



Jen Geary, Dr. ©
TRIDENT MEDIATION
COUNSELLING AND SUPPORT FOUNDATION

P.O.Box 8148, Canmore, Alberta, T1W 2T9

Ph: (403) 678 2918 – Fax: (636) 216-0941

Email - info@tridentfoundation.net

Web - <http://www.tridentfoundation.net>

A BILL OF RIGHTS: TOWARDS ENVIRONMENTAL HUMAN RIGHTS

Number of words (excluding title page, footnotes and
bibliography) = 3,995.

TABLE OF CONTENTS

A BILL OF RIGHTS: TOWARDS ENVIRONMENTAL HUMAN RIGHTS (DRAFT)	1
TABLE OF CONTENTS.....	2
I A BILL OF RIGHTS: TOWARDS ENVIRONMENTAL HUMAN RIGHTS.....	3
<i>A International Matters and ‘EHR’</i>	<i>5</i>
<i>1 Generations of Human Rights.....</i>	<i>6</i>
<i>2 Environmental Protection and Human Rights.....</i>	<i>7</i>
<i>3 The Canadian Charter</i>	<i>12</i>
<i>B The Law in Australia and ‘EHR’</i>	<i>15</i>
<i>C Limitations of Human Rights Law Including ‘EHR’</i>	<i>18</i>

I A BILL OF RIGHTS: TOWARDS ENVIRONMENTAL HUMAN RIGHTS

As the National Human Rights Consultation ('*Consultation*') is conducted key questions seem to arise. A substantive question is what kinds of human rights and duties should be safeguarded and advanced in a possible bill of rights.¹ A purpose in this paper is to respond to this question by considering the apparent link between human and environmental rights.² The term 'human rights' may signify the claim of a person or persons to the 'enjoyment of human rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society'.³ Maybe a cohort of rights includes ecological ones.⁴ The word 'environment' seems to be multidimensional and comprises 'the natural environment, the built or urban environment, the cultural environment and the economic, social, health and work

¹ National Human Rights Consultation Secretariat, 'About the Consultation' *Human Rights* (2009) [3] < National Human Rights Consultation Secretariat < http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation > at 19 April 2009.

² See Centre for International Environmental Law, *Human Rights and the Environment* (2009) < <http://www.ciel.org/Hre/programhre.html> > at 13 April 2009; Editorial, 'Dramatic environmental change is a human rights issue, says 50+50 speaker' (2009) *Y File* [1] York University < <http://www.yorku.ca/yfile/archive/index.asp?Article=12332> > at 16 April 2009; Jan Hancock, *Environmental Human Rights: power, ethics and law* (2003) 12, 59, 63 Google < http://books.google.com/books?id=668ntVpdhU0C&dq=environmental+human+rights&printsec=frontcover&source=bl&ots=iPVimbPJhG&sig=z6xgnGfzxYpMiWf_A0TDJh9LKXs&hl=en&ei=NmXnSZS6B4-UswPt5Lz1AQ&sa=X&oi=book_result&ct=result&resnum=9 > at 14 April 2009; Office of the United Nations High Commissioner for Human Rights (2001) 1, 'Introduction'. *Human Rights and the Environment* Office of the United Nations High Commissioner for Human Rights < <http://www.unhchr.ch/environment/> > at 13 April 2009; *Stockholm Declaration on the Human Environment*, UN Doc A/Conf/48/14/Rev, 1 (1973) principles 1-21; Barbara Rose Johnston 'Commentary' (2004) 2 *Human Rights Dialogue* 12 Carnegie Council on Ethics and International Affairs < http://www.cceia.org/resources/publications/dialogue/2_11/index.html/res/id=sa_File1/Human_Rights_Dialogue_Environment.pdf > at 13 April 2009; Alexey V Yablokov, *Ecology and Human Rights in Russia* (2000) The Online Gladfly < <http://gadfly.igc.org/russia/yablokov1.htm> > at 16 April 2009.

³ Jean-Pierre L Fonteyne, Anne McNaughton, James Stephen Stellios, *Harris – Cases and Materials on International Law: An Australian Supplement* (2003) 191.

⁴ Colm Campbell and Ronan Kennedy, 'The CHRIS Database Project: A Country-specific Human Rights Information System' (Paper presented at 13th Annual BILETA Conference: '*The Changing Jurisdiction*', Dublin, March 27-28 2008) 3 British and Irish Legal Education Technology Association < <http://www.bileta.ac.uk/Document%20Library/1/The%20CHRIS%20Database%20Project%20-%20A%20Country-specific%20Human%20Rights%20Information%20System.pdf> > at 19 February 2009.

environments.’⁵ The environment includes the worlds’ oceanic surroundings.⁶ Ecological and health matters have standing as rights under global and domestic legislation.⁷

Perhaps the Allies fought in World WAR 11 to advance human rights.⁸ Currently, the ‘Consultation’ marks an important milestone opening possibilities for the establishment of an Australian bill of rights. In 1973 a human rights bill was developed as a forerunner to constitutional changes in Australia.⁹ Again in 1985 another adaptation of a bill of rights was developed.¹⁰ An Australian bill could encompass environmental human rights (‘EHR’) and thereby address a seeming gap with the *Canadian Charter*.¹¹ The development of a bill can become invaluable to advance rights.¹² Perhaps ‘EHR’ comprise individuals having access to necessities of life, such as food security including fish, water, soil, a sustainable hygienic and protected atmosphere, and safe living conditions, participatory and informational processes to enhance the dignity of persons.¹³ Maybe ‘EHR’ include ‘the civil and political rights that enable

⁵ Gerry Bates, *Environmental Law in Australia* (6th ed, 2006) 3.

⁶ Donald K Anton, Jennifer Kohout and Nicola Pain, ‘Nationalizing Environmental Protection in Australia: The International Dimensions’ 23 *Environmental Law* 1 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138923# > at 13 April 2009; Bates, above n 5, 380; *International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature on 29 December 1972, 11 ILM 1294 (enacted into force 30 August 1975) art 1.

⁷ Ibiroko Odumosu, ‘Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement’ *Human Rights and Resource Development Project* (2006) 1; *UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 31 ILM 1312 (1992) art 1 (2); *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*, UN Doc A/51/869 art 21.

⁸ DJ Harris, *Cases and Material on International Law* (6th ed, 2004), 654.

⁹ Fonteyne, McNaughton and Stellios, above n 3, 193.

¹⁰ Ibid.

¹¹ *Canadian Charter of Rights and Freedoms* 1982.

¹² Hugh M Kindred, Phillip M Saunders, Jutta Brunnee, Robert J Currie, Ted L McDorman, Armand LC deMestral, Karin Mickelson, Rene Provost, Linda C Reif, Stephen J Toope, Sharon A Williams, *International Law Chiefly as Interpreted and Applied in Canada* (7th ed, 2006) 835.

