



NGLS

# Roundup

United Nations Non-Governmental Liaison Service (NGLS)  
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## Human Rights Approaches to Sustainable Development

### INTRODUCTION

During the decade since the 1992 United Nations Conference on Environment and Development (Earth Summit), the value of applying human rights approaches to meeting sustainable development objectives has become better understood and tested in numerous national, regional and multilateral settings. Since 1997, the reform initiatives by UN Secretary-General Kofi Annan to mainstream human rights across the UN system have played a catalytic role in promoting a rights-based approach, combined with the leadership role played by High Commissioner for Human Rights, Mary Robinson, to bring economic, social and cultural rights on a par with civil and political rights. In terms of the social dimension of sustainability, Mr. Annan in his 1998 Annual Report on the Work of the Organization said: "The rights-based approach...describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as

charity, and gives communities a moral basis from which to claim international assistance where needed." Many organizations around the world, as well as some northern and southern governments, see the upcoming World Summit on Sustainable Development (WSSD), to be held from 26 August-4 September 2002 in Johannesburg (South Africa), as an opportunity to further strengthen a rights-based approach to institutional reform and policy setting.

Procedural rights, such as rights to information, participation and access to justice, have the potential to empower civil society groups to make social and environmental claims and to hold State bodies and private sector actors accountable for their actions or omissions, while exercising basic civil and political rights to be free from harassment and abuse. While a number of States still refuse to recognize the human right to a clean environment, the international jurisprudence developed around numerous universally-recognized substantive rights, such as the right to life, health, food and housing, offers robust legal and conceptual bridges between the social, economic and environmental dimensions of sustainable development, and could shift priorities in the political economy of resource allocation and distribution.

Human rights approaches to sustainable development have both a national and international dimension. While State Parties to the various international human rights treaties are responsible for protecting and promoting the rights of people under their own jurisdiction, they also have a duty to cooperate internationally and afford international assistance where needed in the realization of the human rights of all people. This duty stands in sharp contrast to some of the more salient concerns raised in the review of implementation of the 1992 Earth Summit agreements (notably on the role of the international community in financing the implementation of Agenda 21), as well as to concerns raised about current forms of governance of global trade and finance.

A number of recent UN and NGO initiatives aim to consolidate these links in the build-up to the Johannesburg Summit. In particular, the UN Commission on Human Rights held an expert seminar, organized jointly by the

### CONTENTS

<i>Introduction</i> .....	1
<i>Human Rights and the Environment</i> .....	2
<i>Multilateral Antecedents</i> .....	2
<i>Regional Antecedents</i> .....	3
<i>National Antecedents</i> .....	3
<i>Procedural Rights: The ECE Aarhus Convention</i> .....	4
<i>Substantive Rights and Sustainable Development</i> .....	4
<i>The Right to Health</i> .....	5
<i>The Right to Adequate Housing</i> .....	5
<i>The Right to Food</i> .....	5
<i>Human Rights and Access to Water</i> .....	5
<i>Globalization, Human Rights and Sustainable</i>	
<i>Development</i> .....	6
<i>Toxic Waste</i> .....	6
<i>The Role of Global Economic Institutions</i> .....	7
<i>IFI Governance and Human Rights</i> .....	7
<i>TRIPs and Human Rights</i> .....	7
<i>The WTO Agreement on Agriculture</i>	
<i>and Human Rights</i> .....	7
<i>Conclusion</i> .....	8

Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Environment Programme (UNEP) in January 2002 in Geneva, to review and assess progress achieved since the Earth Summit in promoting and protecting human rights in relation to environmental questions and in the framework of Agenda 21 (see *NGLS Roundup 88*). This year, it decided to make available the outcome of the seminar (E/CN.4/2002/WP.7) to the WSSD preparatory process and to take up relevant WSSD outcomes at its next session in March-April 2003. The Northern Alliance for Sustainability (ANPED) has also launched an international campaign on environmental human rights in the build-up to WSSD (see also *NGLS Roundup 88*).

