

# The Right to Life and Environmental Protection: Preliminary Reflections(\*)

JOHANNES VAN AGGELEN

## *I. Diversity and compatibility of concepts*

1. Although the right to life within the framework of contemporary human rights law is rightly considered a non-derogable right and a norm of *jus cogens*<sup>(1)</sup>, it is a much more contested issue when the right to life is linked to the emerging human right to environment, c.q. environmental protection.

2. In a statement to the Commission on Human Rights in 1991, the American delegation conceived a right to environmental quality "as a purely political gesture, further diluting or degrading the very concept of rights". A similar very sceptical attitude towards environmental issues within the framework of human rights law was taken in February 1992 when the Commission discussed the various studies currently undertaken by the Sub-Commission. Professor Shelton in this connection

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(\*) Communication to the Inter-American Seminar on Human Rights and the Environment:

Geneva, 18 February 1992.

Urgent Fax Message to  
Professor A.A. Cançado Trindade:

In fact, I am sending you hereby my contribution in writing to the Seminar to be held in Brasilia. (...) As a scholar I recognize the importance of your Seminar, both in terms of law and the environment as well as in terms of education and the environment.

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(1) See e.g. B.G. Ramcharan (editor): "The right to life in international law", 1985, and Johannes van Aggelen: "Le rôle des organisations internationales dans la protection du droit à la vie", (1986).

questioned "whether the goals and bases of environmental protection and human rights are the same or at least compatible"<sup>(2)</sup>.

3. Even UNEP cautioned, within the framework of the study on human rights and the environment undertaken by Mrs. Ksentini, member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to select issues as neutral as possible in order to avoid "politically loaded topics", but did mention "the right to healthy physical environment".

4. Despite the fact that *de lege lata*, the gap between the right to life as integrated in an emerging human right to environment and the concept of environmental protection is still considered wide, attempts are being made to narrow it, not in the least after harrowing experiences, such as the Bhopal and Chernobyl disasters. In other words, the right to environmental protection is still related to environmental rights, rather than human rights.

5. Many environmentalists in fact argue that true guarantees of environmental protection will only come when society extends rights to the environment to guarantee it equal status with other rights-bearing entities.<sup>(3)</sup>

6. The Vatican, in its reply to Mrs. Ksentini, stated that the right to life and human dignity are "at the heart of the ecological question".

7. In a submission to UNCED, I have defended that at least at the regional level a general right to environmental protection has been recognized. Art. 24, of the African Charter on Human Rights and Peoples' Rights, adopted in Banjul, Gambia on 20 June 1981, states:

"All peoples shall have the right to a general satisfactory environment favourable to their development".<sup>(4)</sup>

In addition, the Additional Protocol to the American Convention on Human Rights, in article 11, para. 2 provides:

"The States Parties shall promote the protection, preservation and improvement of the environment".<sup>(5)</sup>

8. Moreover, the Declaration of Fundamental Rights and Freedoms adopted by the European Parliament in April 1989 confirms a fundamental right to environmental protection in the form of an obligation on the Community Institutions to take all necessary measures to assure the preservation, protection and improvement of the quality of the environment.

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(2) D. Shelton: "The right to environment" in "The Future of Human Rights Protection in a Changing World, Essays in honour of Torkel Opsahl", 1991, p. 206.

(3) C. Giagnocavo, H. Goldstein: "Law Reform or World Reform: The Protection of Environmental Rights", McGill Law Journal, Vol. 35, 1990, p. 346.

(4) Doc. CAB/LEG/67/3/Rev. 5, I.L.M. Vol. 21 (1982), p. 58.

(5) Protocol of San Salvador, 18 November 1988, O.A.S.T.S. Nr. 69; I.L.M. Vol. 28, 1989, p. 698.

9. It is noteworthy that the introductory document prepared by the Italian Government for the Siena Forum on International Law of the Environment in April 1990 reflected in para. 231:

"Compared to the Stockholm Declaration, environmental protection today forms the content of the law itself, and not the context within which the right to liberty, equality and conditions adequate for life is achieved".

## *II. Evolution of the right to life within the framework of human rights law*

10. The human right to life was initially conceived as a protection against physical abuse. The "travaux préparatoires", art. 3 of the Universal Declaration, art. 6 of the International Covenant on Civil and Political Rights, art. 1 of the American Declaration on the Rights and Duties of Man (1948) and art. 4 of the American Convention (1969) all bear implicit or explicit witness of this phenomenon. It coincides with the original emphasis on civil and political rights within the development of human rights law.