¹³ See *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 34 ILM 1542 (1995) art 2; Jeffrey Atik, ‘Commentary’ (2004) 2 *Human Rights Dialogue* 26 Carnegie Council on Ethics and International Affairs, < http://www.cceia.org/resources/publications/dialogue/2_11/index.html/res/id=sa_File1/Human_Rights_Dialogue_Environment.pdf > at 13 April 2009; Bates, above n 5, 15, 46, 114, 118, 120, 126, 219, 221, 272, 319, 373; DE Fisher, *Australian Environmental Law* (2003) 67; Sherry Fisher, *Political theorist calls for recognition of environmental human rights* (2009) 1 University of Connecticut < <http://advance.uconn.edu/2009/090323/09032309.htm> > at 16 April 2009; Warwick Gullet, ‘Fisheries’ in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse* (4th ed, 2002) 633, 635; Hancock, above n 2, 1, 6, 59, 61-62, 67-68; Johnston, above n 2, 12; Northern Alliance for Sustainability, *Environmental Human Rights* (2009) Northern Alliance for Sustainability < <http://www.anped.org/index.php?part=71> > at 16 April 2009; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 983-984, 1038, 1041,

individual and group participation in the creation of institutions that ensure social and eco-systemic viability.’¹⁴ In this paper it is concluded that ‘EHR’ as part of an Australian bill of rights are called for. Maybe in the advancement of ‘EHR’ Australia can benefit from the lessons learned of international communities.

A International Matters and ‘EHR’

Perhaps there is a linkage between civil liberties, environmental and international law.¹⁵ A contemporary idea ‘of human rights is one founded in international law’.¹⁶ Human, environmental and international laws might be separated into different categories.¹⁷ Each area seems to have particular objects, regulations and challenges that will often be interpreted from particular legal perspectives.¹⁸ Fields of human rights seem to be divided into sub-areas and perceptions ‘about the “conflict” between an economic market freedom and a fundamental right’ may need to be juxtaposed.¹⁹ There could be a tension between free trade and environmental protection.²⁰ The right of self-determination may need to be balanced against security interests.²¹ Thus, conflicts in law and regulations might occur.²²

1083; *Ruckelshaus v Monsanto Co* (1984) 467 US 986, s 1-2 (a); RJ Soden and D Prager ‘Broken Promises: Environmental Rights Regimes as Human Rights Guarantees in Latin America and Sub-Saharan Africa’ (*Paper presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, 5 February 2009*) All Academic Inc < http://www.allacademic.com/meta/p69664_index.html > at 13 April 2009; David Takacs, ‘The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property’ [2008] *New York University Environmental Law Journal* 711, 712, 722, 725, 728-729, 733, 763 New York University < <http://www3.law.nyu.edu/journals/envtlaw/issues/vol16/Takacs.pdf> > at 16 April 2009.

¹⁴ Johnston, above n 2, 12; Takacs, above n 13, 730.

¹⁵ Bates, above n 5, 14, 40, 44; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 835.

¹⁶ Standing Committee on Environment Communications, Information Technology and the Arts, Parliament of Australia, *Water Bill 2007 [Provisions] Water (Consequential Amendments) Bill 2007 [Provisions]* (2007) 9; THE HONOURABLE John von Doussa QC, ‘Human Rights and Climate Change: A Tragedy in the Making’ *HREOC Seminar Series for the 60th Anniversary of the Universal Declaration of Human Rights* (2008) [6] < http://www.hreoc.gov.au/legal/seminars/speeches/john_von_doussa08.html > at 23 April 2009.

¹⁷ BS Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’ (2007) 27 *Melbourne Journal of International Law* The Australasian Legal Information Institute < <http://www.austlii.edu.au/au/journals/MelbJIL/2007/27.html> > at 23 February 2009; Martti Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’ (2007) 1 *EUROPEAN JOURNAL OF LEGAL STUDIES* 3, 5, 6, 7, 10 European University Institute < <http://www.ejls.eu/1/3UK.pdf> > at 22 February 2009.

¹⁸ Koskenniemi, above n 17, 4.

¹⁹ John Morijn, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies? An Analysis of Diverging Uses of ‘Fundamental Rights’ In the Context of International and European Trade Law* (2008) 22 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1076647 > at 8 May 2009.

²⁰ Chimni, above n 17, [28].

²¹ K Martti Koskenniemi, *Occupied Zone* (2007) 13 Harvard Law School < <http://blogs.law.harvard.edu/hltf/files/2009/02/mktel-aviv-07e.doc> > at 24 February 2009.

Pahuja (2006) supports an exchange of ideas between formerly divided fields of global law and states, 'that values such as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them.'²³ Maybe rights are mutually supporting and have permeable boundaries.²⁴ Legal elements could have overlapping margins such as the relationships between the three generations of human rights.²⁵

1 Generations of Human Rights

Individuals seem to have a claim to human rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²⁶ Conceivably, it is challenging to categorize the human right to broadly acceptable surroundings under any one cohort of rights as this right includes social and political, cultural and monetary elements.²⁷ Perhaps the first cohort of human rights includes the right to life, not to be tortured or to be subject to discriminatory treatment.²⁸ Generally, this cohort might include social and political liberties, such as, the right to participate in elections, not to be discriminated against, for example, in accessing public services, fair dealing and freedom of communication.²⁹ The second group of rights appears to include equality ones.³⁰ These rights might be linked to monetary, social and cultural liberties connected to education, shelter and

²² Ibid 14.

²³ *Declaration on the Right to Development*, GA Res 41/128 1986 s 1; Sundhya Pahuja, *Operationalising the Universal: Development and the Rule of Law* (Paper Presented at the Human Right and Global Justice Conference, Warwick, 29-31 March) 5 The University of Warwick < <http://www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/participants/papers/pahuja.doc> > at 24 February 2009.

²⁴ *Declaration on the Right to Development*, GA Res 41/128 1986 art 6; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 849.

²⁵ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 849.

²⁶ *Universal Declaration of Human Rights*, GA Res 217A (111), UN Doc A/810 at 71 1948 art 2.

²⁷ Harris, above n 8, 655; Odumosu, above n 7, 35.

²⁸ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 847.

²⁹ Tom Calma, Human Rights, Multiculturalism and Indigenous Rights (Speech delivered at Reconciliation Strategy Launch, South Brisbane, 30 July 2008) [14] < http://www.hreoc.gov.au/about/media/speeches/race/2008/20080730_MDA.html > at 17 April 2009, Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 847; Linda Mae McKay-Panos, *The Public's Right of Effective Access to Information in the Environmental Assessment Process* (Master of Laws), University of Calgary (2000) 45; Nickie Vlavianos, 'The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis' *Human Rights and Resource Development Project* (2006) 7-8.