This issue seeks to examine the various dimensions of human rights jurisprudence linked to sustainable development and some of the important developments that have taken place over the past decade in this field.

## HUMAN RIGHTS AND THE ENVIRONMENT

As far back as the United Nations Conference on the Human Environment, held in Stockholm in 1972, the international community recognized the global nature of environmental problems and established the link between environmental conditions and the enjoyment of basic human rights of the individual, by affirming that environmental conditions “are essential to his [or her] wellbeing and to the enjoyment of basic human rights—even the right to life itself.”

In July 1994, Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, issued her final report (E/CN.4/Sub.2/1994/9) that underscores the importance of the protection of human rights by the rule of law as one of the means of “democratic expression of [environmental and social] claims, within a structured framework that guarantees legal action while fostering dialogue.” The report gives equal importance to the establishment of a legal framework to pursue “the right to a healthy and flourishing environment.” It states that the notion of the indivisibility and interdependence of all human rights underpins the links between the right to development and the right to a healthy and safe environment. It is impossible, the report asserts, to “separate the claim to the right to a healthy and balanced environment from the claim to the right to ‘sustainable’ development, which implies a concentration of efforts to combat poverty and underdevelopment.”

Ms. Ksentini’s report was based on consultations with governments, international agencies, human rights bodies, NGOs and indigenous peoples. Its draft Principles on Human Rights and the Environment represent an effort to reformulate existing human rights, which do not deal with environmental issues directly, so that they can explicitly address the right to a healthy and safe environment. One of its most important conclusions, based on a survey of national and international human rights law and of international environmental law, is

that there has been “a shift from environmental law to the right to a healthy and decent environment.”

The following sections reviews some of the cases presented at the January 2002 OHCHR/UNEP Expert Seminar or were part of its background material.

### *Multilateral Antecedents*

The protection of the environment figures prominently in some court decisions by international juridical bodies, and is also present in international legally binding instruments as diverse as the Convention on the Rights of the Child and the International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples.

The International Court of Justice, in issuing its ruling on the 1997 case concerning the Gabcikovo-Nagymaros Project (Hungary and Slovakia), said that “The protection of the environment is...a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”

The Rome Statute of the International Criminal Court proclaims that in dealing with the most “serious crimes of concern to the internationally community,” it will have jurisdiction over “widespread, long-term and severe damage to the natural environment” in cases in which the attack would be clearly “excessive in relation to the concrete and direct overall military advantage anticipated.”

Article 24 of the Convention on the Rights of the Child integrates environmental concerns into the provision of primary health care aimed at combating disease and malnutrition. It highlights the dangers and risks that environmental pollution poses in relation to adequate nutritious foods and clean drinking water.

The Convention on Biological Diversity (CBD) upholds the cultural rights of indigenous peoples in the sustainable management of biological diversity present in their communities, and promotes their participation in decision making to ensure equitable sharing of the benefits arising from the utilization of their knowledge and sustainable use of their natural resources.

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) sets standards for safeguarding land rights of indigenous and tribal peoples. It requires direct participation of indigenous peoples in formulating development plans, as well as in setting up environmental impact studies that may affect them. In addition, the Convention recognizes indigenous peoples’ ownership rights to their land, including “the right to participate in the use, management and conservation of these resources.” Equally important, the Convention makes provisions to protect indigenous peoples from unlawful acts that would dispossess them of their lands, as well as to guarantee their right to access to justice, including remedial procedures.

The Cartagena Protocol on Biosafety of the CBD, which was adopted in January 2000, is the first

multilateral environmental treaty that incorporates the precautionary principle as enshrined in the Rio Declaration (Principle 15). The Protocol also stipulates that countries should be informed in advance of the risks genetically modified organisms (GMOs) might engender on the conservation and sustainable use of biological diversity and on human health. Some NGOs emphasize the importance of securing rights of access to environmental information and participation in decision making as indispensable enabling conditions for adequate implementation of the precautionary principle.

