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# International Environmental Justice: Rights and Remedies

By KENNETH F. MCCALLION\*

Since the signing of the Universal Declaration of Human Rights<sup>1</sup> in 1948, the scope of human rights abuses recognized as violations of fundamental human rights has significantly expanded. The three categories of human rights abuses traditionally recognized under customary international law—genocide, war crimes and crimes against humanity—have been expanded to include other abuses, such as torture, mass rape and child labor.<sup>2</sup>

There has also been a growing recognition that environmental rights are inextricably connected to fundamental human rights. Although environmental rights are not explicitly enumerated in the Universal Declaration of Human Rights, it has become generally recognized that environmental rights are closely linked with the right to life, which is the most fundamental *jus cogens* norm, without which no other rights can be exercised.<sup>3</sup> Further, it cannot be seriously challenged that the pollution and degradation of our planet's natural environment and its constituent ecosystems threaten not only the

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1. Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

2. See, e.g., Torture Victims Protection Act of 1991, 28 U.S.C. §1350 (1994 & Supp. 2003); Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (1994 and Supp. 2003).

3. See Universal Declaration of Human Rights, *supra* note 1, art. 3, at 72; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 6(1), 999 U.N.T.S. 172, 175 [hereinafter ICCPR]; American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Off. Rec. OEA/Ser. 11.23/Doc21.rev. 6 (1948) [hereinafter American Declaration].

right to life for a significant number of our own species, but that of many other species as well. The accelerating destruction of the rain forests, the rapid desertification of huge portions of Africa and Asia, ozone layer depletion, pollution of groundwater and countless other environmental tragedies have been repeatedly documented. And, even where the world community has belatedly taken steps to ban CFCs and the transport and sale of other hazardous chemicals, it is far from clear as to whether or how we can cure the massive environmental damage that has already occurred. For example, the planet has been left with a hole in the critically sensitive ozone layer, which protects us from excessive ultraviolet radiation, but we lack the capability to repair the damage. Similarly, while DDT has been banned in the United States since the 1970s, high levels of the toxic pesticide continue to persist in the food chain, and continued exports of DDT to less developed countries has tended to reinforce the persistence of deadly chemicals in the food chain. This is especially true when foreign grown vegetables and fruits exposed to DDT and other chemicals developed by U.S. companies are then imported back into the United States, creating a "circle of poison."<sup>4</sup>

### **The Global Environmental Crisis and Environmental Rights**

One of the possible reasons why scholars and courts have been slow to recognize the importance of environmental rights as a fundamental human right is that the threat of massive damage to the environment from man-made sources is of relatively recent vintage. Until the industrial revolution, there were continual threats of national disasters—floods, earthquakes, volcanic eruptions, famines, pestilence and plagues—but there was little or no linkage of cause and effect between human activities and these catastrophic events. In Biblical times, Noah built his ark to protect the planet's species from extinction as a result of a global flood; man-made environmental disasters have only plagued us in modern times.<sup>5</sup>

When the U.S. Constitution was being drafted, there was much

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4. See Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 561 (1994); Mitchell Stachel, *A Vicious Circle of Poison: New Questions About American Exports of Powerful Pesticides*, U.S. NEWS & WORLD REPORT, June 10, 1991, at 31.

5. Now that countless species have been driven into extinction by environmental pollution and other man-made causes, we are experiencing a reverse Noah's Ark phenomenon, where many species are forced to "walk the plank" into oblivion.

debate over the burning human rights issues of the day, including freedom of religion, freedom of speech, and freedom of association. These rights were explicitly enshrined in the Constitution and Bill of Rights because it was perceived that these were the ones most severely threatened in Colonial America. The industrial revolution was just beginning to pick up steam during the mid-1700s, and the availability of clean air and clean water was still presumed to be limitless. If there had been massive air and water pollution engulfing Boston and Philadelphia at the time, the Constitution's drafters may well have addressed that issue as well. However, Rachel Carson's ground-breaking book *Silent Spring* would not shake Americans into awareness of environmental dangers until 1962.

