*.

In *López Ostra v Spain*,¹⁷¹ the ECtHR recognised a breach of privacy rights as a result of air pollution for the first time. The applicant lived in a town with a heavy concentration of leather tanneries. The applicant's home was 12 metres away from an unlicensed treatment plant for liquid and solid waste.¹⁷² For a period of three years, due to a malfunction, the plant released gas fumes, pestilential smells, and contamination into the atmosphere, which caused health problems and nuisance to the applicant.¹⁷³ Several reports indicated that gas concentrations in the applicant's house exceeded the permitted legal limit.¹⁷⁴ The applicant contended that the air pollution infringed her privacy rights.¹⁷⁵ The ECtHR held that, "*severe environmental pollution* may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."¹⁷⁶ The Court concluded that the Spanish Government had failed to strike a fair balance between the public interest in the town's economic well-being – specifically in having a waste-treatment plant – and the applicant's privacy rights.¹⁷⁷ The Court ordered the Government to pay compensation to the applicant for "non-pecuniary damage for distress and anxiety at the situation in addition to nuisance caused by the fumes, noise and smells."¹⁷⁸ On the ECtHR's decision to award damages, Acevedo has commented that:¹⁷⁹

¹⁷¹ *López Ostra v Spain* [1994] 303 ECHR 46. See generally *Romashina v Russia* (2006) ECHR Application Nos 53157/99 and *Moreno Gómez v Spain* [2004] ECHR 633 at [53].

¹⁷² *López Ostra v Spain*, above n 171, at [7] and [54].

¹⁷³ At [8], [9] and [53].

¹⁷⁴ At [18] and [19].

¹⁷⁵ At [30], [34], [40] and [47].

¹⁷⁶ At [51] (emphasis added).

¹⁷⁷ At [58].

¹⁷⁸ At [65].

¹⁷⁹ Marina Acevedo "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (1999) 8 NYU Env'tl LJ 437 at 479.

The Court did not provide any guidance as to how it reached this determination. It did not indicate the factors it considered relevant and irrelevant in assessing the equitable level of compensation, and whether it would have included the nature and degree of nuisance, the time over which it was suffered, and the compensatory measures (if any) taken by the State. Nevertheless, the Court's finding is significant, as it is the first instance in which the Court awarded damages for a breach of the Convention in connection with a finding of environmental harm.

In another case, *Fadeyeva v Russia*,¹⁸⁰ the applicant lived 450 metres from the largest steel plant in Russia, which was responsible for 95 percent of industrial emissions in the town.¹⁸¹ The concentration of toxic substance in the town's air was 20 to 50 times higher than the maximum permissible legal limits. One report found that "the environmental situation in the town had resulted in a continuing deterioration in public health".¹⁸² The applicant alleged a violation of article 8 due to "the State's failure to protect her private life and home from severe environmental nuisances arising from the industrial activities of the steel plant."¹⁸³ The ECtHR laid out the following general principles in regards to article 8(1):¹⁸⁴

Article 8 has been relied on in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedom guaranteed by the Convention (see *Kyrtatos v Greece*). Thus in order to raise an issue under article 8 the interference *must directly affect* the applicant's home, family or private life. The adverse effects of environmental pollution must attain a *certain minimum level* if they are to fall within the scope of Article 8 (*López Ostra v Spain*). The assessment of that minimum threshold depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects, as well as on the general environmental context.

The ECtHR has also recognised that article 8(1) imposes a positive duty on the State to ensure the fulfilment of the right to privacy.¹⁸⁵ For example, the State has an obligation to

¹⁸⁰ *Fadeyeva v Russia Federation* (2005) Eur Ct HR 257.

¹⁸¹ At [10], [11] and [19].

¹⁸² At [15], [29]-[47] and [84]-[87].

¹⁸³ At [64].

¹⁸⁴ At [68]-[134] (emphasis added).

¹⁸⁵ *López Ostra*, above n 171, at [51] and *McGinley & Egan v United Kingdom* 27 Eur HR Rep 1 (1998) at 45.

inform the public about environmental risks.¹⁸⁶ The State's obligation also includes regulating private industry in a manner securing proper respect for privacy right.¹⁸⁷

*C The Emergence of a New Human Right to Address Environmental Concerns:
The Right to a Healthy Environment*

Recently, scholars have advocated for a new environmental human right: the right to a safe, healthy and ecologically-balanced environment.¹⁸⁸ Hayward explained why this new right is necessary in addition to the existing human rights (such as the rights to life and privacy):¹⁸⁹

The suggestion that an express environmental right is not necessary because remedies can be deduced from existing rights of life, privacy, and so on, is ultimately not very credible, since environmental protection is not a primary aim of these rights and may not always a derivate aim, or not one strongly enough established to support claims in courts.¹⁹⁰ Another source of concern about deriving environmental rights from rights [such as the right to life] instituted for quite different purposes is that ... it 'depends on the initiative of the adjudicating body' and requires 'a willingness in the adjudicating body to be assertive and perhaps adventures'.

Atapattu then explained, in detail, the difference between the two approaches:¹⁹¹

The drawback of the [reinterpretation approach] is that the victim has to prove that the environmental issue in question has violated one of his or her human rights. If this link cannot be established, then the action will fail. Thus, for example, a victim of pollution caused by an industrial establishment must prove that, as a result of suffering pollution damage, his or her health has been impaired or his or her standard of living has been affected. It may not be easy to establish this link in every case. On the other hand, the recognition of a distinct human right to a healthy environment would allow a victim to establish that the pollution level in his or her neighbourhood has increased as a result of the industrial establishment and exceeds the permissible level for that particular pollutant. In such a situation, establishing individual injury

¹⁸⁶ *Guerra v Italy* App No 14967/89, 26 Eur HR Rep 357 (1998) and *Tătar v Romania* (2009) Eur Ct HR, Application No 67021/01.

¹⁸⁷ *Hatton*, above n 170, at [89] and [119] and *Manual on Human Rights and the Environment*, above n 100, at 51-54.

¹⁸⁸ Hayward, above 89 and Sumudu Atapattu "The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law" (2002) 16 Tul Env'tl LJ 65.

¹⁸⁹ Hayward, above n 89, at 12-13 and 175-177. See also Bruckerhoff, above n 34, at 634 and 639.

¹⁹⁰ See also Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 at 312-315.

¹⁹¹ Atapattu, above n 188, at 99. See also Ksentini, above n 89, at [180].

(which may be long term anyway) is not necessary, as the victim would be in a position to show that the environment in which he or she is living has been polluted by the activity of the industry in question. Establishing that because of the emission of a pollutant above a certain threshold, the environment is no longer healthy to live in, is all that is required. This approach thus circumvents one major problem inherent in the litigation process, namely establishing injury.

The UN Environmental Programme has labelled this new right as a “debated” concept.¹⁹² This debate arises from the lack of uniform acceptance of such a right at the international, regional and national levels.

1 International level

The sources of international law include international treaties and customs.¹⁹³ Whether international law recognises the human right to a healthy environment is a “hotly debated” issue with largely contrasting views.¹⁹⁴ This paper does not intend to fully enter into that murky debate.¹⁹⁵ The following are four key reasons as to why there is no international recognition of a human right to a healthy environment. First, to date, States have avoided establishing legally binding international human rights treaties that explicitly recognise a new human right to environment.¹⁹⁶ Secondly, attempts to garner support for drafting a legally non-binding international declaration setting out a new human right to environment have also been unsuccessful.¹⁹⁷ Thirdly, the protection of existing human rights (such as the rights to life and privacy) is the closest international human rights bodies have come to accepting

¹⁹² “High Level Expert Meeting on the Future of Human Rights and Environment: Moving the Global Agenda Forward” United Nations Environmental Programme <www.unep.org>.

¹⁹³ Statute of the International Court of Justice, Article 38. See generally Ian Brownlie *Principles of Public International Law* (Oxford University Press, Oxford, 2012).

¹⁹⁴ See generally Philip Alston “Conjuring up New Human Rights: A Proposal for Quality Control” (1984) 78 Am J Int’l L 607, Dina Shelton “What Happened in Rio to Human Rights?” (1992) 3 Yearbook of Int’l Env’tl L 75 at 81 and Sumudu Atapattu *Emerging Principles of International Environmental Law* (Transnational Publishers, New York, 2006) at 4. Contrast Marie-Claire Segger and Ashfaq Khalfan (eds) *Sustainable Development Law Principles, Practices and Prospects* (Oxford University Press, New York, 2004) at 71-72.

¹⁹⁵ See generally Boyd, above n 8, at Ch 4, Marc Pallemmaerts “The Human Right to a Healthy Environment as a Substantive Right” in Maguelonne DeJeant-Pons and Marc Pallemmaerts (eds) *Human Right and the Environment* (Council of Europe, Belgium, 2002) 11 at 11-21 and Iveta Hodkova “Is There a Right to a Healthy Environment in the International Legal Order?” (1991) 7 Conn J Int’l L 65.

¹⁹⁶ Shelton, above n 88, at 122, Rebecca Bratspies “Human Rights and Environmental Regulations” (2012) NYU Env’tl LJ 225 at 245 and Boyle, above n 74, at 49.

¹⁹⁷ Ole Pedersen “A Bill of Rights, Environmental Rights and the UK Constitution” (2011) PL 577 at 578 and Norman Dorsen and others (eds) *Comparative Constitutionalism* (Thomson, Minnesota, 2003) at 1319.

complaints of human rights violations based on environmental considerations.¹⁹⁸ This demonstrates international human rights bodies' preference for the reinterpretation approach. Finally, the original support for a human right to environment in the 1970s has shifted towards the "sustainable development" concept following the 1992 Earth Summit.¹⁹⁹ Therefore, there remains a lack of consensus amongst the States about whether such a right should be recognised at the international level.²⁰⁰

2 *Regional level*

Consistent with international developments, there appears to be no regional consensus on the existence of a human right to a healthy environment. In 2007, at an Asia and Pacific regional ministerial conference on the environment, the consensus was not to declare a human right to the environment. Similarly, in Europe, the Council of Europe's Committee of Ministers rejected proposals from the European Parliamentary Assembly to add a protocol to the European Convention recognising a human right to environment in 2004 and 2010.²⁰¹ The lack of political will amongst European Ministers to accept this proposal was based on several factors:²⁰²

1. A fear of watering down the European Convention with a series of newly claimed human rights;
2. The belief that the human right to environment lacks justiciability; and
3. The fact that each State has serious environmental problems which could be subject to complaints if the right gained acceptance.

¹⁹⁸ Anderson, above 81, Boyle, above n 74, at 43 and Gunther Handl "Human Rights and Protection of the Environment: A Mildly 'Revisionist' View" in Antonia Cançado Trindade (ed) *Human Rights and Environmental Protection* (Instituto Interamericano de Derechos, San Jose, 1992) 117 at 128.

¹⁹⁹ Hayward, above n 89, at 57 and Glazebrook, above n 190, at 295-300.

²⁰⁰ *Human Rights and the Environment: Final Report and Recommendations*, above n 14, at 7. Also see Shelton, above n 194, at 75.

²⁰¹ Council of Europe, Parliamentary Assembly, Environment and Human Rights Doc 9791 16 April 2003 and Council of Europe, Parliamentary Assembly (24th sitting) on 27 June 2003, Recommendation 1614 and Council of Europe, Reply adopted by the Committee of Ministers on 41 January 2004 at the 869th meeting of the Ministers' Deputies and Parliamentary Assembly of the Council of Europe 2010 reply to Recommendation 1885: Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment Doc No 12298 16 June 2010.

²⁰² Shelton, above n 88, at 133.

The ECtHR has also refrained from explicitly recognising a right to environment under the European Convention. In *Kyrtatos v Greece*,²⁰³ the Court concluded that none of the Convention's rights were "specifically designed to provide general protection of the environment as such." Instead, such an objective is best dealt with at the national level.²⁰⁴

In contrast, other regions of the world have recognised a human right to environment. The African Charter was the first regional human rights instrument to explicitly recognise this right. Article 24 states that "*all people* shall have the right to a general satisfactory environment favourable to their development."²⁰⁵ Soon after, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (Protocol of Salvador) recognised that "everyone shall have the right to live in a healthy environment."²⁰⁶ The State also has a positive obligation to "promote the protection, preservation, and improvement of the environment."²⁰⁷

Scholars have labelled both instruments' ability to provide legal remedies for environmental human rights victims as "weak".²⁰⁸ The African Commission and the IACHR have limited powers. Although the African Commission can receive complaints from the public, it can only issue reports and make non-binding recommendations to State parties.²⁰⁹ A study of 40 cases, in which the African Commission found human rights violations and issued recommendations, revealed only six cases in which the State complied fully with the recommendations.²¹⁰ The Protocol of Salvador does not grant the right of individual petition before the IACHR for violations of the human right to environment.²¹¹ This leaves only the processes of annual State reporting, and the IACHR's non-binding commentary on such

²⁰³ *Kyrtatos v Greece*, above n 111, at [52].

²⁰⁴ See also *X & Y v Federal Republic of Germany* App No 7407/76 15 Eur Comm'n HR Dec & Rep 161 (1976), *Borysiewicz v Poland* ECHR Application No 71146/01 at [48]-[56], *Fadeyeva*, above n 180, at [68] and *Atanasov v Bulgaria* (2011) No 12853/03, 11 April 2011. Contrast Philip Sands "Human Rights, Environment, and the *López Ostra* Case: Content and Consequences" (1996) 6 European Hum Rts L Rev 608.

²⁰⁵ See generally Acevedo, above n 179, at 462-463.

²⁰⁶ Article 11(1).

²⁰⁷ Article 11(2).

²⁰⁸ J Taillant "Environmental Advocacy and the Inter-American Human Rights System" in R Picoletti and J Taillant (eds) *Linking Human Rights and the Environment* (University of Arizona Press, Tucson, 2003) 118.

²⁰⁹ J Nwobike "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria" (2005) 1 African J Legal Stud 129 at 145.

²¹⁰ F Viljoen and L Louw "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 Am J Int'l L 1.

²¹¹ Churchill, above n 110, and Article 19(6).

reports, as methods of addressing environmental human rights violations.²¹² Furthermore, the State's positive obligation is also weakened by other articles in the American Convention. For example, article 1 provides that the State's positive obligation is not immediate. It is to be progressively realised. The rate of progress depends on the State's available resources. Churchill described the effect of article 1 in the following manner:²¹³

If the State lacks the resources to promote a healthy environment, the State needs do nothing. Conversely, if the State has the resources and the human environment can be improved, the State must take some measures. To a considerable extent, therefore, bearing in mind the generally economic conditions prevailing in much of Latin America and the Caribbean, article 1 is a recipe for inaction to protect the environment.

The reference to "all people" in the African Charter initially caused confusion as to who can bring a complaint to the African Commission. Scholars have suggested the reference to "all people" only protects a collective right (such as the entire population of a party State).²¹⁴ In other words, article 24 is not actionable by an individual. It was not until 2000 that, the African Commission clarified that article 24 encompasses both collective and individual rights.²¹⁵

To date, the African Commission has issued one major recommendation specifically on the impact of environmental degradation on the right to a satisfactory environment. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, the plaintiffs alleged that oil companies engaging in oil extraction and pipeline construction violated international environmental law regarding concerns for health, environment and contamination of water, soil and air.²¹⁶ The Commission emphasised that, apart from the duty to respect, protect and promote, the State has a positive obligation to fulfil vis-à-vis article 24 and must "take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of

²¹² Article 19(7).

²¹³ Churchill, above n 110, at 99-100.

²¹⁴ Richard Kiwanuka "The Meaning of 'People' in the African Charter of Human and Peoples' Rights" (1988) 82 Am J Int'l Law 80 and P Birnie and A Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 254.

²¹⁵ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Judgment) ACHPR 155/96, 27 October 2000.