#### **Regional Antecedents**

Regional conventions and charters, together with case law confirm the legal grounds to relate procedural and substantive rights to environmental protection.

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" (1988), of the Organization of American States (OAS) acknowledges in Article 11 the right to a healthy environment, and charges States with the responsibility of promoting "the protection, preservation and improvement of the environment."

In August 2001, the OAS's Inter-American Court of Human Rights issued a landmark verdict concerning the *Awas Tingni Mayagna (Sumo) Indigenous Community versus Nicaragua* case that fully recognizes the impact of environmental degradation on the fulfillment of basic human rights of indigenous people. The case involved a concession granted by the Nicaraguan Government to a subsidiary of a Korean company to log timber on lands owned by the Awas Tingni. The Awas Tingni filed the case at the Inter-American Commission on Human Rights, which subsequently brought it to the Inter-American Court of Human Rights, alleging that the government had failed to consult the community before granting concession rights to the exploitation of natural resources in their land, and consequently had violated their rights to cultural integrity, religion, equal protection and participation in government. The Court ruled in favour of the Awas Tingni community by declaring that the State had violated their right to judicial protection (Article 25 of the American Convention) and the right to property (Article 21 of the Convention). As remedial action, the Court asked the State of Nicaragua to issue land titles to the Awas Tingni community, demarcate their land, and refrain from any actions that would adversely affect the life of the community.

In the *Yanomami versus Brazil* case, the Inter-American Commission on Human Rights established a link between environmental quality and the right to life. The ruling recognized that the government, by authorizing the construction of a highway through Yanomami territory and the subsequent exploitation of their natural resources, had unduly exposed the Yanomami to non-indigenous people who brought along contagious diseases, which remained untreated for lack of medical care. As a result of this, the Commission ruled that, according to the OAS's American Declaration of the Rights and Duties of Man, the Government of Brazil had violated the rights of Yanomami to life, liberty and

personal security as well as the right to residence and movement, and the right to the preservation of health and wellbeing.

The Organization of African Unity (OAU) through its African Charter on Human and Peoples' Rights (1981) upholds the right of all peoples to "a general satisfactory environment favourable to their development." It also lays down the right of access to natural resources and its use bearing in mind the "exclusive interest of the people."

Most cases brought to the European Court on Human Rights, in connection with environmental damage, have invoked the rights to information, privacy and family life, as enshrined in the European Convention on Human Rights and Fundamental Freedoms. By way of illustration, the decision of the Court over *Lopez-Ostra versus Spain* found that environmental harm inflicted on Ms. Lopez-Ostra's community constituted a violation of her right to private and family life and the right to enjoy her home. The released fumes from an unlicensed tannery waste treatment plant in an urban area caused immediate health problems and nuisance to Ms. Lopez-Ostra and her family, and to other people living in the area. While taking full account of the economic interest of the community, the Court ruled that the activities of the tannery waste treatment plant had produced severe environmental pollution that affected the enjoyment of basic human rights. In consequence, the Court awarded Ms. Lopez-Ostra compensation.

#### **National Antecedents**

At the national level, an important body of laws and regulations has been drawn up to ensure the right to a healthy and safe environment in many countries. These legislative changes have also brought along a better understanding of the connection between ecological balance, sustainable development and the promotion, protection and full realization of human rights. On the other hand, however, there is growing legal recognition of the effect of violations of substantive and procedural rights on the environment. In terms of substantive rights, there is a clear understanding that in order to guarantee the right to a safe and healthy environment, it is essential to implement the right to life, development, health, food, water, and housing, among others. With reference to procedural rights, the fulfillment of the right to access to information, participation in decision making, due process, association, and freedom of expression help create the enabling conditions to an effective protection of the environment.