As the environmental crisis has accelerated in the nineteenth and twentieth centuries, constitutional drafters around the globe have explicitly enshrined in approximately sixty national constitutions some form of obligation to protect the environment or other environmental rights.<sup>6</sup> During the last several decades, approximately one thousand bilateral and 350 multilateral agreements designed to protect the environment have been entered into by various nations.<sup>7</sup> Indeed, over one hundred governmental representatives attending the World Conference on Human Rights in Vienna in 1993 declared that the illicit dumping of toxic waste can seriously threaten the right to life.<sup>8</sup> Adjudications by international tribunals have also, in several instances, confirmed that the duty not to cause environmental harm, which poses grave risks to life or health, is a cognizable norm of customary international law.<sup>9</sup> The "grandfather" of all cases in the field of international environmental law, the *Trail Smelter* arbitration, was the first to recognize the principle that international liability may

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6. See, e.g., Fatma Zohra Ksentini, *Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., at 81-89, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), revised by U.N. Doc. E/CN.4/Sub.2/1994/9/Corr. 1 (1994).

7. *Id.* at 8.

8. *Vienna Declaration and Program of Action: Report of the World Conference on Human Rights*, at 20, 24, U.N. Doc. A/Conf. 157/24 (Part 1) (1993) [hereinafter *Vienna Declaration*].

9. I have also argued this point in Kenneth F. McCallion & H. Rajan Sharma, *The Need for an International Court of the Environment to Protect Fundamental Environmental Rights*, 32 GEO. WASH. J. INT'L L. & ECON. 351, 356-57 (2000).

arise from transboundary activity that causes serious environmental harm.<sup>10</sup> Subsequently, the Inter-American Commission on Human Rights concluded that the Brazilian government's construction of a highway through the Amazon rainforest violated the right to life and health of the indigenous Yanomami people, who lacked immunity to many of the illnesses introduced into their environment and whose means of subsistence would be irreparably harmed.<sup>11</sup> The U.N. Human Rights Committee also has ruled that allegations of large-scale dumping of nuclear waste, described by the Committee as a "heinous act" threatening the lives of nearby residents, constituted a *prima facie* violation of the right to life as embodied in Article 6(1) of the International Covenant on Civil and Political Rights.<sup>12</sup> In another case, the Committee noted that the scope of any sovereign's right to pursue economic development<sup>13</sup> is necessarily limited by the state's human rights obligations under international law.<sup>14</sup>

The weight of judicial authority and scholarly opinion in the field, notwithstanding considerable debate on other international environmental norms, also supports the proposition that the duty to prevent such grave environmental destruction, particularly in the trans-frontier context, has attained the status of customary international law.<sup>15</sup> As early as 1976, the International Law Commission determined that a state's "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" violates principles that

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10. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1938). Subsequent adjudications have confirmed and elaborated upon that ruling.

11. *See, e.g.*, Case 7615, Inter-Am. C.H.R., OEA/ser.L/V/II.66, doc. 10 rev.1 (1985).

12. E.H.P. v. Canada, Communication No. 67/1980, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 20, U.N. Doc. CCPR/C/OP/2 (1990).

13. *Vienna Declaration*, *supra* note 8.

14. Ilmari Lansman v. Finland, Communication No. 511/1992, U.N. Human Rights Committee, at para. 9.4, U.N. Doc. CCPR/C/52/D/511/1992 (1992) (stating that Article 27 of the ICCPR safeguards culturally essential economic activities against substantial impacts from environmental degradation, and that means of livelihood need not be traditional in order to be protected).

15. *See, e.g.*, Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at para. 53 (Sept. 25) (stating "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States . . . is now part of the corpus of international law." (quoting *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 241-242)).