²¹⁶ At [1]-[9] and [50].

natural resources.”²¹⁷ The Commission also recognised that Nigeria’s economy depended on oil extraction, the income from which will be used to fulfil the State’s obligations under the African Charter.²¹⁸ The Commission made no clear indication as to how the Nigerian Government should balance economic development with the protection of environmental human rights.²¹⁹

3 National level

Over the past four decades, there has been a growing trend toward constitutional recognition of the importance of environmental protection.²²⁰ At the time of the 1972 Stockholm Declaration, only a handful of constitutions addressed environmental issues.²²¹ Today, some 125 national constitutions (including, the overwhelming majority of those amended or written since 1992) expressly address environmental norms.²²² Out of 164 developing countries, 107 address environmental norms compared to 18 out of 34 developed countries.²²³ About 92 constitutions explicitly recognise the human right to environment.²²⁴ No other human right has achieved such a broad level of constitutional recognition in such a short period of time.²²⁵

The language used to confer the human right to environment differs across constitutions. Common terms include: healthy, safe, secure, decent, viable, satisfactory, sustainable, clean, ecologically balanced, wholesome, free from contamination or suitable for the development of the person.²²⁶ The most common formulation is the right to a healthy environment.²²⁷ The following are a few examples of the ways in which a human right to environment has been expressed:

²¹⁷ At [43]-[53]. See generally Alexandra Kiss and Dinah Shelton *International Environmental Law* (3rd ed, Transnational Publishers, New York, 2004) at 716.

²¹⁸ At [54].

²¹⁹ Atapattu, above n 188, at 88.

²²⁰ See Appendix Two for constitutional environmental provisions.

²²¹ Boyd, above n 8, at 47.

²²² Hayward, above n 89, at 129. See also Boyd, above n 8, at 49.

²²³ Christopher Jeffords *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions* (The Human Rights Institute, Connecticut, 2011) at 13.

²²⁴ Boyd, above n 8, at 72.

²²⁵ David Law and Mila Versteeg “The Evolution and Ideology of Global Constitutionalism” (2011) 99 California L Rev 1163.

²²⁶ Boyd, above n 8, at 76 and Anderson, above n 81, at 10.

²²⁷ Donald Anton *Comparative Constitutional Language for Environmental Amendments to the Australian Constitution* (Environmental Defender’s Office Ltd, Sydney, 1998).

1. Argentina: all inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations.²²⁸
2. Belarus: everyone is entitled to a wholesome environment.²²⁹
3. Venezuela: every person has a right to individually and collectively enjoy a safe, healthy and ecologically balanced environment.²³⁰

Some constitutions also impose a “positive” obligation on the State, as well as non-State actors, to ensure the environment is protected.²³¹

1. Sweden: the public institutions shall promote sustainable development leading to a good environment for present and future generations.²³²
2. Portugal’s Constitution sets out the State’s duty in more detail: the State shall be charged: (a) with preventing and controlling pollution and its effects and harmful forms of erosion; (b) conducting and promoting town and country planning with a view to a correct location of activities, balanced social and economic development and the enhancement of the landscape; (g) promoting environmental education and respect for environmental values and so on.²³³

Although many constitutions contain a human right to environment, only a few have been held to be enforceable by affected individuals.²³⁴ May and Daly observes that:²³⁵

Judicial receptivity to fundamental environmental rights provisions seems to belie predictable patterns. Courts from developed countries have been less receptive to constitutional environmental rights claims than have courts from the developing world.²³⁶

²²⁸ Article 41.

²²⁹ Article 46.

²³⁰ Article 127.

²³¹ See generally May and Daly, above n 50, at 373.

²³² Article 2.

²³³ Article 66(2).

²³⁴ James May “Constituting Fundamental Environmental Rights Worldwide” (2006) 23 Pace Env’tl L Rev 113 at 114. See also Hill, Wolfson and Targ, above n 106 and Thomas Ankersen “Shared Knowledge, Shared Jurisprudence: Learning to Speak Environmental Law Creole (Criollo)” (2003) 16 Tul Env’tl L Rev 807.

²³⁵ May and Daly, above n 50, at 407. See also Bruch, Coker and VanArsdale, above n 150, at 1.

²³⁶ See generally *Pedro Flores v Corporacion del Cobre, Codelco, Division Salvador & Comunidad de Chanaral v Codeco Division el Saldor*, The “Trillium Case” Decision No 2.732-96, Supreme Court, March 19, 1997 (Chile), *Proterra v Ferroaleaciones San Ramon SA* Judgment No 1156-90, Supreme Court Nov 19 (1992) (Peru), *Irazu Margarita v Copetro SA Camara Civil y Comercial de la Plata*, Supreme Court, May 10, 1993

To further explore the nature of constitutional environmental human rights, this paper seeks to ascertain the common factors that influence a constitution's enforceability by affected individuals. Enforceability is an important aspect of environmental protection, as it ensures accountability when rights are violated or responsibilities go unfulfilled.²³⁷ If rights are unenforceable, they may be mere "paper tigers", with their constitutional recognition amounting to nothing more than "cheap talk".²³⁸

Constitutional theory identifies two types of provisions which can be formulated to ensure environmental protection: a fundamental right and a statement of public policy.²³⁹ Whether a constitutional provision is interpreted as a fundamental right or a statement of public policy is important for environmental litigation.²⁴⁰ Statements of public policy are "important goals that guide rather than limit policy action".²⁴¹ They are not enforceable by citizens who are aggrieved by environmental degradation.²⁴² Policymakers that fail to incorporate these statements into actual policy face only potential political repercussions.²⁴³ Including a constitutional provision as a fundamental right, on the other hand, creates a legal entitlement that "ties policymakers' hands" because it forces them to formulate policies and devote resources for that purpose.²⁴⁴

Unfortunately, the distinction between a fundamental right and a statement of public policy is not always clear. No two provisions in the 125 constitutions are worded the same.²⁴⁵ Apart from non-legal (such as social, economic and political) factors, each provision's enforceability ultimately depends on a direct positive interpretation of the provision solely on the language used. Notwithstanding this, the provision's enforceability will generally depend on the presence of negative statements, silence as to rights, linguistic choice, legislative

(Argentina), *Asociacion Para la Proteccion de Medio Ambiente y Educacion Ecologica 18 de Octubre v Aguas Argentinas SA* Federal Appellate Tribunal of La Plata (2003) (Argentina), *Fundacion Natura v Petro Ecuador*, Tribunal of Constitutional Guarantees, Resolution No 230-92-CP, October 15, 1992, Case No 224/90 (Ecuador), *Minors Oposa*, above 106 (Philippine), *Metro Manila Development Authority v Concerned Residents of Manila Bay* GR Nos 171947-48 (SC Dec 18, 2008) (Philippine) and *Magyar Közlöny* Case No. 1994/No.55 (Hungarian Constitutional Court) (Hungary).

²³⁷ Boyd, above n 8, at 71-72.

²³⁸ The phrase "cheap talk" was used by Daniel Farber "Rights as Signals" (2002) 31 J Legal Stud 83.

²³⁹ Brandl and Bungert, above n 29, at 8. See generally Popović, above n 43, at 361-362.

²⁴⁰ Hayward, above n 89, at 72-74.

²⁴¹ A Minkler "Economic Rights and Political Decision Making" (2009) 31 Human Rights Quarterly 368 at 381 and Brandl and Bungert, above n 29, at 16.

²⁴² May, above n 6, at 25.

²⁴³ Brandl and Bungert, above n 29, at 32.

²⁴⁴ Minkler, above n 241, at 382.

²⁴⁵ Glazebrook, above n 190, at 294-300.

history and placement of the environmental human rights provisions within the constitution.²⁴⁶

(a) Negative statements and silence

Negative statements and silence mitigate the legal strength of constitutional environmental human rights and leave citizens with little recourse to address rights violations. These statements, which either directly negate the scale and scope of environmental rights provisions, or refer the responsibility of the environment to the domains of Parliament (requiring enabling legislation to define its parameters, be implemented and enforced), are important caveats to State’s duties and obligations.²⁴⁷ Negative statements can be found in several constitutions.²⁴⁸ For example, article 36 of Lesotho’s Constitution 1993 (part of the principles of state policy chapter) states:

Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.

This is preceded by a clause declaring the State’s duty to be non-justiciable:²⁴⁹

The principles contained in this Chapter [state policy chapter] shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court ...

Thirteen constitutional provisions specify that the human right to environment may be invoked only according to specific conditions determined by law. This type of constitutional provision is described as “non-self-executing”.²⁵⁰ For example, South Korea’s Constitution expressly requires legislative measures as a prerequisite for citizen enforcement: “All citizens

²⁴⁶ Boyd, above n 8, at 72.

²⁴⁷ Jeffords, above n 223, at 12. See also Hayward, above n 89, at 98.

²⁴⁸ Bruch, Coker and VanArsdale, above n 150, at 19.

²⁴⁹ Article 25.

²⁵⁰ Hayward, above n 89, at 96.

shall have the right to a healthy and pleasant environment. The substance of the environmental rights shall be determined by the Act.”²⁵¹

Some constitutions contain no provisions that directly address the enforceability issue. For example, Cuba’s environmental constitution provisions are silent as to whether it confers an individual or collective human right to environment.²⁵² Instead, Cuba’s Constitution only imposes a duty on the State to protect the environment.²⁵³ Scholars have argued that this obligation on the State contains an implicit human right to environment.²⁵⁴ Some courts and States have been sympathetic to such arguments. For example, although Kazakhstan’s Constitution does not expressly include a human right to environment, the Kazakh Environmental Code contains an expansive articulation of the substantive and procedural aspects of the right, and the State’s report to the Compliance Committee of the Aarhus Convention acknowledges citizens’ substantive environmental rights.²⁵⁵ In other countries, citizens cannot vindicate their constitutional environmental rights because the constitution does not explicitly empower them to bring a case before the court.²⁵⁶

(b) Language, legislative intent and placement of constitutional provisions

A condition for the enforceability of a constitutional right is the provision must confer a right of action on individuals.²⁵⁷ This is described as a self-executing provision.²⁵⁸ For example, the Chilean Constitution *prima facie* guarantees enforceability, providing that “the action for the protection of fundamental rights shall always lie in the case of article 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or specific person.”²⁵⁹

When a constitutional provision does not explicitly indicate that the right is self-executing, the constitutional text influences how courts interpret the constitutional rights’

²⁵¹ Article 35(2). See also R Grote “The Republic of Korea: Introductory Note” in R Wolfrum and R Grote (eds) *Constitutions of the Countries of the World* (Oceana Law, New York, 2011) at 14 and Boyd, above n 8, at 172-173.

²⁵² See May and Daly, above n 50, at 406.

²⁵³ Article 27.

²⁵⁴ Boyd, above n 8, at 60, 217-218 and 222.

²⁵⁵ Government of Kazakhstan, Environmental Code, Law No. 212-Z, 9 January 2007.

²⁵⁶ Bruch, Coker and VanArsdale, above n 150, at 8.

²⁵⁷ Hayward, above n 89, at 95.

²⁵⁸ Boyd, above n 8, at 73.

²⁵⁹ Article 20.

enforceability.²⁶⁰ Jeffords and Minkler have observed that the strength of the language determines the provision’s enforceability vis-à-vis the State.²⁶¹ Words and phrases such as (but not limited to) “duty”, “shall”, “obliged”, and “incumbent upon” are generally considered the language of enforceable law. For example, Togo’s Constitution provides that “*everyone shall* have the right to a clean environment” and the “State *shall oversee* the protection of the environment.”²⁶² In contrast, words and phrases such as (but not limited to) “must strive to” and “take measures” are generally, independently, considered to be statements of public policy.²⁶³ For example, Finland’s constitution states that “public authorities *must strive* to ensure for every citizen the right to a healthy environment.”²⁶⁴ Drafting environmental rights as positive or negative rights will also influence the right’s enforceability. Scholars note that the courts are generally more likely to deem a right to environment as self-executing when it imposes negative or prohibitory obligations on the State.²⁶⁵

The provision’s location in a constitution will also influence its enforceability. First, the right to environment and the State’s environmental duty articulated in the constitution’s preamble will normally not be enforceable because preambles are generally not considered to be legally binding.²⁶⁶ For example, three constitutions (Cameroon, Comoros and Mauritania) place the right to environment in their preamble. Foreseeing the unenforceability issue, those constitutions state explicitly that the preamble is an integral part of their constitution.²⁶⁷ Secondly, placing a human right to environment under the “social, economic and cultural rights” section of the constitution will affect the right’s enforceability.²⁶⁸ For example, the right to environment provision in the Turkish Constitution is located in Part Two, Chapter Three under the heading “Social and Economic Rights and Duties”.²⁶⁹ All provisions under

²⁶⁰ Conor Linehan “UK and Irish Domestic Greenhouse Gas Reduction Targets: Justifiability, Enforceability and Political Context” (2013) 21 *Envtl Liability Law Pol’y and Practices* 45 at 58.

²⁶¹ Jeffords above n 223 and Minkler, above n 241. See also Bruch, Coker and VanArsdale, above n 150, at 17.

²⁶² Article 41.

²⁶³ Jeffords, above n 223, at 18-19.

²⁶⁴ Section 14a.

²⁶⁵ Jose Fernandez “State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question” (1993) 17 *Harv Envtl L Rev* 333 at 375, Hill, Wolfson and Targ, above n 106, at 392, Bruckerhoff, above n 34, at 627, François du Bois “Social Justice and the Judicial Enforcement of Environmental Rights and Duties” in Alan Boyle and Michael Anderson (ed) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 153 at 155 and 156 and Sandra Fredman *Human Rights Transformed: Positive Rights and Negative Duties* (Oxford University Press, Oxford, 2004) at 94-96.

²⁶⁶ Boyd, above n 8, at 58 and Bruch, Coker and VanArsdale, above n 150, at 7.

²⁶⁷ Boyd, above n 8, 66 and Bruch, Coker and VanArsdale, above n 150, at 17-18.

²⁶⁸ Brandl and Bungert, above n 29, at 67.

²⁶⁹ Article 56.

this Part must be evaluated with regard to the economic limit set up by article 65. This restriction of economic feasibility casts doubt on the enforceability of article 56.²⁷⁰ Another example is the right to environment provision (article 225) in the Brazilian Constitution. Traditional fundamental rights are found in Title II, “Fundamental Rights and Guarantees”, under Chapter I “Individual and Collective Rights and Duties”, or Chapter II “Social Rights”. Unlike these enforceable rights, article 225 is located in Title VII, under the heading “The Social Order”. Brandl and Brungert considered that this location grants the right to environment provision more of a public policy character, thus the individual enforceability of article 225 is very “weak”.²⁷¹ Finally, a human right to the environment that is confined to a constitution’s directive principles chapter is generally not enforceable.²⁷² On the other hand, environmental human rights provisions located in a constitution’s fundamental rights section are likely to be deemed enforceable.²⁷³ For example, the South African Constitution is one of the few constitutions which embodies the right to environment in its “Bill of Rights” section of the Constitution.²⁷⁴

Ambiguous language also raises doubts about the content of environmental rights provisions. For example, the Albanian Constitution states that “everyone has the right to be informed about the status of the environment and its protection.”²⁷⁵ Narrowly interpreted, this article could be viewed as a procedural right only: the right to information about the status of the environments condition. Broadly interpreted, this article could be read as a procedural and substantive right: the right to information and a right to environmental protection.²⁷⁶ The resolution of this ambiguity will ultimately depend on judicial interpretation of the constitution.

²⁷⁰ Brandl and Bungert, above n 29, at 72.

²⁷¹ At 7 and 78.

²⁷² Boyd, above n 8, at 220, Hill, Wolfson and Targ, above 106, at 382, Dejo Olowu “Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees” (2006) 69 Sask L Rev 39 at 59 and Michael Anderson “Individual Rights to Environmental Protection in India” in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 199 at 213-214. Contrast *Madras v Champakam Dorairajan* (1951) AIR SC 226 (India), *Sachidanand Pandey v State of West Bengal* (1987) AIR SC 1109 (India), *Kinkri Devi v Himachal Pradesh* (1988) AIR HP 4 (India) and *Minors Oposa v Factoran*, above n 107.