According to a recent study by Earthjustice, there are now 109 national constitutions that make references to the protection of the environment or natural resources. In 100 of them, the right to a healthy and clean environment and/or the State's obligation to prevent environmental damage is recognized. Of these, 53 constitutions explicitly recognize the right to a clean and healthy environment, and 92 of them undertake responsibility for preventing environmental damage. Fifty-four constitutions set up duties for citizens and residents to protect the environment, and 14 of them prohibit the use of property in a manner that harms the environment or encourages land-use planning to prevent such harm. Nineteen constitutions set out rules to make those who

harm the environment liable to pay for compensation, or establish a right to compensation for those suffering environmental injury. The study has also found that 16 constitutions provide an explicit right to information concerning environmental conditions or activities that may affect the quality of the environment.

#### PROCEDURAL RIGHTS: THE ECE AARHUS CONVENTION

Improvements have taken place in the last ten years in terms of articulating the link between human rights and the environment through the adoption of new regional and national legal instruments that give expression to procedural rights, mainly the right to access to information, public participation in decision making, and access to justice.

The application of procedural rights rests on the principle of public participation in environmental protection and sustainable development affairs in the public sphere through existing civil and political rights; i.e. freedom of expression, freedom of association, equal protection of the law and non-discrimination.

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which was drafted under the auspices of the United Nations Economic Commission for Europe (ECE), entered into force in October 2001. It constitutes an example of a regional legal instrument giving effect to procedural rights in the context of environmental questions, and offers what UN Secretary-General Kofi Annan has characterized as "by far the most impressive elaboration of Principle 10 of the Rio Declaration." He also pointed out that although the Convention is regional in scope, its significance would be global.

The Aarhus Convention ensures public access to environmental information held by public authorities, and establishes mechanisms to collect and disseminate such information. Public participation in decision making relates to: (a) specific activities, such as permit procedures that may have an effect on the environment; (b) early public participation in plans, programmes and policies relating to the environment; and (c) executive regulations and rules that have a general application on environmental questions. In laying out provisions on access to justice, the Convention covers cases of violations of procedural rights, i.e. participatory and informational rights, as well as cases questioning the substantive legality of a decision.

#### SUBSTANTIVE RIGHTS AND SUSTAINABLE DEVELOPMENT

Most global and regional human rights bodies have considered the impact of environmental harm on the realization of fundamental human rights without necessarily upholding a basic right to a safe and healthy environment. Instead, these judicial bodies have based their rulings on violations of existing, universally-recognized substantive rights, such as the rights to life, property, health, and information, as a result of water and air

pollution, deforestation, and other types of environmental damage.

A large number of cases presented before the Human Rights Committee (HRC) on violations of the human rights of indigenous peoples arise out of infringements of land rights in combination with environmental degradation. The HRC considered, for instance, in its Communication No. 167/1984 (26 March 1990) of *Lubicon Lake Band versus Canada* the threat posed by oil and gas exploitation to the lives and traditional ways and culture of the Lubicon Lake Band, a Cree Indigenous community living within the borders of Canada in the Province of Alberta. The HRC found that

#### RIGHT TO LIFE

*"Threats to the environment or serious environmental hazards may threaten the lives of large groups of people directly; the connection between the right to life and the environment is an obvious one....A discussion of the interrelationship between the two rights should, however, go beyond this...[and] may be summarized in the following proposition:*

- 1. There is a strict duty upon States, as well as upon the international community as a whole, to take effective measures to prevent and safeguard against the occurrence of environmental hazards which threaten the lives of human beings.*
- 2. Every State, as well as the United Nations Environment Programme (UNEP), should establish and operate adequate monitoring and early-warning systems to detect hazards or threats before they actually occur.*
- 3. States which obtain information about the possible emergence of an environmental hazard to life in another State should inform the State at risk or at least alert UNEP on an urgent basis.*
- 4. The right to life, as an imperative norm, takes priority above economic considerations and should, in all circumstances, be accorded priority.*
- 5. States and other responsible entities (corporations or individuals) may be criminally or civilly responsible under international law for causing serious environmental hazards posing grave risks to life. This responsibility is a strict one, and should arise irrespective of whether the act or omission in question is deliberate, reckless or negligent.*
- 6. Adequate avenues of recourse should be provided to individuals and groups at national, regional or international levels, to seek protection against serious environmental hazards to life. The establishment of such avenues of recourse is essential for dealing with such risks before they actually materialize."*

—From the 1994 Report on Human Rights and the Environment (E/CN.4/Sub.2/1994/9), UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

such oil and gas concessions in the Band's land were disregarding their minority and cultural rights as stipulated in Article 27 of the International Covenant on Civil and Political Rights.