³⁰ *Charter of the United Nations*, opened for signature 26 June 1945, 59 Stat 1031 (enacted into force 24 October 1945) [2]; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 847.

health.³¹ Maybe the third bundle of rights includes ‘the right for self-determination and development’.³² Generally, the latter generation of human rights seems to include communal and collective rights.³³ This third cohort of rights appears to consist of rights pertaining to autonomy, development, harmony, and healthy surroundings.³⁴

Various parties might seek to create hierarchies of rights and place more value on the first rather than the third cohort of rights.³⁵ Perhaps in Africa ‘EHR’ which are often linked to the third generation of rights are considered by the legislature to be of a similar standing to the first groups of rights.³⁶ It may be that ‘EHR’ should be included in additional generation of rights.³⁷ In Africa a substantive investor in the ‘Shell Petroleum Development Corporation (SPDC) consortium – carried out oil production operations that caused environmental degradations of Ogoni land, and health problems for the people’.³⁸ These problems included the release of pollutants into waters and the broader environment comprising Ogoni territory.³⁹ Maybe these harms call for environmental protection.

2 Environmental Protection and Human Rights

International communities appear to have increasing concerns about environmental integrity due to industrial activities.⁴⁰ Tensions seem to exist between ‘EHR’ and approaches by the state to harness natural resources.⁴¹ Individuals appear to have a right to ‘freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.’⁴² This latter right may be appealed to for the enhancement of ecological and industrial integrity.⁴³ There may

³¹ See Calma, above n 29, [15]; Harris, above n 8, 655; *Canada-United States Agreement on Air Quality*, 30 ILM 676 (1991) art 1 (1); Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 847, 1104; *Rio Declaration on Environment and Development*, UN Doc A/CONF151/5/Rev.1 (1992) Principle 14.

³² Calma, above n 29, [16]; Harris, above n 8, 770.

³³ Harris, above n 8, 656; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 847.

³⁴ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 848.

³⁵ Ibid 888.

³⁶ Odumosu, above n 7, 37.

³⁷ Hancock, above n 2, 6.

³⁸ Odumosu, above n 7, 38.

³⁹ Ibid 38, 41.

⁴⁰ Vlavianos, above n 29, 6.

⁴¹ DE Fisher, above n 13, 49-50, 52; Hancock, above n 2, 73; Johnston, above n 2, 12, Takacs, above n 13, 712.

⁴² *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (enacted into force 23 March 1976) art 1 (2); *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (1966) (enacted into force 3 January 1976) art 1 (2).

⁴³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (1966), (enacted into force 3 January 1976) art 12 (b).

be a gap in the 1966 *Covenant* without express provisions for environmental issues.⁴⁴ Cumulative oversight and harmful actions in such countries as the USA may deplete the environment and contribute to changing weather patterns. Perhaps global warming has implications for human rights including cultural, property, health, mobility, safety and survival related ones.⁴⁵ Perhaps the right to life is a key principle of human rights. ‘The Inter-American Commission on Human Rights has recognized that realization of the right to life is necessarily dependent on the physical environment.’⁴⁶ Maybe the environment is critical to personal, social health and civil liberties including the right to existence.⁴⁷

Conceivably, the right to a healthy environment is a part of international and human rights law.⁴⁸ ‘The procedural aspects of the right to a healthy environment embodies the right to information, the right to participate and the right to effective remedies.’⁴⁹ There seems to be a ‘procedural right of access to information’ in environmental law.⁵⁰ The *Vienna Convention* and ‘those protocols in force to which they are party’ are designed to safeguard health and the surroundings against the negative impacts which are caused or are likely to be caused from human actions which alter or are likely to alter the ozone stratum.⁵¹ To protect the natural world it can be important to share data between stakeholders about toxic substances that may be created through

⁴⁴ DE Fisher, above n 13, 50; *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966, UN Doc A/6316 (1966), (enacted into force 3 January 1976).

⁴⁵ Jane McAdam, *Climate Change ‘Refugees’ and International Law* (2007) 2 New South Wales Bar Association < <http://www.nswbar.asn.au/circulars/climatechange1.pdf> > at 19 February 2009.

⁴⁶ *Ibid* 8.

⁴⁷ Hancock, above n 2, 60; Takacs, above n 13, 722; Vid Vukasovic, ‘Human rights and environmental issues’ *Human rights and scientific and technological development* (1990) Pt 4 (9) United Nations University <

<http://www.unu.edu/unupress/unupbooks/uu06he/uu06he0i.htm#9.%20human%20rights%20and%20environmental%20issues> > at 13 April 2009.

⁴⁸ S Giorgetta, ‘Abstract The Right to a Healthy Environment, Human Rights and Sustainable Development’ (2002) 2 (2) *International Environmental Agreements* 171 Ingenta <

<http://www.ingentaconnect.com/content/klu/inea/2002/00000002/00000002/05091973?crawler=true> > at 19 February 2009; Harris, above n 8, 742; Ole W Pederson ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008) 21 (1) *Georgetown International Environmental Law Review* 11 Social Science Research Network <

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122289# > at 13 April 2009.

⁴⁹ See *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature on 22 March 1989, 28 ILM 657, 1673 UNTS 57 (enacted into force 5 May 1992) ss 8, 9; Environment Canada ‘Vienna Convention for the Protection of the Ozone Layer’ *Multilateral Environmental Agreements Environment Canada* (2006) <

http://www.ec.gc.ca/international/multilat/ozone_e.htm > at 13 April 2009; Giorgetta, above n 48, 171; *Stockholm Convention on Persistent Organic Pollutants*, opened for signature on 23 May 2001, UNEP/POPS/CONF/4, 40 ILM 532, 535 (enacted into force 17 May 2004) art 2.

⁵⁰ McKay-Panos, above n 29, 2.

⁵¹ *Vienna Convention for the Protection of the Ozone Layer*, 26 ILM 15, UN Doc A CONF 39/27 opened for signature on 22 March 1985 (enacted into force 22 September 1988) art 2 (1).

industrial processes.⁵² Some countries might have forbidden or strictly limited these substances for health or ecologically-related factors. To protect natural surroundings it can help to have truthful representations about seeming dangerous substances including ‘their characteristics, potential dangers and safe handling and use’.⁵³ Individuals and groups often need to have rights such as those linked to ‘their health, environment, safety and financial interests, to receive adequate and truthful information, to freedom of election and to equal treatment’ recognised.⁵⁴ Toxic substances may deplete the global ozone layer and contribute to climate change.⁵⁵ Maybe this is harmful to ‘human health and the environment’ and calls for remedies to lessen ‘human activities which modify or are likely to modify the ozone layer’.⁵⁶ The *Montreal Protocol* was created to stage out ‘production and consumption of covered ODC’s’ and to promote the sharing of data, evaluation of control procedures, collaboration between states and examination.⁵⁷ Climate change appears to have substantive harmful impacts on the ‘composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare’.⁵⁸ The objects of the *Convention on Climate Change* include to safeguard the ‘climate system’ and to limit greenhouse gas absorption.⁵⁹ A theme which may unite both human rights and ecological legal issues is a concern for humankind.⁶⁰

⁵² Cth, Joint Standing Committee on Treaties Rotterdam Convention — Notification of Certain Hazardous Chemicals and Pesticides c 7 (2003) Parliament of Australia < <http://www.aph.gov.au/HOUSE/committee/jsct/September2003/report/chapt7.pdf> > at 13 April 2009 ; *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998*, opened for signature in 1998 (enacted into force 24 February 2004) art 1.