²⁷³ Bruch, Coker and VanArsdale, above n 150, at 16.

²⁷⁴ Article 24. See generally *Minister of Health & Welfare v Woodcarb (Party) Ltd* (1995) SA 155 (NPD) and Boyd, above n 8, at 151-154.

²⁷⁵ Article 56.

²⁷⁶ Boyd, above n 8, at 60.

The legislative history of the constitution will often provide guidance to the courts about the provision's enforceability. The legislative histories of The Netherlands,²⁷⁷ Greek²⁷⁸ and Indian²⁷⁹ Constitutions reveal that the State's duty to protect the environment should be seen as a statement of public policy rather than the establishment of a fundamental right.²⁸⁰ Similarly, Belgium's legislature did not intend the constitutional right to a healthy environment to be enforceable.²⁸¹

VII *Lessons Learned from Overseas Experience*

From the global to the local level, societies have responded to the global environmental crisis with various legal initiatives. Yet, across the board, there is no coherent legal response. The following is a summary of the "best practice" (facilitating the environmental protection goal) that can be distilled from Part II of this paper:

1. Constitutional environmental rights provisions are ineffectual unless the Legislature or the courts adopt a broad notion of standing;²⁸²
2. There needs to be recognition that existing human rights (such as the right to life and the right to privacy) can be violated as a result of environmental harm;²⁸³
 - a. International, regional and national courts have recognised that the right to life does not solely concern deaths resulting from the intentional and immediate use of lethal force by the State.²⁸⁴ Apart from the Asian jurisprudence, most courts have not recognised that the right to life encompasses a general human right to environment. Scholars have concluded that international and European case law entrenches environmental harm to the extent that there was a real and immediate risk to

²⁷⁷ Article 21.

²⁷⁸ Article 24.

²⁷⁹ Granville Austin *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, Oxford, 1966) at 75.

²⁸⁰ Brandl and Bungert, above n 29, at 56-60.

²⁸¹ See generally L Lavrysen and J Theunis "The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective" in Isabelle Larmuseau (ed) *Constitutional Rights to an Ecologically Balanced Environment* (VVOR, Ghent, 2007) 9.

²⁸² May and Daly, above n 50, at 415-416.

²⁸³ Dinah Shelton "Human Rights and the Environment: Past, Present, and Future Linkages and the Value of a Declaration" (paper presented to UNEP High Level Meeting on the New Future of Human Rights and the Environment, Nairobi, 30 November to 1 December 2009).

²⁸⁴ *Human Rights and the Environment Reference Paper*, above n 163, at 54 and 62 and *Manual on Human Rights and the Environment*, above n 100, at 18.

- human life.²⁸⁵ Thus, at the present time, a general environmental conservation objective is excluded.²⁸⁶
- b. In Europe, the right to privacy is not confined to obvious interferences such as an unauthorised entry into one's home, but may also result from environmental harm such as direct and serious noise and air pollution.²⁸⁷
 - c. The State has a positive obligation to adopt and implement measures to guarantee the rights to life and privacy when it is threatened by activities conducted by State and non-State actors.²⁸⁸
3. An independent human right to a healthy environment should be recognised;
- a. The status of a human right to environment is contentious at the international and regional level.²⁸⁹ There is also little consensus on appropriate terminology.²⁹⁰
 - b. The advantage of this right, compared to the reinterpretation approach, is that the victim only needs to prove that the environment is unhealthy to gain relief.
4. There are two mechanisms for inserting an environmental provision into a constitution: the declaration of fundamental rights and statements of public policy. Only fundamental rights can be enforced by an individual in a court of law. The following factors influence the right's enforceability:
- a. The provision should be self-executing, that is, the constitutional provision should make it clear that citizens can directly sue on the basis of the right.
 - b. The provision should only be placed in the fundamental rights section of a constitution.
 - c. The legislative history should expressly declare the right to be enforceable.
5. Few rights are absolute. Instruments should provide clear guidance as to the balancing exercise between economic development and environmental protection. In the absence of any guidelines, this balancing exercise will ultimately be decided by judges' subjective values. For example, the Indian Supreme Court in

²⁸⁵ *Manual on Human Rights and the Environment*, above n 100, at 36.

²⁸⁶ Sherlock and Jarvis, above n 99, at 17-19. See also *Manual on Human Rights and the Environment*, above n 100, at 7, 19 and 45.

²⁸⁷ *Manual on Human Rights and the Environment*, above n 100, at 45 and 47.

²⁸⁸ *Human Rights and the Environment Reference Paper*, above n 163, at 54 and 62 and *Manual on Human Rights and the Environment*, above n 100, at 34-41 and 51-54.

²⁸⁹ Boyd, above n 8, at 111.

²⁹⁰ Boyle, above n 74, at 50.

Mehta upheld environmental protection despite economic loss. In contrast, the ECtHR in *Hatton* observed that no special status will be accorded to environmental human rights in the balancing exercise between privacy and development rights.

6. Courts must have the power to provide legal remedies for breaches of environmental human rights. Thus, the power of the African Commission and the IACHR to make non-binding recommendations should not be replicated.

Based on the above summary, Part III of this paper will formulate a new constitutional environmental framework for Aotearoa New Zealand’s future constitution.

VIII A New Constitutional Environmental Framework

Submitters to the constitutional review process advocated for a constitutional environmental protection regime through a rights-based approach: affirming the human right to a healthy environment, the rights of nature and the right to intergenerational equity. The author agrees with the submitters’ right-based approach. The incorporation of environmental protection provisions into a constitution could have the following beneficial effects:

1. Positive educational effects, particularly in fostering a collective responsibility for the environment;²⁹¹
2. Signifying the importance that society attaches to environmental protection.²⁹² This may in turn encourage environmentally sound behaviour (such as prompting the Legislature to attend to environmental issues when they otherwise might not);²⁹³
3. Strengthening democracy and accountability by promoting greater public participation, substantively and/or procedurally, in environmental decision-making processes;²⁹⁴
4. Guidance in the promulgation of general and environmental governmental policies;²⁹⁵

²⁹¹ C Stevenson “A New Perspective on Environmental Rights after the Charter” (1983) 21 Osgoode Hall LJ 390 at 397 and Robyn Eckersley “Greening Liberal Democracy: The Rights Discourse Revisited” in Brian Doherty and Marius de Geus (eds) *Democracy Green Political Thought* (Routledge, London, 1996) at 220.

²⁹² J Nedelsky “Reconceiving Rights and Constitutionalism” (2008) 7 J Hum Rts 139 at 153.

²⁹³ C Sunstein “On the Expressive Function of Law” (1996) 144 U Pa L Rev 2021.

²⁹⁴ J Chiappinelli “The Right to a Clean and Safe Environment: A Case for a Constitutional Amendment Recognising Public Rights in Common Resources” (1992) 40 Buffalo L Rev 597.

5. Guidance in State and non-State actors' decision-making processes;²⁹⁶
6. Guidance in the judicial interpretation of legislation and policies;²⁹⁷
7. Clear articulation of citizens' expectation for public authorities' responsibilities;²⁹⁸
8. Protecting rights of the poor and underrepresented, who shoulder the burden of environmental harm more than any other societal group, from the environmentally destructive acts of the majority and the powerful;²⁹⁹
9. An entrenched environmental protection regime would place it beyond the reach of political majorities in legislative bodies.³⁰⁰ This is an important constraint on a democratic legislature. When environmental protection measures are costly or unpopular in the short term than governments whose eye is on the next election have an incentive to encourage economic development at the expense of the environment;³⁰¹ and
10. Today's global environmental crisis demonstrates that, when State and non-State actors make decisions, economic considerations often trump environmental concerns.³⁰² Constitutionalising environmental protection will give greater weight to environmental considerations vis-à-vis rights such as property and freedom of commerce.³⁰³

The remainder of this section sets out six specific recommendations for our future constitutional framework. Where applicable, this paper highlights the key legal issues that

²⁹⁵ See Boyd, above n 8, at 125-127.

²⁹⁶ Bratspies, above n 196. See also Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471 at 480, 488 and 499-501.

²⁹⁷ Hayward, above n 89, at 126.

²⁹⁸ House of Lords and House of Commons Joint Committee on Human Rights *A Bill of Rights for the UK?* (Twenty-ninth Report of Session 2007-2008, HL Paper 165-1, HC 151-1, 2008) at 13-14.

²⁹⁹ Gary Bryner "Constitutionalism and the Politics of Rights" in Gary Bryner and Noel Reynolds (eds) *Constitutionalism and Rights* (State University of New York, New York, 1987) 7 at 8, James Buchanan "Why do Constitutions Matter?" in Niclas Berggren, Nils Karlson and Joakim Nergelius (eds) *Why Constitutions Matters* (Transaction Publishers, New Jersey, 2002) 1 at 12 and House of Lords and House of Commons Joint Committee on Human Rights *A Bill of Rights for the UK?*, above n 297, at 15.

³⁰⁰ Hayward, above n 89, at 129-158 and Anderson above n 81, at 10. Contrast Jeremy Waldron "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J Legal Stud 18 and J Sax *Defending the Environment: A Strategy for Citizen Action* (Knopf, New York, 1971).

³⁰¹ Hayward, above n 89, at 6-7.

³⁰² Boyd, above n 8, at 30 and 34-35 and Bruch, Coker and VanArsdale, above n 150, at 2. See also Nicky Hager "Leak Reveals Ongoing TPP Tussles" *The New Zealand Herald* (online ed, Auckland, 16 January 2014) and Geoff Cumming "Oil: a risky business" *The New Zealand Herald* (online ed, Auckland, 18 January 2014).

³⁰³ Nicolas de Sadeleer "Environmental Principles, Modern and Post-Modern Law" in R Macrory (ed) *Principles of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers* (Europa Law Publishing, Amsterdam, 2004) 223.

Parliament must consider to ensure the successful implementation and enforcement of an environmental protection regime through the courts.

A First Recommendation: Liberal Standing Requirement

The biggest barrier to enforcing environmental rights is standing.³⁰⁴ Following the global trend, the standing requirement should be constructed as broadly as possible to guarantee open and accessible environmental justice to all New Zealanders.³⁰⁵ The Philippine Rules of Procedurals for Environmental Cases and South Africa's National Environment Management Act 1998 are good examples of an open standing regime.³⁰⁶ Any person or entity raising an "environmental issue" (such as alleging violations of statutes relating to environmental and planning laws) should be permitted to bring a court proceeding.³⁰⁷ The purpose of this law reform is that the plaintiff will no longer be required to show that they have a "sufficient interest" in the proceeding. Instead, the court will only focus on whether there has been a statutory breach or environmental harm.³⁰⁸ Concerns for frivolous, vexatious, or otherwise improper filings can be adequately dealt with under the court's inherent power to dismiss claims, as well as financially penalising the plaintiff through costs.³⁰⁹ If one cannot get through the courtroom door, there is no access to environmental justice. Inadequate access in turn results in widespread ecological and social harm.³¹⁰

³⁰⁴ Whittemore, above n 85, at 666 and 687. See also Pring and Pring, above n 100, at 33 and 34, Andrew Roman "Locus Standi: A Cure in Search of a Disease?" in John Swaigen (ed) *Environmental Rights in Canada* (Butterworths, Canada, 1981) at 17-18 and Paul Stein "A Specialist Environmental Court: An Australian Experience" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Wiley Chancery, London, 1995).

³⁰⁵ See generally Nicholas Robinson "Ensuring Access to Justice through Environmental Courts" (2012) 29 *Pace Env'tl L Rev* 364 at 366 and Nicholas Robinson "A Longer View of 'Standing'?" (2013) 21 *Env'tl Liability Law Pol'y and Practices* 78.

³⁰⁶ National Environment Management Act 1998, s 32. See also Jan Glazewski "Environmental Rights and the New South African Constitution" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 178 at 190.

³⁰⁷ See generally *Vision for the Twenty-First Century: Ministerial Declaration on Environment and Development in Asia and the Pacific, 2000* (Kitakyushu, 2000) at [1] and [14].

³⁰⁸ John Bonine *Best Practice - Access to Justice* (World Resource Institute, Washington, 2009) at 2.

³⁰⁹ See generally *Laws of New Zealand Civil Procedure*: High Court at [24], [89] and [379].

³¹⁰ Patricia Kameri-Mbote *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* (International Environmental Resource Centre Working Paper No 2005-1, 2005).

B Second Recommendation: New Standing Models

In addition to citizen and public interest litigation, two additional standing models are proposed. First, environmental prosecutors (environmentally trained and dedicated public prosecutors), as an alternative to public interest litigation, could bring cases based on complaints from the public or their own initiative, so that individual members of the public do not have to overcome the requirements of standing and the expense of litigation. Experiences in South Africa and Ecuador illustrate that many victims lack the financial backing and institutional skills (such as unfamiliarity with legal concepts) required to pursue actions in court.³¹¹ This model has been adopted in Australia, Brazil and Colombia through a national network of environmental lawyers funded by the State.³¹² Second, as an alternative to citizen litigation, environmental ombudsman could accept and investigate complaints from any member of the public. If the complaint is well-founded, the ombudsman would have standing to sue the government on behalf of the citizen. This model has been adopted in Costa Rica, Greece, Hungary and Kenya.³¹³ In New Zealand, the powers of Ombudsmen are, in general, recommendatory only.³¹⁴ For example, the New Zealand environment ombudsman, the Parliamentary Commissioner for the Environment, currently does not have the power to make any binding rulings or reverse decisions made by public authorities.³¹⁵

C Third Recommendation: Affirming a Human Right to Environment³¹⁶

The constitution should declare a substantive human right to environment as well as a statement of public policy guiding State and non-State actors' decision-making processes.³¹⁷ To ensure, the human right to environment provision is judicially enforceable, the provision must be self-executing and placed in the "fundamental rights" section of the constitution.

³¹¹ Anderson, above n 81, at 21.

³¹² See Environmental Defenders Office of New South Wales <www.edonsw.org.au>.

³¹³ Pring and Pring, above n 100, at 38.

³¹⁴ Mai Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) at 690.

³¹⁵ "Functions and Powers of the Parliamentary Commissioner for the Environment" The Parliamentary Commissioner for the Environment <www.pce.parliament.nz>.

³¹⁶ See Appendix Three. This Draft Declaration maps out of the content of the right to a healthy environment, including both substantive and procedural components.

³¹⁷ Some scholars prefers environmental human rights to be procedural rights only, see Richard Macrory "Environmental Citizenship and the Law: Repairing the European Road" 8 J Envtl L 219 and M Fitzmaurice and J Marshall "The Human Right to a Clean Environment - Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases" (2007) 76 Nordic J Int'l L 103 at 106. Contrast Hayward, above n 89 arguing that national constitution ought to guarantee environmental human rights as a substantive right.

Furthermore, clear and mandatory language should be used to remove any doubt about the right's enforceability.

Constitutional drafters should provide clear and precise definition for the term "human right to environment". Feliciano J in *Minors Oposa v Factoran*, a Philippines Supreme Court case, observed that, "it is in fact very difficult to fashion language more comprehensive in scope and generalised than a human right to [environment]."³¹⁸ Concurring with this view, Shelton explained that the phrase "the human right to a healthy environment" is inherently ambiguous the phrase could mean "the environment is safe and healthy for humans" or "the environment itself is safe and healthy bringing within it scope issues of ecology and natural protection".³¹⁹ Furthermore, word "environment" could encompass natural environment only or extend to man-made environment.³²⁰ A succinct definition would have several benefits.³²¹ First, it would provide clear guidelines for judges in cases brought before the court.³²² Secondly, it would help businesses and environmentalists understand the extent of their rights and duties. Vague and unclear definition will lead to litigation, as well as making it difficult for the public to make plans for the future.³²³

Constitutional drafters should also consider what the right to environment entails. The breadth of claims which can be subsumed under this right appears to be entirely limitless. For example: the prevention and control of emission of toxic fumes and exhaust from factories and motor vehicles, discharge of oil, chemical effluents, garbage and sewage into rivers, destruction of fisheries and other living water resources through the use of chemicals, loss of fauna and flora, protection from climate change effects³²⁴ and so on.³²⁵

³¹⁸ *Minors Oposa v Factoran*, above 107, 201-202.