### ***The Right to Health***

Everyone has the right to the highest attainable standard of health, as recognized by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. In environmental terms, the right to health implies the absence of pollution and protection against natural hazards. This right is also linked to the right to water, food and housing as well as safe and healthy working conditions. International, regional and national legal instruments have dealt with numerous cases involving the negative impact of environmental damage on health as a result of large-scale industrial accidents, the regular discharge of toxic and hazardous substances into the air, soil and water, drought and desertification, and climate change. In addressing the negative impact of environmental harm on health, case law has made either explicit reference to the right to health or has been guided by human rights related to an adequate standard of living.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) issued a general comment on the right to health in November 2000 in which it asserts that the "underlying conditions of health" include "food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."

The World Health Organization (WHO) stated in its December 2001 contribution to the Secretary-General's request for comments on the status of progress of Agenda 21 that "the right to health and indeed to life cannot be achieved without basic rights to a safe and healthy environment, including water, air and land: and to the life-supporting systems that sustain life on earth for future generations."

### ***The Right to Adequate Housing***

The right to adequate housing should be seen, according to the Special Rapporteur on this question, Miloon Kothari, as interrelated and indivisible from other economic, social and cultural rights. In this respect, the Committee on Economic, Social and Cultural Rights has interpreted the right to health "as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, and adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions...."

In addition, CESCR has identified seven key elements to guarantee the right to adequate housing, including "sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services."

In analyzing the difficulties of realizing the right to adequate housing, particularly in conjunction with

environmental concerns, the Special Rapporteur noted with concern in his first report (E/CN.4/2001/51) to the Commission on Human Rights that a number of recent judgements across the world give evidence of: (a) disregard of the right to a healthy environment and the right to housing and livelihood, as in the case of the *Narmada Bachao Andolan versus Union of India* and others, where the Supreme Court of India authorized plans to go ahead with the construction of the Narmada Dam, thus ignoring the severe impact of the Dam on the environment and on 400,000 people in the Narmada Valley in central India; and (b) conflict between these rights, as in the Indian Peoples Human Rights Tribunal on Sanjay Gandhi National Park case which pitted the Environmental Action Group (BEAG) against settlement dwellers living next to the Sanjay Gandhi National Park in Bombay. The Bombay High Court gave precedence in its ruling to the conservation of the national park over the fate of half a million slum dwellers by ordering the demolition of their homes.

In his latest report (E/CN.4/2002/59), the Special Rapporteur finds it relevant to his mandate to establish a connection between the realization of the right to adequate housing and access to a safe environment and natural resources. In addition, he recommends addressing multiple discrimination affecting "minority, indigenous and distinctly low-income communities the habitability of whose housing is made hazardous by the environmental degradation of the areas where they live, often adjacent to an environmentally degraded workplace."

### ***The Right to Food***

The realization of the right to food has a direct impact on the right to an adequate standard of living and the right to health, and presupposes the existence of a clean and safe environment conducive to the sustainable development of food resources.

The Commission on Human Rights, in its resolution 2000/10, has condemned the fact that 825 million people, most of them women and children, do not have enough food to meet their basic nutritional needs. The lack of access to safe and nutritious food constitutes in the view of the Commission a violation to the right to adequate food and the fundamental right to be free from hunger. Furthermore, the Commission finds that infringing upon this basic right can also generate "additional pressures upon the environment in ecologically fragile areas."

Sustainability is one of the key components of the concept of the right to food as stated by the CESCR in its General Comment No. 12. In defining food security, the Committee understands that food should be available for present and future generations. It further expands this notion by stating that "the meaning of 'adequacy' is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while 'sustainability' incorporates the notion of long-term availability and accessibility."