“have become particularly essential rules of general international law.”<sup>16</sup>

Universal, obligatory and definable norms of customary international law prohibit taking actions that may be expected to cause long-term, widespread and severe harm to the environment that prejudices the health or survival of a population, and prohibit causing environmental damages that deprive a people of its subsistence.<sup>17</sup> Given that the natural environment is essential to life,<sup>18</sup> and that the right to life is the most fundamental *jus cogens* norm, without which no other right can be exercised,<sup>19</sup> the de minimis obligation not to cause environmental damage that endangers the right to life constitutes an equally basic norm of customary international law. This prohibition is based upon the fundamental rights to life, security of the person and health, as well as international humanitarian and environmental law and the clear practice of states with respect to their own domestic law. It applies within and across national boundaries.

State practice, multilateral and bilateral agreements and decisions by international tribunals have tended to reinforce this conclusion. Indeed, the most compelling evidence for the existence of this customary international law norm is found in a host of multilateral instruments creating liability for various types of environmental damage or obliging states to take affirmative steps to protect the environment in certain respects.<sup>20</sup> To cite one example,

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16. *Report of the International Law Commission on the Work of its Twenty-Eighth Session, Draft Articles on State Responsibility*, art. 19, U.N. GAOR, 31st Sess., Supp. No. 10, at 175, U.N. Doc. A/31/10 (1976); see also *Report of the International Law Commission on the Work of its Forty-Eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 169, U.N. Doc. A/51/10 (1996).

17. ICCPR, *supra* note 3, art. 1.

18. Stockholm Declaration of United Nations Conference on the Human Environment, para. 1, G.A. Res. 2997, U.N. GAOR, 27th Sess., U.N. Doc. A/Conf.48/14/Rev.1, reprinted in 11 I.L.M. 1416 (1972).

19. See, e.g., Universal Declaration of Human Rights, *supra* note 1, art. 3; ICCPR, art. 6(1), *supra* note 3; American Declaration, *supra* note 3; American Convention on Human Rights, Nov. 22, 1969, art. 4(1), 1144 U.N.T.S. 123 (entered into force July 18, 1978); African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 218, 247.

20. See International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III, 26 U.S.T. 765, 767-770, 973 U.N.T.S. 4, 5 (entered into force June 19, 1975, and ratified by 92 states) (providing that the “[o]wner of a ship . . . shall be liable for any pollution damage caused by oil”); International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov.

Article 12 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal directs parties to prepare a draft liability protocol setting forth rules and procedures on liability and compensation for damage resulting from the transboundary movement of hazardous and other wastes.<sup>21</sup> Another example is the proposed International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea that expressly provides, under Article 1, paragraph 6, for strict liability for damage to the environment.<sup>22</sup>

### **Lack of International Environmental Enforcement Mechanisms**

To the extent that these treaties and aspirational statements that call for the protection of the environment<sup>23</sup> represent a codification of customs or rules that establish standards of liability and compensation for environmental damage, they indicate the general acceptance of an

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29, 1969, art. I, V(3)(a), 26 U.S.T. 765, 970 U.N.T.S. 211, 212, 214 (entered into force May 6, 1975); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, art. 1, 26 U.S.T. 2403, 1046 U.N.T.S. 120, 140 (entered into force Aug. 30, 1975); Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, art. 6, 7, Europ. T.S. No. 150 (incorporating "polluter pays" principle and stating that polluting facility or waste dump is liable for damage); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 29, 1991, art. 4(3)(b), 30 I.L.M. 773, 781 (signed by 22 nations of the Organization of African Unity, imposing strict liability on generators of hazardous wastes within states).

21. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 23, 1989, art. 12, 1673 U.N.T.S. 126, 139 (entered into force May 5, 1992) [hereinafter Basel Convention].

22. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, *opened for signature* Oct. 1, 1996, 35 I.L.M. 1406.