³¹⁹ Dinah Shelton *The Links between International Human Rights Guarantees and Environmental Protection* (University of Chicago, Chicago, 2004) at 22.

³²⁰ See generally Atapattu, above n 188, at 64.

³²¹ See generally Anderson, above n 81, at 11.

³²² Kristian Ekeli "Green Constitutions: The Constitutional Protection of Future Generations" (2007) 20 *Ratio Juris* 378 at 386. See generally Timothy Endicott *Vagueness in Law* (Oxford University Press, Oxford, 2000), Ken Kress "Legal Indeterminacy" in D Patterson (ed) *Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2003) 253-291 and Martin Shapiro "The Success of Judicial Review and Democracy" in Martin Shapiro and Alex Sweet (eds) *Law, Politics and Judicialisation* (Oxford University Press, Oxford, 2002) 149-183.

³²³ Anderson, above n 81, at 11-12.

³²⁴ See generally UN Human Rights Council resolutions on human rights and climate change: A/HRC/Res 7/23 (28 March 2008), A/HRC/Res 10/4 (25 March 2009) and A/HRC/Res 16/11 (12 April 2011), ECOSOC, UN Comm'n on Human Rights, *Report of the Working Group on Indigenous Populations on its twenty-third session*, UN DOC E/CN.4/Sub.2/2005/26 (Aug. 12, 2005).

³²⁵ Popović, above n 4, at 514-544.

Parliament should choose an appropriate judicial forum for enforcing the right to environment. As environmental issues often involve complex scientific evidence, it should be considered whether the general court system or the specialist Environmental Court is best placed to hear claims of alleging violations of environmental human rights.

Consideration should also be given to who should possess the right to environment. Should this right be possessed individually and/or collectively (that is, as a community right)?³²⁶ If the right is possessed by the community, does it mean that no complaint can be made unless the population as a whole is enjoying a less than healthy environment, or could a complaint be made by a particular segment of the population? If this right is attached to communities, the mere fact of violation may be enough to establish a breach. If the right is attached to individuals, evidence will more likely be required to prove that the violation caused an injury or damage to the particular individual.

In all systems of rights, competing rights are bound to arise. For example, should the right to environment outweigh the right to economic development? How should the right to environment be balanced with right to life? For example, should a public hospital (offering free public health care) be built on a site that has some ecological importance?³²⁷ Ultimately, each case should be decided on its own facts. However, Parliament should provide guidance as to the relative importance of the right to environment vis-à-vis other constitutional rights. Presently, only few constitutions provide an explicit balancing test defining the relative importance of environmental protection.³²⁸ For example, at least 15 constitutions specifically restrict the use of private property when this could cause environmental damage.³²⁹ Other constitutions, for example Ecuador's Constitution, expressly state that all constitutional rights are interdependent and of equal importance.³³⁰

³²⁶ See generally Richard Desgagne "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89 Am J Int'l L 261, Mark Stallworthy "Whither Environmental Human Rights" (2005) 7 Env't L Rev 12 and Atapattu, above n 188, at 71 and 111. Contrast J Merrills "Environmental Protection and Human Rights: Conceptual Aspects" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 71.

³²⁷ See generally *Yogi Narahari Nath v Honourable Prime Minister Girija Prasad Koirale* (1995) 33 NLR (SC Nepal). See also B Ramcharan *The Right to Life in International Law* (Martinus Nijhoff, Dordrecht, 1985) at 310-311.

³²⁸ Brand and Bungert, above n 29, at 92.

³²⁹ The countries are: Armenia, Belarus, Chile, Croatia, Czech Republic, Kenya, Mexico, Moldova, Romania, Russia, Slovakia, Slovenia, Thailand, Ukraine, Uzbekistan and Serbia.

³³⁰ Article 11(6).

Next, it must be determined whether there should be generic and/or specific limitations on the right to environment, as is the case in many constitutions. First, few countries preclude segments of the society from enjoying or utilising the right to environment. For example, the right to environment in the El Salvador Constitution appears to be limited to children.³³¹ The Philippine Supreme Court Rules of Procedure for Environmental Cases only permit Filipino citizens to right to bring a suit on behalf of nature. If Parliament adopts an eligibility limitation, it should be consistent with international and domestic anti-discrimination human rights laws.³³² Secondly, 41 constitutions also include provisions that authorise restrictions on all human rights in order to meet the public interest in security, order, health and/or the exercise of other rights.³³³ For example, the South African constitution provides that: “the right [such as the right to environment] in the Bill of Rights may be limited only ... to the extent that the limit is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. A public interest limitation is similarly included in s 5 of the NZBORA. Finally, 46 constitutions contain emergency limitation provisions (such as war and natural resources).³³⁴ Emergency provisions often allow for the suspension of environmental human rights during periods of emergency.

Extensive and expensive State investments are required to implement an environmental protection regime. Therefore, Parliament must consider whether the right to environment should be immediately enforceable or subject to the progressive realisation principle. For example, Turkey’s Constitution incorporates the progressive realisation principle, providing that: “the State shall fulfil its duties as laid down in the Constitution ... within the capacity of its financial resources ...”.³³⁵ This principle does not obligate the State to fulfill its duties immediately. Instead, the State must strive to fulfill its obligation over time, as it acquires the necessary resources and expertise.³³⁶ The application of this principle has been widely held to mean that the right is unenforceable.³³⁷ However, this orthodox understanding has gradually been eroded by a series of court decisions in many countries.³³⁸ Parliament should also

³³¹ Article 34.

³³² Human Rights Act 1993, s 21(g) and “Discriminatory Laws” New Zealand Human Rights Commission <www.hrc.co.nz>. See also, Popović, above n 4, at 509-512.

³³³ Article 36. See generally Boyd, above n 8, at 64.

³³⁴ Boyd, above n 8, at 64. See also Popović, above n 4, at 599-601.

³³⁵ Article 65. See generally Boyd, above n 8, at 64-65.

³³⁶ Boyd, above n 8, at 23.

³³⁷ Article 24.

³³⁸ Fredman, above n 264, at 240 and UN Food and Agriculture Organisation “Justiciability of the Right to Food” in *The Right to Food Guidelines: Information Papers and Case Studies* (FAO, Rome, 2006) 71 at 77.

consider whether the right to environment should be subject to the minimum core principle.³³⁹ This principle requires the State to provide a minimum quantum of environmental protection in legislative plan and policies.³⁴⁰

A number of constitutions impose a positive obligation on the State and non-State actors to protect and improve the natural environment. For example, Indian Constitution requires every citizen: “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”³⁴¹ The Sri Lankan Constitution mandates that the State: “protect, preserve and improve the environment for the benefit of the community.”³⁴² In accordance with this global trend, State and non-State actors should have a positive obligation to improve the environment. Imposing an affirmative obligation requires the State and non-State actors to undertake positive activities to fulfil the right. Failure to undertake that positive duty entails liability. Constitutional obligations should be applied to non-State actors because, in most environmental litigation, a non-State actor’s action is more likely to be the direct cause of the environmental degradation, in contrast to a governmental decision to authorise a non-State actors’ conduct.³⁴³ Presently, the NZBORA only binds State actors and non-State actors fulfilling public functions.³⁴⁴ In New Zealand, where there is no statute imposing a duty on State or non-State actors to take or refrain from taking action relating to environmental harm, the courts have generally been reluctant to hold such duties exist, deferring to Parliament to impose the appropriate duty.³⁴⁵ Furthermore, international human rights and environmental law treaties have not yet directly imposed obligations on non-State actors to uphold environmental human rights.³⁴⁶ Accordingly, enacting legislation imposing a positive duty to promote the environment is advisable.

³³⁹ May and Daly, above n 50, at 431.

³⁴⁰ See generally *South Africa v Grootboom* 2001 (1) SA 46 (CC), *Minister of Health v Treatment Action Campaign* 2002 (5) SALR 721 (CC) and *Mazibuko v Johannesburg* 2009 ZACC 28, Case CCT 39/09 (CC).

³⁴¹ Article 15A. See generally *Kinkri Devi v State of Himachal Pradesh*, above n 271, and *Rural Litigation and Entitlement Kendra v Uttar Pradesh* (1985) AIR SC 652 (India).

³⁴² Article 27.

³⁴³ Popović, above n 4, at 584-588 and footnotes 447 and 448 and Bruch, Coker and VanArsdale, above n 150, at 28-29. See also *Draft Interim Report of the Secretary-General’s Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, E/CN.4/2006/97 (February 2006) at 4.

³⁴⁴ NZBORA 1990, s 3. See generally *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC).

³⁴⁵ *Human Rights and the Environment: Final Report and Recommendations*, above n 14, at 42-44.

³⁴⁶ At 29.

Several pertinent issues to environmental litigation should be addressed during the drafting process. First, which party has the burden of proof in establishing the breach of environmental right? Cases of environmental pollution are notoriously difficult to prove. The primary reason for this is the difficulty in showing that the harm was caused by the particular pollutant.³⁴⁷ This difficulty could be remedied by shifting the burden of proof. For example, the plaintiff would only have to show a *prima facie* case that the injury has been caused by the defendant and the onus would then shift to the defendant to show that they are not responsible.³⁴⁸ The alleged polluter should carry the burden of proof because often only the polluter has access to information capable of corroborating or refuting the applicant's allegation. Secondly, what is the appropriate threshold for breach? Presently, international courts require environmental harm impacting on human rights to be actual or imminent, as well as substantial. Should the threshold be lowered to a mere possibility of harm? Furthermore, should the defendant be subject to strict liability?³⁴⁹ Thirdly, how should the judiciary resolve scientific uncertainty as to the activity's environmental harm? To resolve any uncertainty, the Court could apply the precautionary principle.³⁵⁰ The precautionary principle implies the existence of a social responsibility to protect the public from exposure to harm, when scientific investigation has found a plausible risk.³⁵¹ Furthermore, where there is doubt about the existence or nature of the environmental harm, that doubt should be construed in favour of the victim.³⁵² Finally, remedies should be available for breach of environmental human rights. Drafters should consider the relationship between constitutional liability and other liability regimes in New Zealand. For example, previous case had concluded that the statutory bar to damages arising directly or indirectly out of personal injury did apply to NZBORA compensation.³⁵³

³⁴⁷ Martyn Day "Shifting the Environmental Balance" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Wiley Chancery, London, 1995) at 298.

³⁴⁸ Contrast Paul Bowden "Citizen Suits - Can we Afford them and Do we Need them Anyway?" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Wiley Chancery, London, 1995) at 181.

³⁴⁹ See also Resource Management Act 1991, ss 15A, 15B and 15C and Nolan, above n 96, at [9.62].

³⁵⁰ Anderson, above n 81, at 11 and Boyd, above n 8, at 129.

³⁵¹ See generally Marco Martuzzi and Joel Tickner (eds) *The Precautionary Principle: Protecting Public Health, the Environment and the Future of Our Children* (World Health Organisation, Copenhagen, 2004), Linda Cameron *Environmental Risk Management in New Zealand – Is there Scope to Apply a More Generic Framework?* (New Zealand Treasury, Wellington, 2006) and Elizabeth Fisher "Review of the Precautionary Principle in the Twentieth Century" (2003) 13 J Envtl L 315.

³⁵² See also Philippine Supreme Court Rules of Procedures for Environmental Cases 2010, Rule 20.

³⁵³ *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA).

D Fourth Recommendation: Affirming Intergenerational Equity

The human right to environment should refer to intergenerational equity.³⁵⁴ Scholars have defined environmental human rights to include a concern for future generations.³⁵⁵ The present generation has the ability to harm the conditions of nature that the future generations will inherit and, because of this, present generations have a direct responsibility to protect and preserve the environment for future generations.³⁵⁶ The intergenerational equity principle is progressively being recognised in many constitutional environmental human rights provisions. For example:

- i. Eritrea: the State shall have the responsibility to regulate all land, water and natural resources and to ensure their management in a balanced and sustainable manner and in the interest of the present and future generations.³⁵⁷
- ii. Qatar: the State has the duty to preserve the environment and its natural balance in order to achieve comprehensive and sustainable development for all generations.³⁵⁸

Since future generations have no means of protecting themselves from serious risks of harm brought about by the present generation, it should be possible for certain agents to initiate legal action on their behalf. A system of self-appointed guardians for court approval on an *ad hoc* basis, or guardians authorised by an independent government agency (such as the Parliamentary Commissioner for the Environment) in advance so that one has a designated guardian in place *ex ante*, could both be appropriate governance models.³⁵⁹

³⁵⁴ See generally Ekeli, above n 320, at 387-388.

³⁵⁵ R Hiskes *The Human Right to a Green Future* (Cambridge University Press, Cambridge, 2009) and John Rawls *A Theory of Justice* (Oxford University Press, Oxford, 1999).

³⁵⁶ Brown Weiss "In Fairness to Future Generations and Sustainable Development" (1992) 8 *Am Uni J Int'l L & Pol'y* 19, R Howarth "Sustainability as Opportunity" (1997) 73 *Land Economics* 569 and E Padilla "Intergenerational Equity and Sustainability" (2002) 41 *Ecological Economics* 69. Contrast W Beckerman "Debate: Intergenerational Equity and the Environment" (1997) 5 *J Political Philosophy* 392 and Robert Solow "Sustainability: An Economist's Perspective" in Robert Dorfman and Nancy Dorfman (eds) *Economic of the Environment: Selected Readings* (3rd ed, Norton, New York, 1993) 179.

³⁵⁷ Article 10(3).

³⁵⁸ Article 33.

³⁵⁹ See generally Christopher Stone "Safeguarding Future Generations" in A Agius and S Busuttil (eds) *Future Generations and International Law* (Earthscan, London, 1998) 65 and Kristian Ekeli "The Principle of Liberty and Legal Representation of Posterity" (2006) 12 *Res Publica* 385.

The Colombian Constitutional Court has declared that “the protection of the environment is a compromise between the present and future generations”.³⁶⁰ To address the competing interests of the present and future generations, Parliament should consider the following issues. First, what period of time will “future generations” cover? Secondly, what is the level of responsibility? State and non-State actors should be responsible for actions that could lead to irreversible damage of ecosystems that are crucial for meeting future generations’ basic physiological needs. They should also be responsible for actions causing reversible harm to the ecosystems that can only be rectified at a very high cost. As the Brundtland Report stressed, “the development that meets the needs of the present [cannot] compromise the ability of future generations to meet their own needs”.³⁶¹ Thirdly, which resources must be protected for the benefit of future generations? For example, should only critical resources be protected? Critical resources are those necessary to meet basic physiological needs, such as water and soil, which are essential for food production. Finally, what is the appropriate balance between present generations’ right to develop and future generations’ right to environment? For example, some activities which pose threats of serious and irreversible future environmental harm might produce significant short-term economic benefits. Ultimately, this balancing exercise depends on the extent to which both voters and politicians are willing to make short-term sacrifices for the sake of the long-term interests of succeeding generations, especially where the long-term benefits of environmental protection lack evidential certainty.³⁶²

E Fifth Recommendation: Affirming Procedural Rights

Parliament should respect, protect and actively promote procedural rights.³⁶³ It has become apparent throughout the world that access to environmental justice is essential to averting environmental degradation.³⁶⁴ Environmental procedural rights help to achieve environmental substantive rights because, without access to information (such as the citizen’s right to

³⁶⁰ *Fundepúblico v Mayor of Bugalagrande* Corte Constitucional Expendiente T-101, June 1992 (Colombia).