### ***Human Rights and Access to Water***

According to some estimates, more than a billion people have no access to clean drinking water, and

nearly three billion live without basic sanitation. Five million people die every year from waterborne diseases such as cholera, typhoid, and dysentery.

Access to drinking water is a prerequisite for the fulfilment of the right to life, liberty and security stated in Article 3 of the Universal Declaration of Human Rights; the right to an adequate standard of living enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights; and is related to the realization of the right to adequate housing.

UN Human Rights Sub-Commission Special Rapporteur El Hadji Guissé pointed out in his report (E/CN.4/Sub.2/1998/7) a number of obstacles to the right of access to drinking water and sanitation, such as bad management of fresh water resources, unequal geographical and socio-economic distribution of drinking water and sanitation services, and the privatization of State-owned enterprises linked to water services and ensuing high increases in the cost of drinking water supplies.

The Special Rapporteur on the right to food, Jean Ziegler, affirms in his latest report (E/CN.4/2002/58) that drinking water should be considered as a public good as it is essential for healthy nutrition. He states that it is critical to set standards for water quality and ensure equitable access to water resources. In addition, he recommends including drinking water as a component of the right to food to ensure its "accountability and justiciability."

At the same time, the Special Rapporteur on adequate housing, Miloon Kothari, points out in his report (E/CN.4/2002/59) that a review of case studies on the impact of privatization of water and sanitation services reveals that most "fail to demonstrate improvements in the quality and coverage of services to vulnerable groups." In this respect, the Special Rapporteur indicates that the privatization of water services involves an "overemphasis" of profit making over social concerns that results in fragmentation of service delivery and deficient coverage of low-income communities, as well as a deficit in accountability of private service operators. Mr. Kothari affirms that some of the best practices in the provision of water and sanitation services in both developed and developing countries come from publicly owned utilities.

Several NGO initiatives aimed at overcoming obstacles to the right of access to drinking water and sanitation highlight the need to increase public participation in decision making and an enhanced role for governments. The Global Water Contract, a citizen's initiative, recognizes basic access to water as "an inalienable political, economic and social right, at once individual and collective." For its part, the recent Porto Alegre Water Declaration, representing NGOs from around the world such as Attac France and Italy, Council of Canadians, the Institute for Agricultural and Trade Policy, and the International Rivers Network, among others, states that the "Earth's freshwater belongs to all living species and therefore must not be treated as a commodity to be bought, sold and traded for profit as an economic good." The Declaration demands a sustainable use of water for the "common good of our societies and the

natural environment." Access to water "in quantity and quality sufficient to life," the Declaration says, "is an individual and collective inalienable right which cannot be submitted to any constraint of social (sex, age, income), political, religious or financial nature." The cost to fulfil such a right for all, it adds, must be financed by the collectivity.

#### GLOBALIZATION, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

Historically, human rights issues have been discussed primarily in terms of State responsibilities at the national level. An important departure from this trend was the adoption by the General Assembly in 1986 of the Declaration on the Right to Development. This Declaration, though it does not enjoy legally binding status, is often regarded as a holistic vision integrating civil and political as well as economic, social and cultural rights, and as striking a balance between national and international responsibilities of States. More recently, with the accelerating pace of global economic integration and interdependence, combined with the increasing role and influence of international trade and financial institutions over domestic governance prerogatives, a growing number of UN human rights bodies have placed renewed emphasis on Member States' duty to international cooperation in the protection and promotion of human rights (as specified in the UN Charter and various international human rights instruments). Developed countries have tended to resist this trend, while developing countries insist that their national responsibilities are increasingly conditioned by transnational factors beyond their control.

#### *Toxic Waste*

In this category of issues, the Commission on Human Rights has been reviewing the human rights impact of trade in toxic wastes for some years. In resolution 2001/35, the Commission affirmed that the illicit movement and dumping by transnational corporations and other enterprises from industrialized countries of hazardous and other wastes in developing countries "constitutes a serious threat to the human rights to life, good health and a sound environment for everyone."