23. See Rio Declaration on Environment and Development, U.N. GAOR, 4th Sess., U.N. Doc. A/CONF.151/PC/WG.III/L.33/rev.1 (1992) (stating that human beings "are entitled to a healthy and productive life in harmony with nature"); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *opened for signature* Nov. 17, 1988, art. 11(1), 28 I.L.M. 156, 165 (1989) ("Everyone shall have the right to live in a healthy environment. . ."); Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308, 1309 (Twenty-four signatories recognized "the right to live in dignity in a viable global environment."); G.A. Res. 45/94, U.N. GAOR, Sess., at 2, U.N. Doc. A/Res/45/94 (1991) ("All individuals are entitled to live in an environment adequate for their health and well-being.").

underlying duty not to degrade the environment to such an extent that it impacts the internationally guaranteed rights to life, health, and security of the person. However, international law rarely provides for remedies or mechanisms for the enforcement of and redress for environmental wrongs. Although environmental norms, by their very global nature, require international cooperation and enforcement in order to be effective, environmental polluters and violators are often able to elude the sporadic and inconsistent implementation of environmental laws by individual states or regional bodies.

Aside from a handful of multilateral treaties that provide for monitoring of noncompliant bodies,<sup>24</sup> no judicial tribunal with mandatory jurisdiction, the right to monitor, or enforcement authority has been established to enforce the evolving norms of international environmental law. Similarly, while the International Court of Justice (ICJ) at the Hague has jurisdiction over environmental disputes, virtually no such disputes have been resolved by it in over forty years, and its jurisdiction is strictly limited to disputes submitted by state parties, with no standing afforded to individuals, corporations, or other nongovernmental organizations.<sup>25</sup> Most recently, in the *Gabcikovo-Nagymaros* case, a dispute concerning environmental damage resulting from the diversion of the Danube River between Hungary and Slovakia, the ICJ declined to reach the environmental issue, preferring to resolve the dispute on the basis of a breach of a 1977 treaty between the parties.<sup>26</sup>

In the area of international criminal law, the Rome Statute of the International Criminal Court (ICC), which defines its jurisdiction over the most serious crimes of international concern, does not address the issue of its competence to prosecute environmental crimes. The exercise of jurisdiction over environmental offenses by

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24. See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 451, *reprinted in* 26 I.L.M. 1541; United Nations Framework Convention on Climate Change, May 9, 1992, *reprinted in* 31 I.L.M. 849 (entered into force March 21, 1994); Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217, (entered into force March 16, 1983); Basel Convention, *supra* note 21; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *supra* note 20.

25. See Statute of the International Court of Justice, art. 34(1), 1947 ICJ Acts & Docs. 37, 44 ("Only states may be parties in cases before the Court.").

26. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), *supra* note 15.

the ICC would require amendment of the statute.<sup>27</sup> This omission from the ICC's jurisdiction is notably conspicuous in light of the fact that the International Law Commission's Draft Articles on State Responsibility specifically provide, in Article 19(d), that "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" shall constitute an international crime.<sup>28</sup>

### **Regional and National Environmental Enforcement Efforts**

Environmental enforcement efforts have been most particularly robust in Europe and the United States. The European Court of Justice (ECJ), the European Court of Human Rights, and the Council of Europe have defined and implemented specific international environmental norms that are capable of adjudication in regional or municipal fora. For example, the ECJ has occasionally permitted access to nongovernmental organizations and individuals in matters concerning the application of European Union regulations and directives pertaining to the environment.<sup>29</sup> The European Court of Human Rights, in its groundbreaking *Lopez-Ostra* decision in 1994, utilized traditional human rights norms to expand the scope of environmental protection, but it has generally failed to extend the implications of its jurisprudence in subsequent cases.<sup>30</sup>

The Council of Europe has also attempted to harmonize standards for environmental protection within Europe internally, as well as with international minimum standards, by promulgating a number of multilateral conventions that require member states to

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27. Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 22, U.N. Doc. A/Conf. 183/9, at 21 (1998) ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.").

28. *Report of the International Law Commission on the Work of its Thirty-Second Session*, U.N. GAOR, 35th Sess., Supp. No. 10, at 1, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l L. Comm'n 5, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2).