³⁶¹ World Commission on Environment and Development *Our Common Future* UN Doc A/42/47 (11 December 1987) and UN ECOSOC and UN Commission on Human Rights *Report of the Working Group on Indigenous Populations on its Twenty-Third Session* UN DOC E/CN.4/Sub.2/2005/26 (Aug. 12, 2005).

³⁶² Gregory Kavka and Warren Virginia “Political Representation for Future Generations” in R Elliot and A Gare (eds) *Environmental Philosophy* (University of Queensland Press, St Lucia, 1982) 21 at 28.

³⁶³ Atapattu, above n 188, at 113, Robinson, above n 304, at 364 and Peggy Kalas “International Environmental Dispute Resolution and the Need for Access by Non-State Entities” (2001) 12 *Colo J Int’l Envtl L & Pol’y* 191.

³⁶⁴ See generally K Ginther and others (eds) *Sustainable Development and Good Governance* (Martinus Nijhoff, Leiden, 1995).

environmental information), access to participation in decision making (such as the citizen's right to submit comment on proposed environmental plans) and access to justice (such as the citizen's right to challenge State's environmental decision in the courts), it would be impossible to defend one's substantive rights.³⁶⁵ Access to information empowers and motivates people to participate in a meaningful and informed manner. Access to participation in decision-making enhances the ability to be responsive to public concerns and demands, to build consensus, and to improve the acceptance of and compliance with environmental decisions.³⁶⁶ Access to justice promotes more accountability and greater transparency in individual, business and government practices.³⁶⁷ To enhance procedural rights, these six "building blocks" should be implemented: cost,³⁶⁸ availability of scientific and technical expertise,³⁶⁹ an alternative dispute resolution scheme, legal jurisdiction, remedies³⁷⁰ and enforcement tools.³⁷¹ The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters 1998,³⁷² recognised as the most significant articulation of procedural rights in the environmental context, could be used as a model for future reforms.³⁷³

³⁶⁵ *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach* (UN Development Programme, 2005) at 5.

³⁶⁶ See generally *Berkeley v Secretary of State for the Environment, Transport and Regions (No 1)* [2001] 2 AC 603 (HL) at 38 and *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at [49].

³⁶⁷ J Foti "Voice and Choice: Opening the Door to Environment Democracy" (The Access Initiative, Washington, 2008).

³⁶⁸ Lord Justice Brooke "Environmental Justice the Cost Barrier" (2006) 18 J Env'tl L 341 at 345. See also Aarhus Convention Compliance Committee, Communication ACCC/C2008/33, *Concerning Compliance by the UK*, adopted at the Committee 29th Meeting (September 21-24, 2010).

³⁶⁹ See also *Minors Oposa v Department of Environment and Natural Resources* (1994) 33 ILM 173 (Philippine Supreme Court) at 205.

³⁷⁰ See generally Alan Doyle "Squeezing the Lemon: A New Model for Environmental Enforcement in Ireland?" (2013) 21 Env'tl Liability Law Pol'y and Practices 61.

³⁷¹ Pring and Pring, above n 100, at x, xv and annex two and *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by UN General Assembly Resolution 60/147 on 16 December 2005.

³⁷² See generally *Manual on Human Rights and the Environment*, above n 100, Jerzy Jendroska "UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Towards More Effective Public Investment in Monitoring Compliance and Enforcement in Europe" (1998) Nat'l Env'tl L & Pol'y 187 and Jeremy Waters "The Aarhus Convention: A Driving Force for Environmental Democracy" (2005) 2 J Eur Env'tl & Plan L 2.

³⁷³ See generally *A Report into Claim Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, above n 25, at 266-267 and "Brakes on RMA Reform" *The Otago Daily Times* (online ed, Otago, 14 September 2013).

F Final Recommendation: Affirming Rights of Nature

Nature ought to have an independent legal right. This ecocentric approach aligns with kaitiakitanga Māori, which provides a principle framework that treats the environment as an entity in its own right, over which humanity has a guardianship role. A precedent for nature having an independent legal standing already exists in New Zealand.

The Tūtohu Whakatupua agreement between Whanganui iwi and the Crown provides for the statutory recognition of the Whanganui River as a legal entity with standing in its own right.³⁷⁴ The agreement allows for the appointment of a guardian body (Te Pou Tupua) to represent the River's interests and act on its behalf.³⁷⁵ This agreement has been heralded as a sign that the Government no longer sees nature as an exploitable resource, but views nature with more ecocentric values.³⁷⁶ In recognising that nature has rights, Parliament should consider the following issues.

Like future generations, nature cannot defend itself in a courtroom and is dependent upon a member of the public to protect its interest. Guardians could be appointed on an *ad hoc* or *ex ante* basis. For example, Ecuador's constitution provides that "every person, people, community or nationality will be able to demand the recognition of rights for nature before the public bodies."³⁷⁷ When guardians are appointed on an *ad hoc* basis, any individual or community should be able to defend nature's rights. The court should not focus on whether the guardian has a "sufficient interest" in the matter, as the guardian is a vehicle through which nature can vindicate its constitutional rights.

What rights should nature have? For example, should nature have the right to life? Few examples of the content of nature's rights can be found in international and domestic documents. The World Charter for Nature 1982, article 2 states: "the genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, *must be at least sufficient for their survival*, and to this end necessary habitats

³⁷⁴ *Whanganui Iwi and the Crown Tūtohu Whakatupua* (Agreement, part of the Whanganui River Settlement, 30 August 2012) at [2.1]-[2.9]. At [2.7].

³⁷⁵ At [2.8.2].

³⁷⁶ Alison Fairbrother "New Zealand's Whanganui River Gains a Legal Voice" *The Huffington Post* (online ed, New York, 18 September 2012).

³⁷⁷ Article 71. See generally Michelle Bassi "La Naturaleza O Pacha mama de Ecuador: What Doctrine Should Grant Trees Standing?" (2009) 11 Oregon R Int'l L 461.

shall be safeguarded.” Ecuador’s Constitution, article 71 states that: “nature has the inalienable right to *exist, persist, regenerate, and be respected*.”³⁷⁸ In the Tūtohu Whakatupua agreement, the guardian has the function to protect the river’s *environmental health and wellbeing*.³⁷⁹ A further issue is whether, as a right holder, humanity can sue nature for any liabilities it causes. For example, could the neighbouring farms sue the Waikato River for flood damages?

Environmental protection is not an all-or-nothing matter. A completely unharmed nature cannot be the key objective, since humanity cannot entirely eliminate hazards created by civilisation. Having recognised nature has rights, an Ecuadorian Provincial Court Judge warned that such recognition would require “the reconsideration of many human activities [for] which environmental cost is [currently] too high”.³⁸⁰ Thus, based on the ecocentric approach, Parliament must strike the appropriate balance between the constitutional rights of nature and human beings. For example, should nature’s rights trump the human right to economic development where that development will or is likely to cause irreparable damage to the environment? Ultimately, the “appropriate” balance is a complex policy-based social-benefit problem: how much development is society willing to forgo in order to protect the environment?³⁸¹

State and non-State actors engaging in environmental harmful activities should be responsible for the protection, preservation and rehabilitation of the environment.³⁸² This approach has been employed in other jurisdictions. For example:

1. Brazil: Those who exploit mineral resources have the obligation to restore any environmental degradation.³⁸³
2. Ecuador: Nature has the right to be restored. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective

³⁷⁸ See generally Whittemore, above n 85, at 660.

³⁷⁹ *Whanganui Iwi and the Crown Tūtohu Whakatupua*, above n 369, at [2.20.1] (emphasis added).

³⁸⁰ Juicio No: 11121-2011-0010 (Acción de Protección) and Joel Colón-Ríos “Notes on the Theory and Practice of the Rights of Nature: The Case of the Vilcabamba River” (unpublished paper) at 14. See also Oficio No 0626-2011 J22GPP, 20 May 2011.

³⁸¹ See generally Mark Sagoff *The Economy of the Earth* (Cambridge University Press, Cambridge, 1988) at 197 and Atapattu, above n 188, at 117-125.

³⁸² See generally *KM Chinnappa v Union of India*, above n 65.

³⁸³ Article 225.

mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.³⁸⁴

3. Paraguay: Any damage to the environment will entail an obligation to restore and to pay for the damage.³⁸⁵

Ecuador’s Constitution contains many specific provisions devoted to nature’s rights. First, it mandates that uncertainties regarding the interpretation of environmental law be resolved in nature’s favour.³⁸⁶ Secondly, it incorporates the precautionary principle, that is, “in case of doubt about the environmental impact stemming from a deed or omission, even if there is no scientific evidence of the damage, the State shall adopt effective and timely measures of protection.”³⁸⁷ Thirdly, it reverses the legal burden of proof so that those accused of causing environmental harm must prove their actions caused no such harm.³⁸⁸ Constitutional drafters should assess whether similar provisions are suitable for our future constitutional framework.

IX Conclusion

The Panel asked people to share their aspirations for Aotearoa New Zealand and how they want this country to be governed in the future. The author submits that the environment, as part of New Zealand’s core identity, should be recognised at all levels of policy planning and decision-making. The constitutional values that should direct and govern State and non-State actors’ actions are: the right of present and future generations to an environment of certain quality, intergenerational respect for all natural things, and the recognition of nature as a right holder. Until these values are taken into account both environmental and human rights will be denied in New Zealand.

UN Special Rapporteur Ksentini once observed that “law must be based on values, the fundamental values of this century being *human rights and the environment*.”³⁸⁹ The author respectfully amends this statement to the following “law must be based on values, the fundamental values of this century being *human rights and the rights of nature*.” A human

³⁸⁴ Article 72.

³⁸⁵ Article 8.

³⁸⁶ Article 401.

³⁸⁷ Article 396.

³⁸⁸ Article 397(1). See also Erin Daly “The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature” (2012) 21 REICEL 63 at 64.

³⁸⁹ Ksentini, above n 89, at [257] (emphasis added).

rights-based approach to environmental protection is ineffective in isolation because human rights law is about the well-being of humans and thus is only indirectly concerned with the environment. Environmental protection law must directly take into account the rights of nature. Respecting, maintaining and improving human and environmental rights gives “man the best opportunities for living in harmony with nature”.³⁹⁰ As the Brundtland Report stressed, “a sound environment is the prerequisite to attaining the sustainable development goal.”³⁹¹

Constitutionally enshrining rights to nature itself and a human right to a clean and healthy environment is an inherently complex task. To ensure the successful design, implementation and enforcement of these rights, Parliament must address the following seven legal issues: standing, justiciability, the scope and content of the rights, procedural rights, managing competing interests (in particular, nature against human rights),³⁹² remedies, and enforcement tools. An effective constitutional environmental protection regime must also be accompanied by changes in the interdependent and indivisible ethical, cultural, economic, social and political systems.³⁹³ The author acknowledges that constitutional rights are not the silver bullet for solving today’s environmental crisis. As Professor Epp concludes, “rights are not magical solutions to any or all problems.”³⁹⁴ Rights to humanity and nature are merely one, small component of Aotearoa New Zealand’s efforts in ensuring that humanity and the wider Earth community successfully thrive together in the coming years.

³⁹⁰ See generally *World Charter for Nature* 1982.

³⁹¹ *Our Common Future*, above n 358, at 14, 19 and 48.

³⁹² Ksentini, above n 89, at [252].

³⁹³ Whittemore, above n 85, at 662-665 and 671-681.

³⁹⁴ Charles Epp *The Rights Revolution: Lawyers, Activists and Supreme Court in Comparative Perspective* (University of Chicago Press, Chicago, 1998) at 205.

X *Appendix One*

*Sources of International Law Applicable to Environmental Human Rights:*³⁹⁵

Substantive Right	Treaty Provisions	Resolutions, Decisions, Reports	International Court Decisions
Environment; Clean Environment; Healthy Environment; Environmental Protection	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art 11). African Convention on Conservation of Nature and Natural Resources (ACCNRR) (Art 11). Indigenous and Tribal Peoples Convention. International Labour Convention No 169 (1989) (Art 4(1), 7(3), 7(4), 15 and 16). African Charter on Human and Peoples’ Rights (ACHPR) (Art 24).	Report of the Secretary-General, Human Rights and the Environment as part of sustainable development. Report of the Secretary-General, Human Rights and the Environment as part of Sustainable Development, UN Doc. E/CN.4/2004/87 (February 6, 2004). Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Resolution 2004/17, UN CHR 60 th Session, UN Doc E/CN.4/2004/L.18 (2004). Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fifth Session, UN Subcommission on the Promotion and Protection of Human Rights,	Decision regarding Communication No. 155/96 (<i>Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria</i>) Case No. ACHPR/ comm/A044/1 (May 27, 2002).

³⁹⁵ This chart is not exhaustive. For more information, see Malone and Pasternak, above n 94, at 77 – 129. Also see Ksentini, above n 89, at [34]-[36].

		UN Doc.E/CN.4/Sub.2/2003/13 (2003). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador UN Doc E/C.12/1/Add/100 (June 7, 2004).
Water	International Covenant on Economic, Social and Culture Rights (ICESCR) (Art 11(1), 12(1)). Convention on the Elimination of Discrimination Against Women (Art 14(2)(h)). Convention on the Rights to the Child (CRC) (Art 24(2)(c)).	The Right to Water, UN Committee on Economic, Social and Cultural Rights UN/Doc.E/C.12/2002/11 (Arts 11 and 12 ICESCR includes a right to water).
Life	International Convention on Civil and Political Rights (ICCPR) (Art 12). CRC (Art 6). American Convention on Human Rights (ACHR) (Art4). European Convention on Human	Report on the Situation of Human Rights in Ecuador, Inter-Am CHR OEA/ser L/V/II.96 doc.10 rev 1 (April 24, 1997). <i>EHP v Canada</i> Decisions of the Human Rights Committee 20 (1990).

Rights (ECHR) (Art 2). EU Charter (Art 2).			
Health	European Social Charter (Art 11). ICESCR (Art 12). CRC (Art 24). ACHPR (Art 16). EU Charter (Art 35).	The Right to the Highest Attainable Standard of Health, CESCR General Comment 14. UN Doc/EC.12/2000/4 (2000). Resolution 2004/27 UN CHR, 60 th Session, at 3 UN Doc. E/CN.4/2004/L.41 (2004).	<i>Yanomami v Brazil</i> Res 12/85, Case 7615, Inter-Am CHR OEA/ser L/V/II.66 doc 10 rev 1 (March 5, 1985).
Privacy;	ECHR (Art 8). African Charter on the Rights and Welfare of the Child (Art 10). ICCPR (Art 17). CRC (Art 16).		<i>Lopez Ostra v Spain</i> App No. 16798/90, 20 Eur HR Rep 277 (Judgment of Dec 4, 1994). <i>Hatton & Others v UK</i> Application No 36022/97 (Judgment of Feb 10, 2001).
Residence	ICCPR (Art 12). ACHR (Art 22). ACHPR (Art 12). EU Charter (Art 45).		

Food	ICESCR (Art 11). CRC (Art 24). ACHR (Art 12). CEDAW (Art 14).	Economic, Social and Cultural Rights: The Right to Food, Report submitted by the Special Rapporteur on the Right to Food UN Doc E/CN.4/2003/54 (Jan 10, 2003). Resolution on 2004/19, UN CHR, 60 th Session, at 2, UN Doc E/CN.4/2004/L.24 (2004).	
Property	ILO 169. (Art 4(1), 7(3), 7(4), 15 and 16). ACHR (Art 21). ECHR (Protocol 1, Art 1). EU Charter (Art 17).		<i>Pialopoulos v Greece</i> Feb 15, 2001 (Eur Ct Hum Rights 2001 Reports of Judgments and Decisions). <i>The Mayagna (Sumo) Awas Tingani</i> Community Case, Inter-Am Ct HR Case No 11.557 (filed Oct 2, 1995), Judgment of Feb 1, 2000
Procedural Rights			
Information	Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Arts 4-5). United Nations Framework	Johannesburg Summit Plan of Implementation [128] (2002).	Report on the Situation of Human Rights in Ecuador Inter-Am CHR, OEA/ser.L/V/II.96, doc 10 rev 1 (April 24, 1997).