11. The Human Rights Committee, in its first general comment on article 6, CCPR adopted in July 1982, observed that the right to life should not be interpreted narrowly, but nevertheless gave primarily examples of physical abuses: acts of genocide and other acts of mass violence causing arbitrary loss of life. The Committee considered that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killings by security forces.<sup>(6)</sup>

12. After the General Assembly adopted resolution 32/130 by which it for the first time declared that all human rights, whether civil, political, economic, social or cultural were indivisible, the development of human rights law takes another dimension. Concepts as solidarity rights or third generation rights emerge in the late seventies, but according to many scholars, they do no more than obfuscate the concept of human rights.<sup>(7)</sup>

13. Although the main characteristic of "solidarity rights" may be that they require implementation by all parts of society, Prof. Shelton correctly affirmed that it is in reality no distinguished feature, and that the protection of the right to life imposes no lesser duty upon governments than on individuals.<sup>(8)</sup>

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(6) See General comment 6 [16] contained in document CCPR/C/21/Rev. 1, dated 19 May 1989.

(7) See P. Alston: "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?", *Netherlands International Law Rev.*, Vol. 29, 1982, p. 307; *ibidem*: "Conjuring Up New Human Rights: A Proposal for Quality Control", *A.J.I.L.*, Vol. 78, 1984, p. 607.

(8) Shelton: "The Right to Environment", *loc. cit.*, p. 201.

14. In my book, based on research done at the Research Centre of the Hague Academy of International Law in 1983, I have indeed projected that this rubric of human rights becomes ever more controversial because of its open-ended quality, with the result that even newer rights and guarantees are being discussed.<sup>(9)</sup> The *jus cogens* nature of the right to life could be weakened, if the right incorporates too many aspects that have traditionally been classified as economic and social guarantees. I admit, however, that the world community nowadays has a legal duty to safeguard the continued existence of mankind. Prof. Gormley called it a reverse obligation *erga omnes*.<sup>(10)</sup>

15. Within this wider perspective one could fit in the second general comment on the right to life adopted by the Human Rights Committee in November 1984 dealing with the designing, testing, manufacture, possession and deployment of nuclear weapons.<sup>(11)</sup> In addition, two reports prepared by the United Nations Secretary-General on "Respect for the Right to Life: Elimination of Chemical Weapons" and submitted to the Sub-Commission<sup>(12)</sup>, where it is affirmed that it endangers basic human rights, such as the right to life, and the right to live in a sound and healthy environment, are relevant in this respect.

### *III. The emerging human right to environmental protection*

16. The controversiality of the concept necessarily leads to the current lack of a precise definition or qualification. Several attempts have been made, but none seems ultimately satisfactory. These attempts include constitutional guarantees and guarantees contained in declarations and other human rights instruments, but without the proper judicial remedies. The abortive attempt in 1973 to elaborate an additional protocol to the European Convention on Human Rights which considered the protection of the life of individuals an integral part of the original goals of human rights and declaring that the protection of life essentially requires the existence of a natural environment favourable to human health, is clear evidence in this regard. The so-called "Steiger Protocol" was finally not adopted, i.a. for lack of a clear definition. Neither did it consider indirect threats to life.<sup>(13)</sup>

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(9) See review of my book by Prof. Dr. W.P. Gormley in *Dalhousie Law Journal*, Vol. 13, 1990, p. 850.

(10) W. Paul Gormley: "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms", *Georgetown International Environmental Law Review*, Vol. III, Issue 1, Summer 1990, *loc. cit.*, p. 105.

(11) General Comment 14 (23) in doc. CCPR/C/21/Rev. 1/p. 16.

(12) Doc. E/CN.4/Sub.2/1989/4; E/CN.4/Sub.2/1990/37; see also Sub-Commission resolution 1989/12 on "Movement and dumping of toxic and dangerous products and wastes".

(13) Report of the Working Group for Environmental Law, Bonn, 1973.

17. This proposal was certainly inspired by the Stockholm Declaration of 1972, in particular Principle 1 declaring that "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". Similar phraseology was used in Principle 1 of the Legal Principles adopted by the Expert Group on Environmental Law of the World Commission on Environment and Development (1986) and in an NGO Draft Charter on Environmental Rights and Obligations of Individuals, Groups and Organizations, dated February 1990, and which was submitted to the Bergen Conference on Sustainable Development in the ECE Region.

18. Whether the qualifying adjective is generally satisfactory (art. 24, African Charter), decent, violable, healthy, clean or whether the entitlement is to the highest attainable standard of physical health<sup>(14)</sup> at this juncture, these objectives impede rather than facilitate a legal remedy. Mrs. Ksentini in her preliminary report on Human Rights and the Environment also begs the question.<sup>(15)</sup> In this connection, reference should be made to an Earth care petition presented to Mr. Maurice Strong in 1975, then Executive Director of UNEP in the presence of the then Director of the Human Rights Division, Mr. Marc Schreiber. The petition alleges that the failure of governments to act, individually and collectively, to protect the environment has resulted in gross violation of human rights. Upon receiving the petition, Mr. Strong stated that those who by their acts, endanger the environment are committing an act of aggression "against the right to life itself". A proposal to use the so-called "1503 procedure" as legal remedy, for this purpose, was however never followed up.<sup>(16)</sup>

19. Despite the fact that the Global Consultation on the Right to Development as a Human Right, held in Geneva in January 1990, considered the right to life and to security in a healthy and durable environment, one of the basic principles of human rights<sup>(17)</sup>, effective legal remedy against violation of the right to life within the context of environmental protection will remain the exception rather than the rule.