⁵³ Health Canada, ‘Rotterdam Convention on Prior Informed Consent Procedure’ (2009) Consumer Product Safety Health Canada < <http://www.hc-sc.gc.ca/cps-spc/pest/part/int/pic-icp-eng.php> > at 13 April 2009.

⁵⁴ *Constitution of the Republic of Costa Rica 1825 (as amended)* art 46

⁵⁵ Department of Climate Change, ‘Summary Carbon Pollution Reduction Scheme’ *Green Paper* (2008) 2 Department of Climate Change < <http://www.climatechange.gov.au/greenpaper/index.html> > at 28 April 2009 ; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1052; Glen McLeod and Peter Newman, ‘Climate change law and the real world’ in Wayne Gumley and Trevor Daya-Winterbottom (ed), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 45, 47.

⁵⁶ *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature on 16 September 1987, 26 ILM 1550, 1522 UNTS 3 (enacted into force 1 January 1989) 5.

⁵⁷ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1053.

⁵⁸ *United Nations Framework Convention on Climate Change*, opened for signature on 9 May 1992, UN Doc A/AC.237/18, 31 ILM 848 (entered into force 21 March 1994) art 1 (1).

⁵⁹ DE Fisher, above n 13, 63.

⁶⁰ Edith Brown Weiss, International human rights law and environmental problems *Environmental change and international law: New challenges and dimensions* (1992) [1] United Nations University < <http://www.unu.edu/unupress/unupbooks/uu25ee/uu25ee0k.htm#international%20human%20rights%20law%20and%20environmental%20problems> > at 19 February 2009.

Perhaps such factors as the physical and emotional welfare and safety of individuals and groups including the right for sustenance are protected under key international human rights laws.⁶¹ The World Trade Organisation has seemingly demarcated between various areas of law including trade, human rights and environmental aspects.⁶² Possibly, a background to this situation is *The Application of Sanitary and Phytosanitary Measures Agreement*. Theoretically this accord seems to safeguard the health of living beings ‘from risks related to diseases, pests, and disease-carrying or -causing organisms, as well as from additives, contaminants, toxins or disease-causing organisms in food, beverages, or feedstuffs’.⁶³ Thus, an element of the accord seems to be to safeguard the environment.⁶⁴ Under Article 5.1 a risk assessment is required to determine actions to protect the health of a state.⁶⁵ Under Article 5.2 risk assessments are to include technical data, manufacturing information, examination and selection processes.⁶⁶ Maybe a key issue in *EC — Hormones* is that before European Communities restricted trade with Canada and the USA they should have undertaken a risk assessment as mentioned in the accord.⁶⁷ Perhaps another context in which an impact assessment was not conducted was in the Occupied Palestinian Territory.⁶⁸

The *AARHUS Convention* seems to connect environmental and human rights law.⁶⁹ The *Convention* states, ‘Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.’ The *Rio Declaration* reads, ‘Human beings are at the centre of concerns for sustainable

⁶¹ Hancock, above n 2, 6; Diane Ryland, ‘Abstract The Evolution of Environmental Human Rights in Europe’ (2005) 47 *Managerial Law* 1 < <http://www.emeraldinsight.com/Insight/viewContentItem.do;jsessionid=6A570E6E1B1126AEAF7FF4FBDA540356?contentType=Article&contentId=1519760> > at 14 April 2009; Richard L Skolnik, *Essentials of Global Health* (2007) 60-61 Google < http://books.google.com/books?id=XBARu3KzSNAC&pg=RA1-PA60&lpg=RA1-PA60&dq=ICESR&source=bl&ots=7FXd74-XHQ&sig=YCcDzXKRktiXyTtG6noziWNeZkQ&hl=en&ei=onDnSZfWH52wtgOTzrXIAQ&sa=X&oi=book_result&ct=result&resnum=6 > at 14 April 2009.

⁶² Hancock, above n 2, 3.

⁶³ Tim Josling, Donna Roberts and Ayesha Hassan, *The Beef-Hormone Dispute and its Implications for Trade Policy* (2009) 12 Freeman Spogli Institute for International Studies < <http://iis-db.stanford.edu/pubs/11379/HORMrev.pdf> > at 22 February 2009.

⁶⁴ Ibid.

⁶⁵ *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*

⁶⁶ Ibid.

⁶⁷ *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body) s I (i).

⁶⁸ Commission of Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine Occupied Arab Territories, Including Palestine (2004) [11] Economic and Social Council, United Nations < <http://domino.un.org/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/631c8deb907650e985256e6000520f3b!OpenDocument> > at 25 February 2009.

⁶⁹ *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, opened for signature on 25 June 1998, ECE/CEP/43 (enacted into force 30 October 2001).

development.⁷⁰ This focus in the *Declaration* could encompass a holistic perspective that places value on humans and the broader ecology in which we live.⁷¹ Perhaps in contrast to the *Stockholm Declaration* the *Rio Convention* encourages signatories to assume active rather than passive duties towards the environment.⁷² Maybe the *Rio Declaration* is not determinative although it can extend customary international law.⁷³ Perhaps under customary law Hungarians and Slovaks have the rights to growth that enhances their wellbeing and for their surroundings to be safeguarded.⁷⁴

The common law with its private nuisance principle has been invoked to safeguard the environment.⁷⁵ An example of this is *EHP v Canada*.⁷⁶ This case involved the keeping of radioactive and discarded substances close to residential quarters at Port Hope, Ontario, Canada.⁷⁷ Key issues pertained to the right to life and the negative effects on the environment due to the storage of radioactive emissions.⁷⁸ Legal challenges included those pertaining to the standing of the complainant and that domestic legal redress had not been exhausted.⁷⁹ Perhaps in Canada bodies linked with the administration of justice are reticent 'to embrace fully the notion of looking at environmental development and impacts from a human rights perspective'.⁸⁰

⁷⁰ *Rio Declaration on Environment and Development*, UN Doc A/CONF151/5/Rev.1 (1992) Principle 1.