Convention on Climate Change
(UNFCCC) (Art 6).

Convention on Biological Diversity
(CBD) (Art 13).

Rotterdam Convention on Prior
Informed Consent Procedure for
Certain Hazardous Chemicals and
Pesticides in International Trade
(PIC) (Art 15).

ICCPR (Art 19).

ACHR (Art 13).

ACHPR (Art 9).

EU Charter (Arts 11 and 42).

Public Participation	<p>United Nations Convention to Combat Desertification (Arts 3, 10, 13, 14, 19 & 25).</p> <p>UNFCCC (Art 4).</p> <p>CDB (Art 14).</p> <p>ICCPR (Art 19).</p> <p>EU Charter (Arts 41 & 44).</p> <p>Aarhus Convention (Arts 6-8).</p>	<p>Report on the Situation of Human Rights in Ecuador Inter-Am CHR, OEA/ser.L/V/II.96, doc 10 rev 1 (April 24, 1997).</p>
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	ACHR (Art 23).	
	ACHPR (Arts 9 & 13).	
	SEA (Art 8).	
	PRTR (Art 13).	
Expression / Association	ICCPR (Arts 19 & 22).	Report of the Special Rapporteur, The
	CRC (Arts 13 & 15).	Right to Freedom of Opinion and
	ACHR (Arts 13 & 16).	Expression UN Doc E/CN.4/2004/62.
	ECHR (Arts 10 & 11).	
	ACHPR (Arts 9 & 10).	
	ACRNC (Arts 7 & 8).	
	EU Charter (Arts 11 & 12).	

*XI Appendix Two*³⁹⁶
Constitutional Environmental Provisions

Afghanistan	Preamble, Para 10 – prosperous life and a sound environment for all those residing in this land.	Chapter 1, Art 15 – State is obliged to adopt necessary measures for safeguarding forests and the environment.	
Albania	Part 2, Chapter IV, Art 56 – everyone has the right to be informed for the status of the environment and its protection.	Part 2, Chapter V, Art 59 (1e-1f) – States, within its constitutional powers and the means at its disposal, aims to ensuring a healthy and ecologically sustainable environment for the present and future generations.	Part 2, Chapter V, Art 59 (1e-1f) – rational exploitation of forests, waters, pastures and other natural resources on the basis of the principle of sustainable development.
Algeria	Title I, Chapter V, Art 66 – every citizen has the duty to protect public property and the interests of the national collectively and to respect the property of others.	Chapter III, Article 17 – public property is an asset of the national collectively and encompass the subsoil, the mines and quarries, the sources of natural energy, the mineral, natural and living resources of the different zones, the natural maritime zones, the waters and forests.	

³⁹⁶ Note: the author paraphrased some of the constitutional provisions. This table derived from Constitution Finder, a website run by the TC William School at the University of Richmond. <www.confunder.richmond.edu> and May, above n 234. Note: some provisions may not be up to date because some constitutions are not written in English and some countries' constitution is often amended.

Andorra	Title II, Chapter V, Art 31 – State has the task of ensuring the rational use of the soil and of all the natural resources, so as to guarantee a befitting quality of life for all and, for the sake of the coming generations, to restore and maintain a reasonable ecological balance in the atmosphere, water and land, as well as to protect the autochthonous flora and fauna.	Preamble: the Andorran People, with full liberty and independence, and in the exercise of their own sovereignty ... willing to bring their collaboration and effort to all the common causes of mankind, and especially to those of preserving the integrity of the Earth and guaranteeing an environment fit for life for the coming generations, ... approve the present Constitution, in the exercise of their sovereignty.	
Angola	Part II, Art 24(1) – all citizens shall have the right to live in a healthy and unpolluted environment.	Part II, Art 24(2) – State has the obligation to take the requisite measures to protect the environment and national species of flora and fauna throughout the national territory and maintain ecological balance.	Part II, Art 24 (3) – acts that damage or directly or indirectly jeopardize conservation of the environment shall be punishable by law.
Argentina	Part I, Chapter 2, Art 41 – all inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present	Part I, Chapter 2, Art 41 – State has the obligation to provide for protecting this right, for utilizing natural resources rationally, for preserving the natural and cultural patrimony and that of biological	Part I, Chapter 2, Art 41 – as a first priority, environmental damage shall bring about the obligation to repair it. Every resident has the duty to preserve the environment.

	needs without endangering those of diversity, and for providing environmental future generations.	information and education.
Austria	Section 1 – the Republic of Austria subscribes to universal protection of the environment. Universal environmental protection means the preservation of the natural environment, being the basis for human existence, from harmful influences. Universal environmental protection in particular consists of measures to keep clean air, water and soil, as well as avoidance of nuisances caused by noise.	
Australia	Chapter IV, Section 100 – the Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters and rivers for conservation or irrigation.	

Armenia	Chapter 1, Art 10 – State shall ensure the protection and reproduction of the environment and the rational utilisation of natural resources.	Chapter I, Art 8 – owner of property may not exercise the right to property ... so as to cause damage to the environment.	Chapter 5, Art 89(5): the Government ... shall ensure the implementation of State policies in the area of ... environmental protection.
Azerbaijan	Part II, Chapter III, Art 39(I) – everyone has the right to live in a healthy environment.	Part II, Chapter III, Art 39(II) – the right to get compensation for damage rendered ... due to the violations of ecological rights.	Part II, Chapter III, Art 39(II) – everyone has the right to collect information on the environmental situation.
Bahrain	Part II, Article 11 – all natural wealth and resources are State property. The State shall safeguard them and exploit them properly, while observing the requirements of the security of the State and of the national economy.		
Belarus	Section II, Articles 46 & 55 – everyone is entitled to a wholesome environment. State has the duty to preserve and restore the environment. Right to compensation for loss or damage caused by the violation of the right to a wholesome environment. Everyone has	Section II, Article 44 – prohibiting the use of property in a manner harmful to the environment.	Section II, Article 34 – right of the citizens to receive, store and disseminate complete, reliable, and timely information ... on the state of the environment.

	the duty to protect the environment.		
Belgium	Title II, Art 23(4) – everyone has the right to lead a life worthy of human dignity ... [including] the right to enjoy the protection of a healthy environment.		
Belize	Commencement (e) – the people of Belize requires policies of the State to protect the environment.		
Benin	Title II, Art 27 – everyone person has the right to a healthy, satisfying and lasting environment and has the duty to defend it.	Title II, Art 27 – the State has the obligation to watch over the protection of the environment.	Annex to Benin Constitution, Part I, Chapter 1, Art 24 – the African Charter on Human and Peoples' Rights, annexed to the Benin Constitution, provides that all peoples have the right to a general satisfactory environment favourable to their development.
Bolivia	Art 33 – human beings have a right to a healthy, protected, and balanced environment	Art 34 – any person, acting in its own name or representing a collectively to exercise the legal actions in defence of Art 33 rights.	Arts 137 & 170 – assets in patrimony of the nation constitute public property which is inviolable, and it is the duty of every inhabitant of the national territory to respect and protect it. The State shall regulate the system of exploitation of

renewable natural resources, with provisions for their conservation and increment.

Brazil	<p>Title VII, Chapter VI, Art 225 – everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life. In particular, the Government has the responsibility to:</p> <p>I. preserve and restore essential ecological processes and provide for ecological management of species and ecosystems;</p> <p>II. preserve the diversity and integrity of the Country’s genetic patrimony and to supervise entities dedicated to research and manipulation of genetic material;</p> <p>III. define, in all units of the Federation, territorial spaces and their</p>	<p>Title VII, Chapter VI, Art 225, Para 4 & 5 – the Brazilian Amazon Forest, the Atlantic Forest, the Serra do Mar, the Pantanal of Mato Grosso, and the Coastal Zone ... shall be utilized, as provided by law, under conditions assuring preservation of the environment, including use of natural resources. Vacant governmental lands or lands seized by the State through discriminatory actions, which are necessary to protect natural ecosystems are inalienable.</p>	<p>Title VII, Chapter VI, Art 225, Para 2 & 3 – conduct and activities considered harmful to the environment shall subject the infractors, be they individuals or legal entities, to criminal and administrative sanctions, irrespective of the obligation to repair the damages caused. General obligation of such infractors to repair the damages caused to the environment. Those who exploit mineral resources has the obligation to restore any environmental degradation.</p>
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components that are to be specially protected, with any change or and suppression permitted only through law, prohibiting any use that compromises the integrity of the characteristics that justify their protection;

IV. require, as provided by law, a prior environmental impact study, which shall be made public, for installation of works or activities that may cause significant degradation of the environment;

V. control production, commercialization and employment of techniques, methods and substances that carry a risk to life, the quality of life and the environment;

VI. promote environmental education at all levels of teaching and public

	<p>awareness of the need to preserve the environment; and</p> <p>VII. protect the fauna and the flora, prohibiting, as provided by law, all practices that jeopardize their ecological functions, cause extinction of species or subject animals to cruelty.</p>	
Bulgaria	<p>Chapter 2, Art 55 – every citizens have the right to a healthy and favourable environment in accordance with the established standards and norms.</p>	<p>Chapter 1, Art 15 – Chapter 2, Art 55 – every citizens have the obligation to protect the environment.</p> <p>the State shall ensure the protection and reproduction of the environment, the conservation of living Nature in all its variety, and the sensible utilization of the country's natural and other resources.</p>
Burkina Faso	<p>Title I, Chapter IV, Art 29 – the right to a healthy environment. Every citizen has the duty to protect, defend, and promote the environment.</p>	<p>Title I, Chapter IV, Art 30 – every citizen has the right to initiate an action or to join a collective action under the form of a petition against the acts ... affecting the environment or the cultural or historic patrimony.</p>

Cambodia	Chapter V, Art 59 – the State has the duty to protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind, geology, ecologic system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.		
Cameroon	Preamble – every person shall have a right to a healthy environment. Every person has the duty to protect the environment.	Preamble – the State has the duty to ensure the protection and improvement of the environment.	Part XII, Art 65 – the Preamble shall be part and parcel of this Constitution.
Cape Verda	Title II, Art III, Art 70(1) – everyone shall have the right to a healthy, ecologically balanced environment, and the duty to defend and conserve it.	Part I, Title I, Art 7(j) – the State has the duty to protect the land, nature, natural resources and environment.	Part II, Title III, Art 70(2) & (3) – the State shall adopt policies for the protection and conservation of environment. The State has the duty to stimulate and support the creation of associations for the protection of the environment and protect natural resources.

Chad	Title II, Chapter I, Art 47 – every person has the right to a healthy environment.	Title II, Chapter I, Art 48 – the State has the duty to see to the protection of the environment.	Title II, Chapter I, Art 52 – every citizen has the duty to respect and protect the environment.
Chechnya	Section I, Chapter 2, Art 39 – everyone has the right to favourable environmental surroundings, reliable information about its condition and to compensation for damage caused to his/her health or property through ecological violations of the law.	Section I, Chapter 2, Art 33 – the ownership, usage and disposition of land and other natural sources is to be realised freely if it does not inflict damage on the surrounding environment and does not violate the law and legal interests of other people.	Section 1, Chapter 2, Art 55 – everyone is obliged to preserve nature and prevent damages, as well as to be careful with removing natural riches.
Chile	Chapter III, Art 19(8) – everyone has the right to live in an environment free from contamination. The State has the duty to watch over the protection of this right and the preservation of nature. The State has the right to enact laws, which establish specific restrictions on the exercise of certain rights in order to protect the environment.	Chapter III, Art 20 – the right to appeal to the courts for protection when the right to live in a contamination-free atmosphere has been affected by an arbitrary or unlawful action imputable to an authority or a specific person.	Chapter III, Art 20 – the Court must immediately take the steps that it deems necessary to ensure due protection to the person affected.
China	Chapter 1, Art 9 – the State has the duty to ensure the rational use of natural	Chapter 1, Art 9 – prohibition of appropriation or damage of natural	Chapter 1, Art 26 – State protects and improves the living environment and the

	resources and protect rare animals and plants.	resources by any organization or individual by whatever means.	ecological environment, and prevents and remedies pollution and other public hazards. The State organizes and encourages afforestation and the protection of forests.
Colombia	Title II, Chapter 3, Art 79 – every individual has the right to enjoy a healthy environment. Guaranteeing the community's participation in the decisions that may affect the environment. The State has the duty to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.	Title II, Chapter 5, Art 95(8) – every citizen has the duty to protect the country's cultural and natural resources and to keep watch that a healthy environment is being preserved.	Title II, Chapter 3, Art 80 – the State has the duty to plan the handling and use of natural resources in order to guarantee their sustainable development, conservation, restoration, or replacement. The State also has the duty to caution and control the factors of environmental deterioration, impose legal sanctions, and demand the repair of any damage caused.
Comoros	Preamble – The right of all Comorans to health. This Preamble shall be considered an integral part of the Constitution.		

Congo	Title II, Art 46 – every citizen shall have the right to a healthy, satisfactory and enduring environment. The State has the duty to strive for the protection and the conservation of the environment.	Title III, Art 65 – every citizen has the duty to defend the environment, and contribute to the improvement of the quality of life and the preservation of his or her natural milieu as well as to the protection of the environment. Every citizen has the duty not to negatively affect the environment.	Title II, Art 46 – every citizen has the obligation to compensate for all pollution resulting from an economic activity; such compensation is for the benefit of the populations of the exploited zones.
Costa Rica	Title V, Art 50 – every citizen has the right to a healthy and ecologically balanced environment. The State has the duty to guarantee, defend and preserve this right.	Title V, Sole Chapter, Art 50 – every citizen has the right to denounce those acts which infringe the right to a healthy and ecologically balanced environment and to claim reparation for harm caused.	
Croatia	Chapter II, Section III, Part 3, Art 69 – everyone has the right to a healthy life.	Chapter II, Section III, Part 3, Art 69 – the State has the duty to ensure every citizen the right to a healthy environment.	Chapter II, Section III, Part 3, Art 69 – citizens, government, public and economic bodies and associations shall pay special attention to the protection of human health, nature and the human environment.
Cuba	Chapter I, Art 27 – the State shall protect the environment and natural	Chapter I, Art 27 – every citizen has the duty to contribute to the protection of the	

	resources of the country. It recognizes their close link with the sustainable economy and social development for making human life more sensible, and for ensuring the survival, welfare, and security of present and future generations.	water and the atmosphere, and to the conservation of the soil, flora, fauna and all the rich potential of nature.	
Czech Republic	Chapter 4, Art 35(1) – every citizen has the right to a favourable environment.	Chapter 4, Art 35(3) – every citizen when exercising his or her rights may not endanger or cause damage to the living environment, natural resources, the wealth of natural species, and cultural monuments beyond limits set by law.	Chapter 2, Part 1, Art II, - the exercise of ownership rights must not cause damage to human health, nature and the environment beyond legal limits.
East Timor	Part II, Title III, Art 61(1) – every citizen has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.	Part II, Title III, Art 61(2) – the State has the obligation to recognize the need to preserve and rationalize natural resources.	Part II, Title III, Art 61(3) – the State shall promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.
Ecuador	Title II, Chapter 6, Art 66 & Chapter 7, Art 74 – every citizen is guaranteed the	Title II, Chapter 7, Art 71 – nature, or Pacha Mama, where life plays and	Title II, Chapter 7, Arts 72 & 73 – nature is entitled to restoration. This

	<p>right to live in a healthy, ecologically balanced, pollution free environment and in harmony with nature. Individuals, communities, peoples and nations are entitled to benefit from the environment and natural resources that allow them to live well.</p>	<p>performs, is entitled to full respect, existence, and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes. Any person, community, national or nationality may require the public authority to comply with the rights of nature. The principles enshrined in the Constitution, will be used to apply and interpret these rights, as appropriate. The State will encourage individuals, legal persons, and collective entities to protect nature and promote respect for all the elements that form an ecosystem.</p>	<p>restoration is independent of the obligation of the State and persons or companies to compensate individuals and groups that depend on affected natural systems. In case of severe or permanent environmental impact, including those linked to the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration, and take appropriate measures to eliminate to mitigate adverse environmental consequences.</p> <p>The State shall apply precautionary and restrictive measures to activities that could lead to species extinction, destruction of ecosystems, or the permanent alteration of natural cycles.</p>
El Salvador	<p>Title II, Chapter II, Section 1, Art 34 – every child has the right to live in familial and environmental conditions</p>	<p>Title II, Chapter II, Section 1, Art 69 – the State has the duty to control the quality of food products and the environmental</p>	

	that permit his integral development, for which he shall have the protection of the State. The State shall protect the right of the pollution to live in a healthy and ecologically balanced environment, that guarantees sustainable development.	conditions that may affect health and well-being.	
Equatorial Guinea	Title I, Art 6 – the State has the obligation to assure conservation of nature.		
Eritrea	Chapter II, Art 10(2) & (3) – the State has the duty to bring about a balanced and sustainable development throughout the country, and shall use all available means to ensure all citizens to improve their livelihood in a sustainable manner, through their development. The State shall have the responsibility to regulate all land, water and natural resources and to ensure their management in a balanced and sustainable manner and in	Chapter II, Art 8(3) – the State has the duty to regulate all land, water and natural resources and to ensure their management in a balanced and sustainable manner and in the interest of the present and future generations.	Chapter II, Art 8(3) – the State has the duty to create the right conditions for securing the participation of the people to safeguard the environment.

	the interest of the present and future generations.		
Estonia	Chapter II, Art 34 – restriction on a person's right to freedom of movement in order to protect the environment.	Chapter II, Art 53 – everyone shall be obligated to preserve the human and natural environment and to compensate for damages caused by him or her to the environment.	
Ethiopia	Chapter 3, Part 2, Art 44(1) – every citizen has the right to a clean and healthy environment.	Chapter 3, Part 2, Art 43(1) – every citizen has the right to sustainable development.	Chapter 5, Art 92(1)–(4) – government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment. The design and implementation programmes and projects of development shall not damage or destroy the environment. People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly. Government and citizens shall have the duty to protect the environment.