29. See Malgosia Fitzmaurice, *The Right of the Child to A Clean Environment*, 23 S. ILL. U. L.J. 611, 639-40 (1999).

30. *Lopez-Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994); see also *Balmer Schafroth and Others v. Switzerland*, 1997 Y.B. Eur. Conv. on H.R. 316 (Eur. Ct. H.R.) (rejecting claims for violation of Articles 6 and 13 of the European Convention on Human Rights by applicants living within a five kilometer radius of a nuclear power station that did not meet current safety standards).

conform their municipal laws to achieve those ends. In addition to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,<sup>31</sup> the Council, on November 4, 1998, opened for signature a Convention on the Protection of the Environment Through Criminal Law that commits member states to enact domestic legislation to establish as criminal offenses specified types of environmental harm and pollution, whether intentional, grossly negligent, or simply negligent in character.<sup>32</sup>

In the United States, the Alien Tort Claims Act (ATCA)<sup>33</sup> has provided some limited basis for civil enforcement of international environmental law violations in federal courts. As the Second Circuit Court of Appeals noted in *Kadic v. Karadzic*,<sup>34</sup> "international law also permits states to establish appropriate civil remedies . . . such as the tort actions authorized by the Alien Tort Act."<sup>35</sup> The ATCA has "a broad scope."<sup>36</sup> Violations of "universal, definable, and obligatory international norms" of customary international law are actionable in the U.S. district courts,<sup>37</sup> and U.S. courts determine the content of customary international law by looking to the practices of nations, as evidenced by treaties, court decisions, U.N. declarations, and the work of scholars.<sup>38</sup>

Plaintiffs in U.S. courts have invoked the ATCA through claims for crimes against humanity, genocide,<sup>39</sup> cruel and degrading treatment, race discrimination, and for violations of environmental human rights and the rights to life and personal security. It has been well-settled for over two hundred years that certain international law

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31. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, Europ. T.S. No. 150.

32. Convention on the Protection of the Environment Through Criminal Law, Nov. 4, 1998, Europ. T.S. No. 172.

33. 28 U.S.C. § 1350 (1994).

34. 70 F.3d 232, 240 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996).

35. *See also* *Iwanowa v. Ford Motor Co.*, 67 F.Supp. 2d, 424, 441-443 (D.N.J. 1999).

36. *Kadic*, 74 F.3d at 388. *See also*, Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 50 ALB. L. REV. 579 (1997).

37. *Xuncax v. Gramajo*, 886 F.Supp. 162, 179, 184 (D. Mass. 1995).

38. *Paquete Habana*, 175 U.S. 677, 700 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (2d Cir. 1980).

39. *See, e.g.*, *Bodner v. Banque Paribas*, 114 F.Supp. 2d 117 (E.D.N.Y. 2000).

violations are actionable under the ATCA without showing some state action.<sup>40</sup> For example, violations of international criminal law, such as crimes against humanity, which are often asserted by plaintiffs in environmental cases affecting indigenous groups and others, clearly do not require state action and may be brought against corporations.<sup>41</sup> However, the reach of the ATCA is not limitless, and legal principles such as *forum non conveniens* and the Act of State doctrine, have been raised in numerous U.S. cases in attempts to persuade federal judges that the resources of the U.S. courts should not be used to redress all international environmental wrongs.

### **International Court of the Environment**

Despite vigorous national and regional attempts to enforce environmental law norms, there can be no question that environmental polluters are free to operate with impunity and without substantial risk of detection or prosecution throughout much of the globe, and there is a noticeable absence of any international mechanisms for the redress of grievances arising from environmental wrongs. In the area of international criminal law, the Rome Statute of the International Criminal Court,<sup>42</sup> which defines its jurisdiction over the most serious crimes of international concern, does not expressly address the issue of its competence to prosecute environmental crimes.

The establishment of an International Environmental Court would, therefore, fill a serious gap in global environmental enforcement, and would substantially contribute to the effort to establish legal uniformity and a common, global environmental legal database. An International Environmental Court, based loosely upon the model of the existing International Criminal Court, could be established either under the auspices of the United Nations or independent of it. One proposal would be for fifteen independent judges to be selected by the signatories to the treaty.<sup>43</sup> The Court would be empowered to adjudicate all disputes between private and

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40. *Kadic*, 70 F.3d at 239-40; *see also Iwanowa*, 67 F.Supp. 2d at 443-445 (distinguishing cases on which the UCC relies).