⁷¹ Bates, above n 5, 432; Aðalheiður Jóhannsdóttir, *The significance of the default* (2009) 25, 38 DiVA portal Uppsala University < http://www.diva-portal.org/diva/getDocument?urn_nbn_se_uu_diva-9546-2_fulltext.pdf > at 23 February 2009; Hancock, above n 2, 56; Nancy Perkins Spyke, 'The Land Use - Environmental Law Distinction: A Geo-Feminist Critique' *Duke Environmental Law & Policy Forum* 55, 85.

⁷² See DE Fisher, above n 13, 59; Hancock, above n 2, 73; Johnston, above n 2, 12, Takacs, above n 13, 712.

⁷³ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1032.

⁷⁴ Bates, above n 5, 38; Gabcikovo-Nagymaros Project (*Separate Opinion of Vice President Weeramantry*) [1993] ICJ 85, 87; International Court of Justice < <http://www.icj-cij.org/docket/files/92/7383.pdf> > at 13 April 2009; Adriana Koe, 'Damming the Danube: The International Court of Justice and the Gabcikovo Nagymaros Project (Hungary v Slovakia)' (1998) 27 *Sydney Law Review* 4 The Australasian Legal Information Institute < <http://www.austlii.edu.au/au/journals/SydLRev/1998/27.html> > at 13 April 2009.

⁷⁵ Bates, above n 5, 171, 174, 176-177; Stephen J Eagle, *The Role of the Common Law in Defining and Protecting the Environment: A Prolegomenon* (2008) 2-3 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103984 > 26 February 2009; Rosemary Lyster, and Adrian Bradbrook, *Energy Law and the Environment* (2006) 53; Rosemary Lyster, Zada Lipman, Nicola Franklin, Graeme, Wiffen and Linda, Pearson, Linda, *Environmental and Planning Law in New South Wales* (2007) 2-5.

⁷⁶ *EHP v. Canada* ('EHP'), UN Doc CCPR/C/OP/1 at 20 (1984) [28].

⁷⁷ *Ibid* [1]

⁷⁸ *Ibid* [2]; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1051.

⁷⁹ *EHP* [3], *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 2200A (XXI) (enacted into force 23 March 1976).

⁸⁰ Vlavianos, above n 29, 2.

Maybe there are varying legal definitions of ecologically sustainable development ('ESD').⁸¹ Perhaps 'ESD is the balance between development and environmental imperatives'.⁸² Key aspects of 'ESD' include 'public participation, access to information and justice, the polluter pays principle, and the application of environmental impact assessment, all of which are regarded as important components of sustainable development at an international level'.⁸³ 'ESD' seems to embrace temporary development that does not undermine the interests of future generations.⁸⁴ 'ESD' and development may restrict the private ownership of property.⁸⁵ Conceivably, economic growth which is engendered through natural sources depletes surroundings calling for appropriate 'environmental and social impact assessments with adequate mitigation measures'.⁸⁶ Perhaps assessment processes should detect, describe and appraise the overt and circuitous harm of an initiative on humans other creatures, the earth, water, atmosphere, weather and countryside, intellectual heritage and other substantive material goods, and their relations.⁸⁷

Human and environmental law may have permeable boundaries in certain contexts and this might need to be integrated to address particular environmental challenges.⁸⁸ It appears that currently there is a gap in key international human rights instruments as there are not express provisions for environmental guaranteed rights although the right of self-determination linked to natural resources seems to be recognized.⁸⁹ Human rights in Canada are substantively interwoven with the *Canadian Charter*.⁹⁰

3 The Canadian Charter

Perhaps in preserving the environment there is a need for recognition of water rights, the impact of global warming and the role of the precautionary approach to safeguard human rights and

⁸¹ Bates, above n 5, 125.

⁸² Ibid 128.

⁸³ Ibid 126; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1042-1044; *Rio Declaration on Environment and Development*, UN Doc A/CONF151/5/Rev.1 (1992) Principle 17; *UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 31 ILM 1312 (1992) art 3 1 (h).

⁸⁴ Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 22, 142.

⁸⁵ Bates, above n 5, 22, 121, 123, 125, 150, 199; Farrier, David, and Moore, Katrina, 'The scope of environmental law' in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse in Australia* (4th ed, 2002) 1; *Kelo, et al. v. City of New London, et al.* (Conn, 2005) (04-108) 545 U.S. 469 268 s 19; Steven Seidenberg 'Where's the Revolution?' (2009) *ABA Journal* 50, 50-60.

⁸⁶ Odumosu, above n 7, 34.

⁸⁷ *Environmental Impact Assessment Act [Gesetz über die Umweltverträglichkeitsprüfung – UVPG] 2001 art 2 (1).*

⁸⁸ Koskenniemi, above n 17, 16.

⁸⁹ Hancock, above n 2, 6, Ryland, above n 61, 1.

⁹⁰ Canadian Human Rights Commission, 'The Canadian Charter of Rights and Freedoms', *Human Rights in Canada: A Historical Perspective* (2009) [1] Canadian Human Rights Commission < <http://www.chrc-ccdp.ca/en/timePortals/milestones/113mile.asp> > at 29 April 2009.

ecological systems.⁹¹ Ecological rights, are ‘very clearly linked with human rights, both civil and political (freedom, equality, dignity), and economic, social, and cultural rights (adequate conditions of life, wellbeing).’⁹² Thus it would appear that human and environmental laws can be interlinked to develop innovative practices and scholarship.⁹³

The *Canadian Charter* does not seem to include ‘EHR’.⁹⁴ This situation appears to be in contrast to the *French* and *African Charters* which do.⁹⁵ International experiences such as those from Africa can provide useful information about ‘EHR’.⁹⁶ Perhaps the *African Charter* pioneers a combination of ‘civil and political rights and economic and social rights in one document. Maybe it was also the first *Charter* to include the right to a general satisfactory environment favourable to development.’⁹⁷ Under *art 24* of the *African Charter* it is mentioned that citizens have a right to acceptable surroundings that are conducive to their growth.⁹⁸ Possibly, a gap in

⁹¹ See *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 34 ILM 1542 (1995) *art 6*; Bates, above n 5, 83, 129, 131-138, 228, 457; Farrier and Moore, above n 85, 5; Editorial, ‘Water and International Water Law’ (2003) *Hot Topics* 3, 3; Gullet, above n 13, 635; David Hodginson and Renee Garner, *Global Climate Change* (2008) 37; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1003, 1016, 1039-1040; Juliet Lucy, *Water Regulation The Laws of Australia* (2008) 115; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 19, 23-25, 136, 142, 164, 172; Rebecca Nelson, ‘Legislation for ICM: advancing water resources sustainability?’ (2005) 22 2 *Environmental and Planning Law Journal* 96, 102; Jacqueline Peel, *The Precautionary Principle in Practice : Environmental Decision Making and Scientific Uncertainty* (2005) 15-21;; *Rio Declaration on Environment and Development*, UN Doc A/CONF151/5/Rev.1 (1992) Principle 15; Jorge Daniel Taillant, *Human Rights, Environment and the WTO* 6 Centre for Human Rights and Environment < <http://www.cedha.org.ar/docs/doc50-eng.doc> > at 23 February 2009; *UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 31 ILM 1312 (1992) *art 2 5 (a)*; *United Nations Framework Convention on Climate Change*, opened for signature on 9 May 1992, UN Doc A/AC.237/18, 31 ILM 848 (entered into force 21 March 1994) *art 3 (3)*.