Special Rapporteur Fatma-Zohra Ouhachi-Vesely noted last year in her report (E/CN.4/2001/55) on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, that there had been an increase in exports of such products from industrialized countries to developing countries via so-called recycling programmes (mercury and lead waste recycling) and development projects that circumvent the provisions of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Illicit activities extend to the transfer of polluting industries and industrial activities and technologies that generate dangerous wastes. The Special Rapporteur states that the transfer of 'dirty' industrial operations from the Organisation for Economic Co-operation and Development (OECD) member countries to non-member countries has increased. In addition, the intensive and uncontrolled use of chemicals, toxic agricultural products and persistent organic pollutants (POPs), and the

export of plastics, computer scrap, and contaminated ships for ship breaking to developing countries are a major cause for concern.

The Basel Action Network (BAN), an environmental watchdog network, has called for the international community to examine the question of toxic waste from an environmental and human rights perspective. BAN has described trade in toxic waste as one following “a path of least resistance” in which the poorest of the poor end up being “the recipients of the risks and poisons of the rich.”

#### *The Role of Global Economic Institutions*

The UN Committee on Economic, Social and Cultural Rights (ESC rights)—the treaty monitoring body set up to oversee implementation of the international covenant on ESC rights—has noted that an increasing number of developing country State Parties, when submitting their periodic progress reports, have claimed that key domestic legislative and policy decisions are now conditioned by the advice of international financial institutions (IFIs) and requirements to conform to the rules of the international trading regime.

#### *IFI GOVERNANCE AND HUMAN RIGHTS*

This phenomenon has compelled the Committee in recent years to gradually develop a two-pronged approach when reviewing State Parties' periodic reports: developing countries that are under the ambit of loan policy conditions by IFIs are increasingly being asked whether they are upholding its ESC rights treaty obligations when negotiating with these institutions. Among these is the imperative, derived from Article 2.1 of the Covenant on “progressive realization” of ESC rights, not to take retrogressive policy and legal measures that would undermine existing social achievements, particularly for the more vulnerable groups. Conversely, reporting States from developed countries are increasingly being asked whether they ensure that their representatives at the governing boards of IFIs do not take decisions that in effect will pressure loan recipient governments to violate their obligations under the Covenant.

Similar questions are being pursued at the UN Human Rights Sub-Commission, including whether IFIs are accountable to human rights prerogatives. The representative of the International Monetary Fund (IMF) at UN human rights bodies in Geneva has argued that the IMF is not bound by human rights obligations. This position, based on a detailed study produced by the IMF General Counsel, centres on the fact that human rights are not explicitly part of the institution's Articles of Agreement. Legal experts at the Sub-Commission and elsewhere have countered this view with various legal references that imply that human rights obligations have primacy over other international agreements. These include Article 103 of the UN Charter and provisions in the 1969 Vienna Convention on the Law of Treaties. The Sub-Commission's two Special Rapporteurs on Globalization and its impact on the full enjoyment of human rights, which are examining these and related questions, will present their final report at the Sub-Commission's 2002 session in August in Geneva.

#### *TRIPS AND HUMAN RIGHTS*

The High Commissioner for Human Rights has also been mandated both by the Commission on Human Rights and

its Sub-Commission to analyze the human rights impact of specific trade agreements and the relationship between these two bodies of international law. At the 2001 session of the Sub-Commission, the High Commissioner submitted a report (E/CN.4/Sub.2/2001/13) which examines the human rights impact of the Agreement on Trade-Related Intellectual Property Rights (TRIPs) adopted at the World Trade Organization (WTO). The report stresses that there is a fundamental difference between the protection and promotion of human rights and the overall thrust of the TRIPs Agreement. The report notes that: “The various links with the subject matter of human rights—the promotion of public health, nutrition, environment and development—are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement. A human rights approach, on the other hand, would explicitly place the promotion and protection of human rights, in particular those of the International Covenant on Economic, Social and Cultural Rights, at the heart of the objectives of intellectual property protection, rather than as only permitted exceptions that are subordinated to the other provisions of the Agreement.”