41. *See, e.g., Doe v. Unocal*, 963 F.Supp. 880, 891-92 (C.D. Cal. 1997).

42. Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 22, U.N. Doc. A/Conf.183/9 (1998).

43. *See Appendix (Draft Treaty), infra*, at art. II.

public parties (concerning environmental damage “of such scale as to affect the general interests of the international community,” if the matter is “accepted for adjudication by the President of the Court upon the recommendation of the Office of General Counsel.”<sup>44</sup> On its own initiative, the court could also direct the Office of the General Counsel to institute such investigations and take appropriate action to address environmental problems of international significance. Any party would have standing to bring a matter to the attention of the Office of General Counsel for investigation, including states, individuals, regional bodies, companies and nongovernmental organizations.<sup>45</sup>

### Conclusion

It has gradually become a generally recognized principle that widespread or international degradation of the environment constitutes a violation of customary international law. Many bilateral and multilateral treaties now have enforcement or dispute-resolution mechanisms built into them, and both European and U.S. tribunals have been used to provide remedies for environmental disasters that interfere with fundamental human rights. Nevertheless, there is a noticeable absence of any effective international forum for the remedy of environmental offenses. The ICJ has been largely ineffective since its jurisdiction is limited to member states. An International Environmental Court would substantially advance the cause of international environmental enforcement and increase the availability of effective global judicial mechanisms.

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44. *Id.* at art. VI.

45. *Id.* at art. VII.

## APPENDIX

# Draft Treaty for the Establishment of an International Court of the Environment

### Preamble

RECOGNIZING that there is now a global environmental crisis that threatens all the major ecosystems of the planet;

RECOGNIZING that the international community has an obligation, as the stewards of global natural resources, to preserve and protect those resources and all other species from further pollution, contamination and extinction;

RECOGNIZING that the right to a healthy, pollution-free environment is a fundamental human right;

RECOGNIZING that there is an urgent need for the establishment of an International Court of the Environment to resolve transnational and international environmental disputes and to preserve and protect global ecosystems; and

RECOGNIZING that such a court is intended to be complementary to national and regional compliance, enforcement and judicial systems.

THEREFORE the Parties to this Statute have agreed as follows:

### **Part 1. Establishment of the Court**

#### ***Article I: The Court***

1.1 There is established an International Court of the

Environment (the Court), which shall have the power to resolve environmental disputes between Parties by mediation, arbitration and/or judicial decisions, and which shall be complementary to national judicial systems. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

***Article II: Composition of the Court***

Option 1. The Court shall be composed of 15 independent judges elected by the U.N. General Assembly to a term of 7 years. The President of the Court shall be directly nominated by the U.N. Secretary General.

Option 2. The Court shall be composed of 15 independent judges serving 7 year terms elected by the parties to this agreement. The President of the Court shall be selected by the parties (or by the other judges).

N.B. The Court may be established either as a U.N. affiliate, as an adjunct to some other international body (e.g., the Permanent Court of Arbitration) or as a totally independent entity.

***Article III (Optional): Relationship of the Court with the United Nations***

3.1 The Court shall be brought into relationship with the United Nations by an agreement to be approved by the Parties to this Statute and concluded by the President of the Court.

N.B. The Court may be established independent of the United Nations.

***Article IV: Seat of the Court***

4.1 The seat of the Court shall be established at \_\_\_\_\_.

4.2 The President, with the approval of the Parties, may conclude an agreement with the host State, establishing the relationship between the State and the Court.

4.3 The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

#### ***Article V: Status and Legal Capacity***

5.1 The Court is a permanent institution open to all parties in accordance with this Statute. It shall act when requested or required to consider a case submitted to it, in accordance with the provisions of Articles VI and VII herein.