⁹² Weiss, above n 60, [3].

⁹³ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998*; Hancock, above n 2, 2; International POPs Elimination Network, *Stockholm Convention in Action in Jordan Land and Human to Advocate Progress (LHAP)* (2006) 8 International POPs Elimination Network < www.ipen.org/ipepweb1/library/ipep_pdf_reports/1jor%20stockholm%20convention%20in%20action%20in%20jordan.pdf > at 19 February 2009.

⁹⁴ *Canadian Charter of Rights and Freedoms 1982*; John Humphrey Centre, *Youth Guide to the Canadian Charter of Rights and Freedoms* (2009) Docstoc < <http://www.docstoc.com/docs/3879610/Guide-to-Canadian-Charter-of-Rights-and-Freedoms> > at 17 April 2009.

⁹⁵ *Charter for the Environment 2005*

⁹⁶ McKay-Panos, Linda, Mae, ‘Foreward’ in Ibironke Odumosu (ed), ‘Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement’ *Human Rights and Resource Development Project* (2006) iii, iii.

⁹⁷ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1038; Odumosu, above n 7, 7.

⁹⁸ *African Charter on Human and Peoples' Rights 1986*; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 904; McKay-Panos, above n 96, iii.

the *African Charter* pertains to ‘a broad individual duty to respect the fundamental rights of others’.⁹⁹ The role of judicial decision making to address such gaps can be a substantive one.¹⁰⁰ Maybe in Canada similar rights need to be read in by judges.¹⁰¹ The role of ‘human rights provision in national constitutions’ can be substantive.¹⁰² In India the courts seem to have extended constitutional law to read in expressions or statements ‘EHR’ thus developing case law.¹⁰³

Perhaps the *Canadian Charter* often restricts the activities of the government that undermine human rights but this does not directly apply to the private sector.¹⁰⁴ Maybe the state should take substantive steps to encourage the non-government sector to respect the rights of minorities and ‘state responsibility stands as the central principle of human rights law’.¹⁰⁵ Perhaps rights of access to data and to enjoy healthy surroundings are not listed in the *Canadian Charter*.¹⁰⁶ Whilst the *Canadian Charter* does not appear to have express provisions for ‘EHR’ its principles may be appealed to address environmental issues.¹⁰⁷ Conceivably, ‘the *Charter of Rights* provides Canadians with an implied right of access to government information.’¹⁰⁸ The *Canadian Charter* may be interpreted as providing ‘health protection from environmental impacts’.¹⁰⁹ If the government is ‘experiencing a state of necessity’, there may exceptional circumstances, as to why the state does not address its obligations to protect the environment.¹¹⁰

Generally, ‘A strong argument may be made that *Charter* section 35, which recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”, supports group rights and may be applied to safeguard basic environmental rights. Maybe some provinces in Canada including Ontario have taken the lead and ‘have passed or introduced environmental bills of rights which include provisions dealing with access to information and other participation

⁹⁹ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 874.

¹⁰⁰ Bates, above n 5, 14, 90; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 853.

¹⁰¹ McKay-Panos, above n 96, iv.

¹⁰² Bates, above n 5, 45.

¹⁰³ *Constitution of India 1950* art 21, Takacs, above n 13, 735.

¹⁰⁴ McKay-Panos, above n 29, 19; Vlavianos, above n 29, 7-8.

¹⁰⁵ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 843, 1017-1018.

¹⁰⁶ McKay-Panos, above n 29, 2.

¹⁰⁷ *Canadian Charter of Rights and Freedoms 1982*; Melody Hessing, Michael Howlett, Tracy Summerville, *Canadian natural resource and environmental policy: political* (2005) 251 Google < http://books.google.com/books?id=qHF160KzwcC&pg=PA251&lpg=PA251&dq=The+Environment+and+the+Canadian+Charter+of+Rights+and+Freedoms&source=bl&ots=TRtmrzy2b5&sig=ou-LWLmsKhwcBjGehv9JvAWc4&hl=en&ei=JJfoSdvLJYWitgPXrLH1AQ&sa=X&oi=book_result&ct=result&resnum=8 > at 17 April 2009.

¹⁰⁸ McKay-Panos, above n 29, 15.

¹⁰⁹ Vlavianos, above n 29, 7.

¹¹⁰ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 843, 1018.

rights.’¹¹¹ There could be a need to amend the *Canadian Charter* by introducing an ‘Environmental Bill of Rights within the Canadian Constitution.’¹¹² Maybe with the effects of toxic waste there is a need to protect minorities and others’ rights to safe water and air and healthy surroundings.¹¹³ Perhaps water is an important element of ‘EHR’ which is needed to retain health and life and water rights could be included in bills.¹¹⁴ Bills of rights could include the right to live in healthy settings through State action to preserve the planet for upcoming generations.¹¹⁵ The protection of national heritage and the environment may be obligations of citizenship.¹¹⁶ Conceivably, this has implications for the kinds of rights which could be included in a bill of rights for Australia.

B The Law in Australia and ‘EHR’

Possibly, the original developers of the Australian Constitution did not include express provisions to a bill of rights.¹¹⁷ Human rights can become problematic and Australian states may resist the creation of a bill because of concerns about this interfering with their rights.¹¹⁸ Perhaps concerns about a loss of states’ rights have also occurred at international levels.¹¹⁹ Civil rights ‘are not well protected in Australia (we have no constitutionally protected Bill of Rights for example) and many international conventions protecting human rights have not been

¹¹¹ *Declaration on the Right to Development*, GA Res 41/128 1986 art 8; McKay-Panos, above n 29, 22-23.

¹¹² McKay-Panos, above n 29, 21-22.

¹¹³ Cth, David R Boyd, *Right to clean air, clean water, and a healthy environment*, Petition: No 163A (2006) 1 Office of the Auditor General of Canada < http://www.oag-bvg.gc.ca/internet/English/pet_163A_e_28897.html .> at 17 April 2009, Ridge, Kathy, ‘Water Supply’ in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse* (4th ed, 2002) 515, 519.

¹¹⁴ See *African Charter on Human and Peoples’ Rights 1986* art 4; *American Convention on Human Rights*, opened for signature 22 November 1969, 114 UNTS 123 (enacted into force 18 July 1978) s 1; *American Declaration on the Rights and Duties of Man* OEA/Ser.L.V/II.82 1948 art 1; United Nations, *Water for Life 2005-2015* (2006) United Nations < <http://www.un.org/waterforlifedecade/>> at 17 April 2009; World Health Organisation, *The right to water* (2009) *World Health Organisation* < http://www.who.int/water_sanitation_health/rightwater/en/ > at 17 April 009.