#### *THE WTO AGREEMENT ON AGRICULTURE AND HUMAN RIGHTS*

More recently, the High Commissioner submitted to the March-April 2002 session of the Commission on Human Rights a report (E/CN.4/2002/54) that reviews the WTO's Agreement on Agricultural (AoA) from a human rights perspective. It cites various studies, including a 14 country case study produced by the Food and Agriculture Organization (FAO), which demonstrates a consistently negative impact of agricultural trade liberalization on the livelihood of small, low-income developing country farmers who are unable to compete with the sudden surge of cheap imports from industrialized countries. The High Commissioner's report notes that “non-discrimination” provisions under international trade law risk creating equal rules among very unequal players, with no distinction made between poor farmers and large agribusiness or industrial firms, for example. The report says: “Treating unequals as equals is problematic for the promotion and protection of human rights and could result in the institutionalization of discrimination against the poor and marginalized.” Under human rights law, the principle of non-discrimination does not envisage according equal treatment systematically. Affirmative action is necessary in some cases to protect vulnerable people and groups. While special and differential treatment for developing countries under trade law is a positive step, the High Commissioner encourages the introduction of measures that go beyond longer transition times and “best endeavour” commitments and calls for “targeted and enforceable treatment.”

In this context, the High Commissioner says she welcomes the commitment made at the Fourth WTO Ministerial Conference held in November 2001 in Doha (Qatar) to make special and differential treatment an integral part of the rules and disciplines of the AoA so as to be operationally effective and to enable developing countries the flexibility to take into account food security and rural development objectives.

On this basis, the Commission on Human Rights in its Resolution 2002/28 of this year, requested the High Commissioner, in cooperation with the WTO, the United Nations Conference on Trade and Development (UNCTAD) and other relevant institutions, "to study and clarify the fundamental principle of non-discrimination and its application at the global level with a view to recommending measures for its integration and effective implementation in the debate on and process of globalization...."

## CONCLUSION

The international human rights community has developed a valuable and comprehensive corpus of jurisprudence and analysis to support the implementation of sustainable development objectives nationally and internationally. It remains to be seen whether the WSSD process will incorporate a human rights approach as part of its inter-governmental outcome. There would be numerous sensitivities and concerns to overcome, not least with regard to North/South differences of view on the balance between national and international human rights responsibilities of States.

Some observers have suggested that Agenda 21 provides an important contribution to the operationalization of the Right to Development, striking a balance between fundamental national governance reforms and the duty of international cooperation, notably on transfer of environmentally sound technologies and mobilization of new and additional financial resources (estimated in Chapter 33 of Agenda 21 at US\$125 billion for average annual contributions by the international community on grant and concessional terms).

Ten years later, and despite the far-reaching advances that have been made in promoting sustainable development, many NGOs and civil society organizations around the world are concerned that important decisions at all levels are still being made without adequate public participation or democratic consent, while many human rights, development and environmental activists continue to be victims of basic civil and political rights abuses by State authorities or private entities—and thus prevented from carrying out their work. They are all the more concerned that the so-called "North-South bargain" struck at the Earth Summit appears to have collapsed when considering net South-North financial transfers resulting from debt servicing and implementation of the TRIPs agreement, and what many have described as the "crisis of legitimacy" facing global economic governance institutions.

In this respect, important parallels can be drawn between current debates in UN human rights bodies on the primacy of human rights obligations over other international agreements and the campaigns of many environmental groups aiming to ensure that multilateral environmental agreements (MEAs) are not subordinated to international trade rules.

Whether or not the formal WSSD process will succeed in taking meaningful steps to respond to these formidable challenges, it is likely that the human rights community at large will continue to seek to infuse the legal and ethical imperatives of a human rights approach at the Johannesburg Summit and beyond.

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