5.2 The Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

### **Part 2: Jurisdiction, Admissibility and Applicable Law**

#### ***Article VI***

6.1 The function of the Court shall be:

(a) To adjudicate environmental disputes of a significant international nature, insofar as such disputes involve the responsibility of members of the international community;

(b) To adjudicate all disputes between private and public parties (including states) concerning environmental damage, insofar as it is of such a scale as to affect the general interests of the international community, and is accepted for adjudication by the President of the Court upon the recommendation of the Office of General Counsel.

(c) To order such emergency, injunctive and preventative measures as necessary and appropriate;

(d) To mediate and arbitrate environmental disputes submitted and accepted by the Court, without prejudice to its judicial function;

(e) Either on the Court's own initiative or at the request of the United Nations, international bodies or other parties, to direct the Office of General Counsel to institute such investigations, supported by independent technical or scientific experts, and to take such other

actions as necessary and appropriate to address environmental problems of international significance.

### ***Article VII***

7.1 The following parties may appear before the Court:

- (a) International public organizations including agencies of the United Nations;
- (b) States;
- (c) Regional, provincial and local authorities and other public bodies;
- (d) NGO's;
- (e) Companies, partnerships and other enterprises;
- (f) Individuals.

7.2 Legal actions by individuals and non-governmental organizations shall be subject to the following conditions:

- (a) All legal recourse to the courts of the relevant state or states has been exhausted, or the filing of such an action in such court or courts would be futile; and
- (b) the Office of General Counsel has fully investigated the claim and recommended to the President that the Court should exercise its jurisdiction; or
- (c) the environmental question or issue is of such international importance that the Court should exercise its original jurisdiction.

### ***Article VIII: Civil and Criminal Matters Within the Jurisdiction of the Court***

8.1 The court has jurisdiction over environmental crimes, which shall be defined as the international infliction of widespread, long-term and severe damage to the natural environment.

8.2 All civil disputes relating to transnational and international environment disputes submitted to it by the Parties.

***Article IX: Exercise of Jurisdiction***

9.1 The Court may exercise its jurisdiction over a person, corporation or State Party with respect to an environmental crime or a civil action submitted to it in accordance with the provisions of Article VII.

***Article X: Precondition to the Exercise Of Jurisdiction***

10.1 The Court shall exercise its jurisdiction over any criminal or civil action submitted to it by a State Party.

10.2 The Court shall exercise its jurisdiction over any criminal or civil action after the Court's Office of General Counsel has conducted a full investigation of a charge or claim submitted to it by a non-State Party, and based on the report of said investigation, the Presiding Justice has determined that there is reasonable cause for the Court to hear the criminal charge or civil complaint.

***Article XI***

11.1 The Court has jurisdiction only in respect of crimes committed after the date of entry into force of the statute, or such civil matters occurring within four years of the date of entry into force of the Statute.

***Article XII: Office of the General Counsel***

12.1 An Office of General Counsel shall conduct investigation of any matters within the jurisdiction of the Court on the basis of information it may seek or obtain from any source, including State Parties, United Nations organs, inter-governmental and non-governmental organizations. The Office of General Counsel shall process the information received or obtained and decide whether there is sufficient basis to proceed. The Office of General Counsel shall make its report and recommendation to the Presiding Justice regarding all claims and complaints filed with it. In all environmental crime cases, the Office of General Counsel shall act as the Prosecutor.

***Article XIII: Challenges to the Jurisdiction of the Court or the Admissibility of a Case***

13.1 At all stages of the proceedings, the Court shall satisfy itself as to its jurisdiction over a case.

13.2 Challenges to the Court's fundamental jurisdiction over a case may be made by:

- (a) a suspect or accused in the case of an environmental crime;
- (b) a defendant in a civil case;
- (c) an interested State Party which has jurisdiction over the crime or civil action under investigation or filed with the Court.

13.3 Any challenge to the Court's jurisdiction must take place prior to or at the commencement of an action.

***Article XIV: Applicable Law***

14.1 The Court shall apply:

- (a) this Statute and its Rules of Procedure and Evidence;
- (b) applicable treaties and the principles and rules of general international law; and
- (c) the national laws of the legal systems of the world to the extent they are consistent with the objectives and purposes of this Statute.