¹¹⁵ Hessing, Howlett and Summerville, above n 107, 251.

¹¹⁶ Citizenship and Immigration Canada, *A Look at Canada* (2008) Citizenship and Immigration Canada < <http://www.cic.gc.ca/english/resources/publications/look/look-20.asp> > at 17 April 2009.

¹¹⁷ *Commonwealth of Australia Constitution Act 1900* (Imp); Fonteyne, McNaughton and Stellios, above n 3, 181.

¹¹⁸ Fonteyne, McNaughton and Stellios, above n 3, 196.

¹¹⁹ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 838.

incorporated into Australian law, even where Australia is a party'.¹²⁰ Thus, perhaps rights are inadequately safeguarded in Australia.¹²¹ There may be a gap in Australia's existing regulatory frameworks to address a combination of human and environmental rights including heritage issues.¹²² Australia might advance civil rights by recognizing that ecological rights are 'human rights'.¹²³

The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('ACT') appears to be designed to safeguard the environment, uphold 'ESD' and biodiversity, protect heritage and support joint administration by members of the government and non-government sectors.¹²⁴ Focus in this 'ACT' seems to be on undertaking collaborative efforts to address global ecological duties, the recognition of the role and application of aboriginal people including their knowledge about the protection of their surroundings and environmentally sustainable applications of biodiversity.¹²⁵ Maybe there is a gap in the 'ACT' which involves water rights and the introduction of measures to counter the effects of global warming.¹²⁶ To lessen the occurrence of global warming first world nations are obliged to assume a leadership role by adopting countrywide policies.¹²⁷ International law may be authoritative but not determinative in Australia particularly so if it is not integrated into Australian law.¹²⁸

Perhaps the peoples of Australia produce approximately one per cent of the planet's greenhouse gases 'but Australians are among the highest per capita emitters in the world'.¹²⁹ This seems to call for the regulatory powers of the Commonwealth to be invoked to curb emissions from greenhouse gases. The authority of the Commonwealth is limited.¹³⁰ The constitutional powers of the Commonwealth with waters and the environment are not named in constitutional law.¹³¹ Conceivably, the Commonwealth has the authority to make laws under s 51 (xxix) and this

¹²⁰ Heather McRae, Garth Nettheim, Laura Beacroft, Luke McNamara, *Indigenous Legal Issues Commentary and Materials* (2003) 413.

¹²¹ Bates, above n 5, 45; Fonteyne, McNaughton and Stellios, above n 3, 194-195, 208, 212; Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee, Australia*, [16] UN Doc A/55/40 (2000).

¹²² Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (2005) 259, 261-262; *UN Draft Declaration on the Rights of Indigenous Peoples*. UN Doc E/CN.E/Sub.2/1994/2/Add.1 (1994) art 1, 28.

¹²³ DE Fisher, above n 13, 69.

¹²⁴ *Environment Protection and Biodiversity Conservation Act 1999 (Cth) sub-s 3 (1) (a) to (d)*.

¹²⁵ *Ibid sub-s 3 (1) (e) to (g)*.

¹²⁶ DE Fisher, above n 13, 63-64; Hodginson and Garner, above n 90, 33, 39, 42-43, 57, 64-65; *Kyoto Protocol*, opened for signature on 16 March 1998, 37 ILM 32 (enacted into force 16 February 2005); Submission to Independent review of the *Environment Protection and Biodiversity Conservation Act 1999 Parliament of Australia*, Canberra, 16 December 2008 (Derek Fenton) <<http://www.environment.gov.au/epbc/review/submissions/pubs/043-derek-fenton.pdf>> at 18 April 2009.

¹²⁷ Lyster and Bradbrook, above n 75, 53.

¹²⁸ von Doussa, above n 16, [25]-[26].

¹²⁹ Lyster and Bradbrook, above n 75, 53.

¹³⁰ Bates, above n 5, 58.

¹³¹ Lucy, above n 91, 115; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 1; Standing Committee on Environment Communications, Information Technology and the Arts, Parliament of Australia, *Water Bill 2007 [Provisions] Water (Consequential Amendments) Bill 2007 [Provisions]* (2007) 9.

legislative power is interwoven with international law.¹³² Perhaps s 51 (xxix) was applied by the Commonwealth to stop the State of Tasmania from constructing a dam on a World Heritage List site.¹³³ The Commonwealth has responsibilities to protect world heritage items.¹³⁴ Treaties can be a means to introduce trade sanctions against defaulting states.¹³⁵ Commonwealth powers that could be applied to advance 'EHR' include 'trade and commerce, external affairs, corporations, finance and taxation, and *people of any race*'.¹³⁶ Also s 81, 83 96, 114, for example, may be applied to expand 'EHR'.¹³⁷ Focal points for government have tended to be 'on the economic, trade and security impacts of climate change, with the social and human rights implications receiving little consideration in policy debates'.¹³⁸ Perhaps Australia is taking steps to address climate change and this could have implications for civil liberties.¹³⁹ Conceivably, the merits of having tolerance for ethnic and other differences, parity and justice which are often linked to human rights approaches provide appropriate doctrines to address climate change.¹⁴⁰

The Australian High Court has considered human rights principles as it has extended the common law and interpreted statutory law.¹⁴¹ Perhaps some of the most significant ecological cases have arisen because judges have been prepared to use the common law.¹⁴² In *Mabo v Queensland* (1992) the concept of terra nullius and exclusive ownership by the crown were shaken by a decision of the High Court.¹⁴³

¹³² *Commonwealth of Australia Constitution Act 1900* (Imp); Fisher, above n 13, 71; Fonteyne, McNaughton and Stellios, above n 3, 195-196; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 14.

¹³³ See Bates, above n 5, 28-29, 63-64, 66-67; *Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1 ss 1, 3, 5-7, 9, 11, 18, 22, 25, 27, 30, 37, 55, 64-65, 69-70, 82, 111, Farrier and Moore, above n 85, 9; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1089; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 15.

¹³⁴ Lee Godden, 'Indigenous Heritage and the Environment: "Legal Categories are Only One Way of Imagining the Real"' (2002) 19 (4) *Environment and Planning Law Journal* 87 258, 260.

¹³⁵ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 843, 1107.

¹³⁶ Bates, above n 5, 57; *Commonwealth of Australia Constitution Act 1900* (Imp) s 51 (i), (ii), (xx), (xxvi), (xxix); Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 15-16.

¹³⁷ *Commonwealth of Australia Constitution Act 1900* (Imp); Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 17.

¹³⁸ von Doussa, above n16, [6].