20. In order to improve this situation, a number of important issues should be clarified. First, there is the dichotomy between individual and collective rights. The right to life surely is an individual human right, while the human right to a whatever qualified environment is often conceived as a collective right. Mrs. Ksentini, in her

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(14) Art. 12 of the International Covenant on Economic, Social and Cultural Rights; see also European Charter on Environment and Health, adopted in Frankfurt in December 1989, art. 1. See further M. Bother: "La relation entre le droit international de la santé et le droit international de l'environnement", *Revue Quebecoise du droit international*, Vol II, 1985, p. 125.

(15) E/CN. 4/Sub. 2/1991/8, para. 69.

(16) Gregory Ho: "UN Recognition of the Human Right to Environmental Protection", *Earth Law Journal*, Vol. 2, 1976, pp. 225-254.

(17) The Realization of the Right to Development, Global Consultation on the Right to Development as a Human Right (HR/PUB/91/2, para. 40).

preliminary conclusions, squarely affirms that the right to the environment cannot be reduced to the right of the individual to claim an environment of quality and she continues by stating that the right is a solidarity right, involving duties and responsibilities at the national and international levels.<sup>(18)</sup>

21. The merger of the two concepts, however, diminishes the chances to be granted *locus standi* under an individual human rights complaint procedure. The jurisprudence is therefore almost not yet existent. During its fifteen years of existence, the Human Rights Committee has considered only one communication directly related to the right to life and the environment. In 1980 the Port Hope Environmental in Ontario, Canada, on behalf of 129 citizens, submitted a communication alleging that storage of radioactive waste near residential areas was a threat to the life of present and future generations of Port Hope considering that excessive exposure to radioactivity is known to cause cancer and genetic defects. Although the Committee observed that the communication raised serious issues, with regard to the obligation of States to protect human life, the communication was considered inadmissible for lack of exhaustion of domestic remedies. It is noteworthy that the Committee did not pronounce itself on acting of future generations, but considered it as an expression of concern "purporting to put into due perspective the importance of the matter."<sup>(19)</sup>

22. The Economic, Social and Cultural Rights Committee established pursuant to ECOSOC resolution 1985/17 has not yet dealt with the question. Moreover, the Covenant has no individual complaint procedures and therefore it is argued that a Protocol should be drafted in the future.

23. Prospects do not seem to be brighter under the Inter-American System. The San Salvador Protocol simply does not grant the right of individual petition for violation of Article 11, the right to environment. Protocol article 19, para. 6 only allows submission of complaints for alleged violation of the right to freedom of trade unions and the right to education.

24. Therefore, when the Inter-American Commission on Human Rights in December 1980 was confronted with a petition on behalf of the Yanomani Indians of Brazil, emphasis was placed on violation of the right to life within the context of environmental protection, rather than claiming an individual or collective human right to environment.<sup>(20)</sup>

25. Allegation of violation of the right to life came up also in a petition submitted to the Inter-American Commission on Human Rights by the "Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana" on

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(18) E/CN. 4/Sub. 2/1991/8, para. 102.

(19) Communication No. 67/1980 declared inadmissible on 27 October 1982, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, 1990, p. 20.

(20) Case No. 7615 dated 5 March 1985 contained in the Annual Report of the Inter-American Commission on Human Rights 1984-1985, doc. OEA/SER.L/V/II. 66.

behalf of the Huaorani People in Ecuador. It was contended that governments have the obligation to take affirmative action to protect the right to life and security of person regarding indigenous people.<sup>(21)</sup>

26. It is indeed true that indigenous people as a vulnerable group need special protection. One author argued that the communities *are* their environment, profoundly integrated and deeply dependent on it for the realization of their right to life.<sup>(22)</sup> It should be clear that here the right to environmental protection is conceived as a collective right.