Fiji	Section 186, 4(b) – in the extraction of minerals from property belonging to Fijian citizens, account must be taken of the risk of environmental damage.		
Finland	Part II, Section 14a – public authorities must strive to ensure for every citizen the right to a healthy environment as well as the opportunity to influence decision-making concerning his living environment.	Part II, Section 14a – every citizen shall be responsible for the natural world and for its diversity, for the environment and for the cultural heritage.	
France	Preamble – every citizen has the right to live in a balanced and health-friendly environment.	Arts 5, 6 and 7 – application of the precautionary principle in any circumstance that may pose irreparable harm to the environment, calls for the promotion of sustainable development (to this effect, reconciling protection and utilisation of the environment, economic development and social progress), and recognizes the right of individuals (subject to the conditions and within the limits defined by the law) to access to	Arts 3 & 4 – principle of polluter-pays and prevention, into national law and mandate their application in policymaking.

		information held by the public authorities and participation in the making of public decisions which have an impact on the environment.	
Gambia	Art 218 – the State and all the people of the Gambia shall strive to protect, preserve and foster the ... natural ... heritage of the Gambia.	Art 220 – individual's duty to protect the environment is unenforceable.	
Georgia	Chapter 2, Art 37(3) – every citizen has the right to live in a healthy environment and enjoy natural and cultural surroundings.	Chapter 2, Art 37(4) – the creation of a healthy environment, in conformity with the ecological and economic interests of society, in the interest of current and future generations, the State guarantees the protection of the surrounding environment and rational use of nature.	Art 37(5) – every citizen has the right to receive complete, objective and timely information concerning the state of the environment of his/her living and working conditions.
Germany	Chapter I, Art 20a – the State has responsibility to protect the natural foundations of life and animals.		
Ghana	Chapter 6, Art 36(9) – the State shall take appropriate measures needed to protect and safeguard the national	Chapter 5, Art 41(k) – every citizen has the duty to protect and safeguard the environment in the context of the principle	

	environment for posterity, and shall seek cooperation with other states and bodies for purposes of protecting the wider international environment for mankind.	of sustainability. Alteration of the use of forests and forest expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy.	
Greece	Part 2, Art 24(1) – the State has the duty to protect the natural and cultural environment.	Part 2, Art 24(1) – the State is bound to adopt special preventive or repressive measures for the preservation of the environment.	
Guatemala	Title II, Chapter II, Section VII, Art 93 – the right to health to be a fundamental right of the human being without any discrimination.	Title II, Chapter II, Section VII, Art 97 – the State and the inhabitants of the natural territory has the responsibility to promote social, economic, and technological development that would prevent the contamination of the environment and maintain the ecological balance.	Title II, Chapter II, Section VII, Art 97 – the State shall issue all the necessary regulations to guarantee that the use of the fauna, flora, land, and water may be realized rationally, obviating their depredation.
Guyana	Part I, Chapter II, Art 36 – in the interests of the present and future generations, the State will protect and make rational use of its land, mineral	Part I, Chapter II, Art 36 – every citizen has the duty to participate in activities designed to improve the environment.	

	<p>and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment.</p>		
Haiti	Title XI, Chapter II, Art 253 – strict prohibition on any practice that might disturb the ecological balance.	Title XI, Chapter II, Arts 254 & 255 – the State has the duty to organize the enhancement of natural sites to ensure their protection and make them accessible to all. The State has the duty to encourage the development of local sources of energy in order to protect forest reserves and expand the plant coverage.	Title III, Chapter III, Art 52-1(h) – every citizen has the duty to respect and protect the environment.
Honduras	Title III, Chapter VII, Art 145 – the right to the protection of one's health.	Title III, Chapter VII, Art 145 – the State has the duty to maintain a satisfactory environment for the protection of everyone's health.	
Hungary	Chapter I, Art 18 – the State recognises and implements everyone's right to a healthy environment.	Chapter XII, Art 70/D – everyone living within the territories of Hungary has the right to the highest possible level of physical and mental health. The State has the duty to implement this right through	

		the protection of the natural environment.	
India	Part IV, Art 48A – the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.	Part IVA, Art 51A – every citizen has the duty to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.	
Iran	Chapter IV, Art 50 – the preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence, is regarded as a public duty in Iran.	Chapter IV, Art 50 – prohibition of economic and other activities that inevitably involve pollution of the environment or cause irreparable damage to it.	
Iraq	Art 33(1) – every individual has the right to live in a correct environmental atmosphere.	Art 33(2) – the state guarantees protection and preservation of the environment and biological diversity.	
Kazakhstan	Section I, Art 31(1) – the State shall set objectives for the protection of the environment favourable for the life and health of the people.	Section I, Art 38 – every citizen has the duty to preserve nature and protect natural resources.	Section I, Art 31(2) – officials are accountable for the concealment of facts and circumstances endangering the life and health of the people.
Kuwait	Part II, Art 21 – the State shall ensure the preservation and proper exploitation of natural resources.		

Kyrgyzstan	Chapter II, Section 3, Art 35(1) – every citizen has the right to a favourable and healthy natural environment.	Chapter II, Section 3, Art 35(1) – the right to compensation for the damage caused to one's health and property by activity in the area of natural exploitation.	Chapter II, Section 3, Art 35(2) – it is the sacred duty of every citizen to protect the environment and natural resources.
Laos	Chapter II, Art 17 – all organizations and citizens shall protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.		
Latvia	Chapter 8, Art 115 – the State has the duty to protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.		
Lesotho	State Policy Chapter Art 36 – the State shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a	Art 25 – the principles contained in this Chapter [state policy chapter] shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court.	

	sound and safe environment adequate for their health and well-being.		
Lithuania	Chapter 4, Art 53 – the State and each individual has the duty to protect the environment from harmful influences.	Chapter 4, Art 54 – the State shall concern itself with the protection of the natural environment, its fauna and flora, separate objects of nature and particularly valuable districts and to supervise the moderate utilization of natural resources as well as their restoration and augmentation.	Chapter 4, Art 54 – prohibition of the exhaustion of land and entrails of the earth, the pollution of waters and air, the production of radioactive impact, as well as the impoverishment of fauna and flora.
Macedonia	Chapter II, Part 2, Art 43 – every citizen has the right to a healthy environment to live in. The State has the duty to establish conditions for the citizen to exercise this right.	Chapter I, Art 8 – the fundamental need for proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development.	Chapter II, Part 2, Art 43 – every citizen has the obligation to promote and protect the environment.
Madagascar	Title II, Section II, Art 39 – the State, with the participation of the autonomous provinces, assures the protection, the conservation, and the improvement of the environment through appropriate means.	Title II, Section II, Art 39 – every citizen has the duty to respect the environment.	

Malawi	<p>Chapter III, Art 13(d) – the State has the duty to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at managing the environment responsibly in order to:</p> <ul style="list-style-type: none"> (i) Prevent the degradation of the environment; (ii) Provide a healthy living and working environment for the people of Malawi; (iii) Accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and (iv) Conserve and enhance the biological diversity of Malawi. 		
Mali	<table border="1"> <tr> <td>Title I, Art 15 – every citizen has the right to a healthy environment.</td> <td>Title I, Art 15 – the protection, defense and promotion of the environment are an</td> </tr> </table>	Title I, Art 15 – every citizen has the right to a healthy environment.	Title I, Art 15 – the protection, defense and promotion of the environment are an
Title I, Art 15 – every citizen has the right to a healthy environment.	Title I, Art 15 – the protection, defense and promotion of the environment are an		

	obligation for all and for the State.		
Malta	Chapter II, Art 9 – the State has the duty to safeguard the landscape of the Nation.		
Mexico	Title I, Chapter I, Art 27 – the State has the duty to take necessary measures to preserve and restore the ecological balance and to avoid the destruction of natural resources.		
Micronesia	Art XIII, Section 2 – prohibiting the testing, storing, using or disposing of radioactive materials, toxic chemicals, or other harmful substances within the jurisdiction of Micronesia, without the express approval of the national government.	Preamble – affirming the people's common wish to preserve the heritage of the past, and to protect the promise of the future.	
Moldova	Title II, Chapter II, Art 37(1) & (4) – every citizen has the right to live in an environment that is ecologically safe for life and health, to obtain healthy food products. Private individuals and legal	Title II, Chapter III, Art 59 & Title II, Chapter II, Art 46(5) – every citizen has the duty to protect the natural environment. The right to private property obligates the observance of requirements regarding the	Title II, Chapter II, Art 37(2) & (3) – the State guarantees every citizen the right of free access to truthful information regarding the state of the natural environment, the living and working

	entities are responsible for any damages they may cause to personal health and property due to an ecological offense.	protection of the environment and maintenance of good neighbourly relations as well as to the observance of other requirements, which are placed upon the owner according to the law.	conditions, and the quality of food products and household goods. Nondisclosure or falsification of information regarding factors detrimental to human health constitutes offenses punishable by law.
Mongolia	Chapter 2, Art 16(2) & 17(2) – every citizen has the right to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance. It is a sacred duty for every citizen to protect nature and the environment.	Chapter 2, Art 6(1) & Chapter 3, Part 3, Art 38(2)(4) – the land, its subsoil, forests, water, fauna and flora and other natural resources shall be subject to State protection. Carrying out the State laws and directing the economic, social and cultural development of the country, the State shall undertake measures on the protection of the environment and on the rational use and restoration of natural resources.	Chapter 1, Art 6(4) – the State is authorised to hold responsible the landowners in connection with the manner the land is used, to exchange or take it over with compensation on the grounds of special public need, or confiscate the land if it is used in a manner adverse to the health of the population, the interests of environmental protection.
Mozambique	Part II, Chapter 1, Art 72 – every citizen shall have the right to live in a balanced natural environment.	Part I, Chapter IV, Art 37 – the State shall promote efforts to guarantee the ecological balance and the conservation and preservation of the environment for the betterment of the quality of life of its	Part II, Chapter I, Art 72 – every citizen has the duty to defend the natural environment.

	citizens.		
Namibia	Chapter 11. Art 95(1) – the State has the duty to actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.		
Nepal	Part 4, Art 26(4) – the State shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and to make arrangements for the special protection of the rare wildlife, the forests and the vegetation.		

Netherlands	Chapter I, Art 21 – it shall be the concern of the State to keep the country habitable and to protect and improve the environment.		
Nicaragua	Title IV, Chapter III, Art 60 – every citizen has the right to live in a healthy environment.	Title IV, Chapter III, Art 60 – the State has the duty to preserve, conserve and recover the environment and the natural resources.	Title VI, Art 102 – the preservation of the environment, and the conservation, development and rational exploitation of the natural resources are responsibilities of the State.
Niger	Title II, Art 27 – every citizen has the right to a healthy environment. The State has the duty to protect the environment.		
North Korea	Chapter 3, Art 57 – the State shall adopt measures to protect the environment, preserve and promote the natural environment and prevent environmental pollution so as to provide the people with a hygienic environment and working conditions.		

Norway	Section E, Art 110b – every citizen has a right to an environment that is conducive to health and to natural surrounding[s] whose productivity and diversity are preserved.	Section E, Art 110b – natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.	Section E, Art 110b – in order to safeguard their right [to a healthy environment], the Constitution establishes the right of citizens to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.
Palau	Art VI – the State shall take positive action to conserve a beautiful, healthful and resourceful natural environment.		
Palestine	Chapter 1, Art 15 – the State strives to achieve a clean, balanced environment whose protection shall be an official and societal responsibility. Tampering with it is punishable by law.		
Panama	Title III, Chapter 7, Art 114 – the State has the fundamental obligation to guarantee that its population lives in a healthy environment, free of contamination (pollution), and where	Title III, Chapter 7, Art 115 – the State and every citizen has the obligation to promote economic and social development that prevents environmental contamination, maintains ecological balance, and avoids	Title III, Chapter 7, Arts 116 & 117 – the State has the obligation to regulate, supervise, and apply, at the proper time, the measures necessary to guarantee rational use of, and benefit from, land,

		air, water and foodstuffs satisfy the requirements for proper development of human life.	the destruction of ecosystems.	river and sea life, as well as forests, lands and waters, to avoid their misuse, and to ensure their preservation, renewal, and permanence. The State has the obligation to regulate benefits gained from non-renewable natural resources to avoid social, economic and environmental abuses that could result.
Papa Guinea	New	Chapter 1, Preamble, Section 4 – the country's natural resources and environment to be conserved and used for the collective benefit of all and be replenished for the benefit of future generations. The Constitution calls for: <ul style="list-style-type: none"> (1) Wise use to be made of natural resources and the environment in the interests of development and in trust for future generations; (2) Conservation and replenishment, for the benefit of ourselves and posterity, of the environment and 	Chapter 1, Preamble, Section 5, Basic Social Obligations(d) – every citizen has the duty to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations.	

	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.		
Paraguay	Title II, Chapter I, Section II, Art 7 – every citizen has the right to live in a healthy, ecologically balanced environment. Thus, priority objectives of social interest are the preservation, recovery, and improvement of the environment, as well as efforts to reconcile these goals with comprehensive human development.	Title II, Chapter I, Section II, Art 7 – law can be enacted to restrict or prohibit those activities that are considered hazardous to the environment, to regulate activities that are likely to cause environmental changes, and define and establish sanctions for ecological crimes.	Title II, Chapter I, Section II, Art 8 – any damage to the environment will entail an obligation to restore and to pay for damage.
Peru	Title III, Chapter III, Art 67 – the State has the duty to promote the sustainable use of its natural resources.	Title III, Chapter III, Art 68 – the preservation of biological diversity and of natural protected areas and sustainable development of Amazonia with adequate legislation.	