27. Growing concern for the rights of indigenous peoples has stimulated the Sub-Commission to start drafting a declaration on the rights of indigenous people. In a revised working paper submitted by the Chairman/Rapporteur in 1991, indigenous people are entitled to a right of non-interference in their eco-system which in fact means a collective right to environmental protection.<sup>(23)</sup> Similar protection is given in ILO Convention No. 169, articles 13-15, adopted on 27 June 1989.<sup>(24)</sup>

28. Children are another vulnerable group where the right to life and environmental protection are intertwined. The children of today are the generation of tomorrow, and as Professor Brown Weiss puts it we should be fair to future generations.<sup>(25)</sup> The General Assembly adopted the Convention on the Rights of the Child on 20 November 1989, which imposes in art. 24 (c) an obligation on States Parties to protect them from environmental degradation.<sup>(26)</sup> However, prospects for an effective remedy under article 44 of the Convention seem dim as the Committee may only address relevant issues indirectly, through the consideration of States reports. UNEP also called special attention to the vulnerable position of children in relation to the environment.<sup>(27)</sup>

29. A second problem to be solved before an effective legal remedy may be obtained is, in my view, the question whether the right to life remains an original right or gradually becomes a derivative right within the context of environmental

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(21) Submission made available to the Special Rapporteur, Mrs. Ksentini, by the Sierra Club Legal Defence Fund, dated 25 June 1990.

(22) William Andrew Shutkin: "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment", *Virginia Journal of International Law*, Vol. 31, 1991, p. 479, *loc. cit.*, p. 480. See also R. Kapasehit and M. Klippenstein: "Aboriginal Group Right: and Environmental Protection", *McGill Law Journal*, Vol. 36, 1991, p. 925.

(23) Doc. E/CN.4/Sub. 2/ 1991/36, pp. 80-81.

(24) International Labour Conference, Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

(25) E. Brown Weiss: "In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity", 1989. See also her intervention: "Our Rights and Obligations to Future Generations for the Environment", *A.J.I.L.*, Vol. 84 (1990), pp. 190-207.

(26) General Assembly resolution 44/25, Annex, of 20 November 1989.

(27) "Children and the Environment", Report of the Executive Director, March 1990.

rights. If so, it will also lose at some point its *jus cogens* character, because the question becomes: "Is the human right to life dependent upon or a prerequisite for the human right to environment"?

30. A last question to be addressed in this connection is whether the concepts here discussed would benefit from the UNCED process. Having attended most of the sessions of Working Group III on Legal and Institutional Matters, I have become pessimistic. Substantive discussion on draft Principle 3 on individual and group rights of the proposed Earth Charter to be adopted in Rio de Janeiro, has still to come off the ground and the written submissions, although generous, do lack general consensus. It may be of interest to refer to the Australian proposal: "The right to life, food and shelter and a healthy environment".<sup>(28)</sup>

#### IV. Concluding remarks

31. It is obvious that the relation between the right to life and environmental protection gained importance again in the wake of the deliberate burning of the Kuwait oil fields by Saddam Hussein in 1991. Art. 35, para. 3 of Protocol I Additional to the four 1949 Conventions on the Laws of War prohibits "to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the national environment". A similar provision protects the natural environment in Article 55.<sup>(29)</sup>

32. Other human rights, which are very often used in the doctrine to underscore the necessity for a right to environment, include the right to self-determination, to information, participation and education.<sup>(30)</sup> If we consider the new concept of environmental refugees, we can add "the freedom of movement" to the list.

33. It is my submission that these issues relate to environmental promotion rather than environmental protection. Regarding the right to life and environmental protection, it is more the concept of environmental security that should guide future

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(28) See doc. A/Conf. 151/PC/WG.III/L.8. Rev. 1, para. 13.

(29) See *i.a.*, Christopher York: "International Law and the Collateral Effects of War on the Environment: The Persian Gulf", South African Journal on Human Rights, Vol. 7, Part. 3, 1991, p. 269. See also: Major B. Schafer: "The Relationship between the International Law of Armed Conflict and Environmental Protection: The Need to Re-evaluate What Types of Conduct are Permissible during Hostilities", Cal. Western International Law Journal, Vol. 19, 1989, p. 287.

(30) See *inter alia*, M. Thorne: "Establishing Environment as a Human Right", Denver Journal of International Law and Policy, Vol. 19 (2) 1, 1991, p. 301. N. Gibson: "The Right to a Clean Environment", Saskatchewan Law Review, Vol. 54, No. 1, Winter 1990, pp. 5-17. This approach is also taken by Mrs. Ksentini in her study. See for a procedural approach to the human right to environment, W. Paul Gormely: "The Right to a Safe and Decent Environment", Indian Journal of International Law, Vol. 28, No. 1, 1988, pp. 1-32.



generations.<sup>(31)</sup> The core of the problems remains, however, the precise definition of concepts. If we don't succeed then we may never be able to make soft law 'hard' and succeed in domestic or international litigation.<sup>(32)</sup>

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(31) See G. Handl, "Environmental Security and Global Change: The Challenge to International Law", *Yearbook on Environmental Law*, Vol. 1, 1990, pp. 3-33.

(32) P.M. Dupuy: "Soft Law and the International Law of the Environment", *Michigan Journal of International Law*, Vol. 12, Winter 1991, pp. 420-435.