Philippines	Article II, Section 16 – the State has the duty to protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.	Article XII, Section 2 – the State has the obligation to take conservation and ecological concerns into account in developing regulations concerning the use and ownership of property.	Article XIII, Section 7 – the State has the duty to protect, develop, and conserve communal marine and fishing resources, both inland and offshore.
Poland	Chapter II, Art 74(2) & (3) – public authorities has the duty to protect the environment. Everyone has the right to be informed of the condition and protection of the environment.	Chapter II, Art 74(1) & (4) – public authorities to pursue policies ensuring the ecological safety of current and future generations. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.	Chapter II, Art 86 – every citizen is obligated to care for the quality of the environment and shall be held responsible for causing its degradation.
Portugal	Part I, Title III, Chapter II, Art 66(1) & (2) – every citizen has a right to a healthy and ecologically balanced human environment, and the duty to defend it. The State has the duty to prevent and control pollution, and its effects, and harmful forms of erosion, to make ecological balance an objective in national planning, to establish nature	Part II, Title I, Art 81(1) – in economic and social matters, a primary duty of the State is to adopt a national policy for energy that is in keeping with conservation of natural resources and a balanced ecology.	Part I, Title II, Chapter II, Art 52(3) – to all is conferred – personally or through associations that purport to defend the interests in issue – the right of popular action in the cases and under the conditions specified by law, including the right to advocate on behalf of the aggrieved party to parties ... to promote the prevention, the suppression and the

	reserves and guarantee nature conservation, and to promote the rational use of natural resources, while safeguarding their capacity for renewal and ecological stability.		prosecution of offences against ... the preservation of the environment ...
Qatar	Part II, Art 33 – the State has the duty to preserve the environment and its natural balance in order to achieve comprehensive and sustainable development for all generations.		
Romania	Title IV, Art 134(2)(e) – the State has the duty to ensure the restoration and protection of the environment, as well as the preservation of ecological balance.	Title II, Chapter II, Art 44(6) – the right to own property implies an obligation to comply with duties related to environmental protection.	Art 35(1) – the State recognises the right of every person to a healthy, well-preserved and balanced environment.
Russia	Section 1, Ch 2, Art 42 – every citizen has the right to a favourable environment. Right to compensation for the damage caused to his or her health or property by ecological violations. Every citizen has the right to	Section 1, Chapter 2, Art 9(1) – a fundamental principle that land and other natural resources shall be used and protected in Russia as the basis of the life and activity of the peoples living on their respective territories.	Section 1, Chapter 2, Arts 36(2) & 58 – owners of land or natural resources prohibits from using their property in a manner that harms the environment. Every citizen has the obligation to preserve nature and the environment,

	reliable information about the Environment condition.		and care for natural wealth.
Sao Tome and Principe	Part I, Art 10(c) – preservation of the harmonious balance of nature and of the environment is a prime objective of the State.	Part II, Art 48(1) – every citizen has the right to an environment of human life. Every citizen has the duty to defend the environment.	Part II, Art 49(2) – the State has the duty to promote the physical and mental well-being of the populations and their balanced fitting into the socio-ecological environment in which they live.
Saudi Arabia	Chapter 5, Art 32 – the State works toward protecting and improving the environment, as well as keep it from being harmed.		
Seychelles	Chapter III, Part I, Art 38 – every citizen has the right to live in and enjoy a clean, healthy and ecologically balanced environment.	Chapter III, Part I, Art 38(a) - (c) – the State has the duty to take measures to promote the protection, preservation and improvement of the environment and to promote public awareness of the need to protect, preserve and improve the environment.	Chapter III, Part I, Art 40(e) – every citizen has the duty to protect, preserve and improve the environment.
Slovak	Chapter 2, Section VI, Art 44(1)–44(3) & Section II, Art 20(3) – every citizen has the right to a favourable	Chapter 2, Section VI, Art 44(4) & 44(5) – the State has an obligation to provide for an efficient utilization of natural resources,	Chapter 2, Section VI, Art 45 – every citizen has the right to complete and current information on the condition of

	<p>environment. Every citizen has a duty to protect and cultivate the environment and cultural heritage. No citizen shall endanger or damage the environment, natural resources and cultural monuments beyond the limits stipulated by the law. Prohibition of the exercise of ownership rights in a manner that damages the environment.</p>	<p>a balanced ecology, an effective protection of the environment. The details concerning the rights and duties pertaining to Art 44 are established by law.</p>	<p>the environment and the causes and consequences of this State.</p>
Slovenia	<p>Section III, Art 72 – every citizen shall have the right to a healthy living environment. The State has the duty to ensure a healthy living environment. The State also has the obligation to define under what conditions and to what extent the causer of damage is obliged to make restitution for damage to the living environment.</p>	<p>Section III, Art 73 – obligation of the State and local community to ensure the preservation of the natural and cultural heritage, and of all persons to protect natural points of interest and rarities and cultural monuments.</p>	
South Africa	<p>Chapter 2, Art 24 – everyone has the right to an environment that is not harmful to their health or well-being</p>	<p>Chapter 2, Art 24(b)(i)–(iii) – the State has the obligation to prevent pollution and ecological degradation, promote</p>	

	and to have the environment protected, conservation, and secure ecologically for the benefit of present and future sustainable development and use of natural generations. resources while promoting justifiable economic and social development.	
South Korea	Chapter II, Art 35(1) & (2) – every citizen has the right to a healthy and pleasant environment. The State and every citizen must endeavour to protect the environment. The substance of the environmental rights shall be determined by the Act.	Chapter IX, Art 120(2) – the State has the obligation to protect the land and natural resources and to establish a plan necessary for their balanced development and utilisation.
Spain	Title I, Chapter III, Art 45(1) – everyone has the right to enjoy an environment suitable for the development of the person. Every citizen has the duty to preserve the environment.	Title I, Chapter III, Art 45(2) – public authorities must concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment.
		Title I, Chapter III, Art 45(3) – the State has the obligation to establish penal and administrative sanctions for environmental harm, and those responsible for such harm shall be obliged to repair the damage caused.
Sri Lanka	Chapter VI, Art 27(14) – State shall protect, preserve and improve the environment for the benefit of the community.	Chapter VI, Art 28(f) – every citizen has the duty to protect nature and conserve its riches.

Sudan	Chapter II, Art 10(1) – every citizen shall have the right to a clean and diverse environment.	Chapter III, Art 23(2)(h) – every citizen has the duty to preserve the natural environment.	
Suriname	Chapter III, Art 6(g) – a social objective of the State is the creation and improvement of the conditions necessary for the protection of nature and for the preservation of the ecological balance.		
Sweden	Chapter 1, Art 2 – the public institutions shall promote sustainable development leading to a good environment for present and future generations.		
Switzerland	Title 3, Chapter 2, Section 3, Art 65(1) – the State collects the necessary statistical data concerning the status and evolution of the environment in Switzerland.	Title 3, Chapter 2, Section 3, Art 74(1) – the State legislates on the protection of humans and the natural environment against damaging and harmful influences.	
Taiwan	Chapter XIII, Section 6, Art 169 – with respect to the utilization of land, the State shall, after taking into account the		

	<p>climatic conditions, the nature of the soil and the life and habits of the people, adopt measures to protect the land and to assist in its development.</p>		
Tajikistan	Chapter 2, Art 38 – guaranteeing the right to health care by measures aimed at protecting the environment.	Chapter 1, Art 13 – the land, the earth, water, airspace, the world of animals and vegetation, and other natural resources are owned by the State, and the State guarantees their effective use in the interests of the people.	Chapter 2, Art 44 – every citizen has the duty to protect the natural, historical and cultural heritage.
Tanzania	Section 2, Art 9(1)(c) – the State has the obligation to ensure that the affairs of the Government are carried out in such a way as to ensure that the natural resources of the nation are developed, preserved and utilized for the common good.	Section 3, Art 27(1) & (2) – every citizen has the obligation of protecting Tanzania's natural resources. Every citizen is also expected to safeguard properties under the State's care, and to combat all forms of destruction.	
Thailand	Chapter V, Section 79 – the State has the obligation to promote and encourage public participation in the preservation, maintenance and balanced exploitation	Chapter IV, Section 69 – every citizen has the duty to conserve natural resources and the environment.	Arts 55-59 – a person has a right to receive facts, explanation, and reason from [the State] and to voice their own opinion before a project, which could

	of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of the environment in accordance with persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life.		affect that person's environment, health and quality of life, is approved and implemented. These procedural rights are expressed as individual and community rights.
Togo	Title II, Art 41 – everyone shall have the right to a healthy environment.	Title II, Art 41 – the State shall oversee the protection of the environment.	
Turkey	Chapter 3, Section VIII, Part A, Art 56 – every citizen has the right to live in a healthy, balanced environment. The State and every citizen have the duty to improve the natural environment, and to prevent environmental pollution.	Chapter 3, Section III, Part B, Art 44 – the State has the duty to take necessary measures to maintain and develop efficient land cultivation and to prevent its loss through erosion.	Chapter 3, Section III, Part B, Art 44 – land distribution policies shall not lead to the depletion of forests and other land and underground resources.
Turkmenistan	Section I, Art 10 – the State shall be responsible for preserving the environment.		

Uganda	Chapter XIII – the State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.	<p>Chapter XXVII – the State has the duty to:</p> <ul style="list-style-type: none"> i) Promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations; ii) Manage the utilization of the natural resources of Uganda in such a way as to meet the development and environmental needs of present and future generations of Ugandans, and in particular, the State shall take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes; and iii) Promote and implement energy policies that will ensure that people's basic needs and those of environmental preservation are met; iv) Create and develop parks, reserves and 	Chapter XIV(b) – the State has the duty to ensure that all Ugandans have access to clean and safe water.
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		recreation areas and ensure the conservation of natural resources; and v) Promote the rational use of natural resources so as to safeguard and protect the bio-diversity of Uganda.	
Ukraine	Chapter II, Art 50 – everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right. Every citizen is guaranteed the right of free access to information about the environmental situation and also the right to disseminate such information. It is forbidden to keep such information secret.	Chapter I, Art 16 – the State has the duty to ensure ecological safety and to maintain the ecological balance on the territory of Ukraine.	Chapter II, Arts 41 & 66 – everyone is obliged not to harm nature and to compensate for any damage he or she inflicted. The use of property shall not aggravate the ecological situation and the natural qualities of land.
United Arab Emirates	Chapter 2, Art 23 – the natural resources in each Emirate shall be considered the public property of that Emirate, and that society shall be responsible for the protection and proper exploitation of such natural		

	resources for the benefit of the national economy.	
Uruguay	Section II, Chapter II, Art 47 – protection of the environment is of common interest. persons should abstain from any act that may cause the serious degradation, destruction, or contamination of the environment.	
Uzbekistan	Part III, Chapter 12, Art 55 – the land, its mineral, fauna and flora, as well as other natural resources shall constitute the national wealth, and shall be rationally used and protected by the State.	Part III, Chapter 12, Art 54 – use of any property must not be harmful to the ecological environment. Part II, Chapter 11, Art 50 – every citizen has the duty to protect the environment.
Vanuatu	Chapter 2, Part II, Art 7 – every citizen has the duty to himself and his descendants and to others to safeguard the natural wealth, natural resources and environment in the interests of the present generation and of future generations.	

Venezuela	Chapter IX, Art 127 – every person has a right to individually and collectively enjoy a safe, healthy and ecologically balanced environment.	Chapter IX, Art 127 – the State has the duty to guarantee that the population develops in an environment free of contamination, where the air, the water, the coasts, the climate, the ozone layer, the living species are especially protected in conformity with the law.	
Vietnam	Chapter 2, Art 29 – State organs, units of armed forces, economic organizations, and individuals have the duty to implement State regulations on the rational use of natural resources and protection of the environment. All acts of depleting natural resources and destroying the environment are strictly prohibited.	Chapter 2, Art 18 – Organisation and individuals have the duty to protect, replenish, and exploit [land allotted to them] in a rational and economical fashion.	
Serbia	Art 74 – everyone has the right to a healthy environment.		
Zambia	Preamble – the State shall conduct the affairs of the state in such manner as to preserve, develop, and utilize its		

resources for this and future
generations.

XII Appendix Three

Draft Principles on Human Rights and the Environment

E/CN.4/Sub.2/1994/9, Annex I (1994)³⁹⁷

Preamble

Guided by the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Vienna Declaration and Program of Action of the World Conference of Human Rights, and other relevant international human rights instruments,

Guided also by the Stockholm Declaration of the United Nations Conference on the Human Environment, the World Charter for Nature, the Rio Declaration on Environment and Development, Agenda 21: Programme of Action for Sustainable Development, and other relevant instruments of international environmental law,

Guided also by the Declaration on the Right to Development, which recognizes that the right to development is an essential human right and that the human person is the central subject of development,

Guided further by fundamental principles of international humanitarian law,

Reaffirming the universality, indivisibility and interdependence of all human rights,

Recognizing that sustainable development links the right to development and the right to a secure, healthy and ecologically sound environment,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Deeply concerned by the severe human rights consequences of environmental harm caused by poverty, structural adjustment and debt programmes and by international trade and intellectual property regimes,

Convinced that the potential irreversibility of environmental harm gives rise to special responsibility to prevent such harm,

³⁹⁷ See also Glazebrook, above n 190, at 324 for the learned Justice's suggested content of the substantive human right to a healthy environment and Popović, above n 4, for an extensive discussion of this document.

Concerned that human rights violations lead to environmental degradation and that environmental degradation leads to human rights violations,

THE FOLLOWING PRINCIPLES ARE DECLARED:

Part I

1. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.
2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.
3. All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.
4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.

Part II

5. All persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.
6. 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.
7. All persons have the right to the highest attainable standard of health free from environmental
8. All persons have the right to safe and healthy food and water adequate to their well-being.
9. All persons have the right to a safe and healthy working environment.
10. All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.
11. All persons have the right not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means. All persons have the right to participate effectively in decisions and to negotiate

concerning their eviction and the right, if evicted, to timely and adequate restitution, compensation and/or appropriate and sufficient accommodation or land.

12. All persons have the right to timely assistance in the event of natural or technological or other human-caused catastrophes.

13. Everyone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This Includes ecologically sound access to nature.

Everyone has the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.

14. Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.

Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.

Part III

15. All persons have the right to information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.

16. All persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.

17. All persons have the right to environmental and human rights education.

18. All persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

19. All persons have the right to associate freely and peacefully with others for purposes of protecting the environment or the rights of persons affected by environmental harm.

20. All persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm.

Part IV

21. All persons, individually and in association with others, have a duty to protect and preserve the environment.

22. All States shall respect and ensure the right to a secure, healthy and ecologically sound environment. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration.

These measures shall aim at the prevention of environmental harm, at the provision of adequate remedies, and at the sustainable use of natural resources and shall include, *inter alia*,

- collection and dissemination of information concerning the environment
- prior assessment and control, licensing, regulation or prohibition of activities and substances potentially harmful to the environment;
- public participation in environmental decision-making;
- effective administrative and judicial remedies and redress for environmental harm and the threat of such harm;
- monitoring, management and equitable sharing of natural resources;
- measures to reduce wasteful processes of production and patterns of consumption;
- measures aimed at ensuring that transnational corporations, wherever they operate, carry out their duties of environmental protection, sustainable development and respect for human rights; and
- measures aimed at ensuring that the international organizations and agencies to which they belong observe the rights and duties in this Declaration.

23. States and all other parties shall avoid using the environment as a means of war or inflicting significant, long-term or widespread harm on the environment, and shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development.

24. All international organizations and agencies shall observe the rights and duties in this Declaration.

Part V

25. In implementing the rights and duties in this Declaration, special attention shall be given to vulnerable persons and groups.

26. The rights in this Declaration may be subject only to restrictions provided by law and which are necessary to protect public order, health and the fundamental rights and freedoms of others.

27. All persons are entitled to a social and international order in which the rights in this Declaration can be fully realized.

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