¹³⁹ Carbon Pollution Reduction Scheme Bill 2009 (Cth) s 3 (2) (a).

¹⁴⁰ von Doussa, above n16, [7].

¹⁴¹ Fonteyne, McNaughton and Stellios, above n 3, 200.

¹⁴² Bates, above n 5, 30.

¹⁴³ Bates, above n 5, 30-31; Farrier and Moore, above n 85, 7; Jen Geary, *Mabo v Queensland No 2 1992* (Cth), *Native Title* (2006) University of Calgary < <http://breeze.ucalgary.ca/p73407298/> > at 26 April 2009; *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 ss 33-34, 36, 39-41, 46, 51, 63; Susan Phillips, 'Land rights and native title in NSW' in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse in Australia* (4th ed, 2002) 661, 671.

If due care of the environment is breached and there is demonstrable harm to the victim to which a duty is owed, tort claims may arise.¹⁴⁴ Perhaps negligent regard for the environment gives rise to harmful substances being in organic entities, such as oysters, which are then harvested and sold to be eaten by consumers.¹⁴⁵ Neglect might occur due to the sale of contaminated oysters which are cultivated in waters that are known by the tortfeasor to be unfit for drinking.¹⁴⁶ If a duty to undertake measures to address waste caused by human effluent is neglected liability may arise.¹⁴⁷

The duty to take substantive action to address pollutants in waters might be connected to foreseeability and degree of risk, a parties control over the menacing elements and the probability that harm will ensue if steps are not taken to address potential threats.¹⁴⁸ Harm may be interwoven with ecological necessity and immediacy.¹⁴⁹ Considerations seem to include the parties' knowledge that harm may occur, the costs and expediency of him/her taking substantive measures to address environmental risks and the vulnerability of the victim.¹⁵⁰ A lack of action by a responsible person may be reasonable because of all of the presenting circumstances of a case.¹⁵¹ The nuances of a case including policy may have called for a tortfeasor to have issued warnings to individuals or a class of persons about potential risks linked to the hazard.¹⁵² Maybe each case and conflicting human rights need to be judged on their merits.

C Limitations of Human Rights Law Including 'EHR'

Conceivably, human rights are linked to generalized categories and these may give rise to conflicts between varying rights.¹⁵³ Perhaps human rights are watery, unsystematic and it is difficult for an individual to understand their central principles.¹⁵⁴ Maybe the construction and

¹⁴⁴ *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR ('Graham') 540 s 4, 8, 10, 15, 20, 34, 43, 79, 80, 83, 91, 97, 101, 106, 107, 161, 187, 189, 230, 260, 281, 328, Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 7.

¹⁴⁵ *Graham*, above n 144, ss 2-3; Bates, above n 5, 181.

¹⁴⁶ *Graham*, above n 144, s 44; Bates, above n 5, 173.

¹⁴⁷ *Graham*, above n 144, s 47; Bates, above n 5, 179; 181, 187, 243.

¹⁴⁸ See Bates, above n 5, 182, 393-395, 403, 414, 416, 423; *Graham*, above n 144, s 47, 55, 74, 88, 118, 134, 152, 158, 190, 192-193, 202, 234, 323; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1002; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 7.

¹⁴⁹ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 988, 998; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 3.

¹⁵⁰ *Graham*, above n 144, s 135, 138, 149, 154, 190, 242, 254, 283; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 8.

¹⁵¹ *Graham*, above n 144, s 201, 244, Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 139.

¹⁵² *Graham*, above n 144, s 286, 293.

¹⁵³ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 849.

¹⁵⁴ *Ibid* 847.

substance of what is involved in 'EHR' is ambiguous.¹⁵⁵ Rights standards may be influenced by social dimensions and become hard to define.¹⁵⁶ Key terminology such as 'sustainability' and 'ESD' seem to be diffuse and are open to a number of interpretations.¹⁵⁷ Perhaps there have been judgments that have helped to define 'sustainability'.¹⁵⁸ Problems with terminology also appear to emerge in human rights which may be challenging 'to define and differ according to their nature'.¹⁵⁹ The precise elements of what comprises a right may be debatable.¹⁶⁰ Maybe there is little agreement about the manner in which rights should be construed.¹⁶¹ Uncertainties about the scope of liberties may be particularly pronounced with aspirational rights.¹⁶² Environmental rights may be weakened by the blending of human and ecological liberties.¹⁶³

Some critics in Western societies are doubtful that 'EHR' are bona fide human rights.¹⁶⁴ Doubts about the substance of emerging rights may undermine the acceptance of existing rights particularly so in respect to third generation rights.¹⁶⁵ Some critics from the East seemingly have suggested that rights emerging from Western thought including social and political rights are not comprehensive enough.¹⁶⁶ Rights from a Western perspective may be essentialist and imposed upon the remainder of the world.¹⁶⁷ In the midst of these kinds of tensions and uncertainties about rights generally it could be that 'EHR' laws may be open to exploitation by governments. Thus, a bill of rights containing 'EHR' provisions may not be fully conducive to citizen engagement.¹⁶⁸

Express provisions for 'EHR' in legislation may give rise to a key question. What quantity of ecological risk is acceptable in economic development to meet social needs?¹⁶⁹ The level of evidence that is required to give rise to the precautionary rule could be uncertain, however, 'a more than 5 per cent uncertainty rating theoretically would trigger application of the

¹⁵⁵ Karen MacDonald, 'Booknotes' Constitutional Environmental Rights by Tim Hayward. Oxford: Oxford University Press, 2005. 236pp. (2005) [2].

¹⁵⁶ Ibid; McKay-Panos, above n 29, 52.

¹⁵⁷ Brad Jessup, *Questioning the sustainability paradigm* (2008) Brad Jessup Online <<http://bradjessup.wordpress.com/>> at 18 April 2009; Odumosu, above n 7, 35; Nelson, above n 91, 102.

¹⁵⁸ McLeod and Newman, above n 55, 53.

¹⁵⁹ McKay-Panos, above n 29, 44.

¹⁶⁰ Fonteyne, McNaughton and Stellios, above n 3, 191-192.

¹⁶¹ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 839; McKay-Panos, above n 29, 52.

¹⁶² Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 848, 905.

¹⁶³ Ibid 888; MacDonald, above n 155, [3].

¹⁶⁴ Harris, above n 8, 770.

¹⁶⁵ Ibid, above n 7, 771.

¹⁶⁶ Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 838

¹⁶⁷ Ibid 886; Kristen Choo, 'Chasing a Dream Living up to the Universal Declaration of Human Rights remains a struggle' (2009) *ABA Journal* 65, 67.

¹⁶⁸ Hessing, Howlett and Summerville, above n 107, 251.

¹⁶⁹ MacDonald, above n 155, [7].

principle'.¹⁷⁰ If significant steps are not taken to preserve the worlds' resources there may be '150 million environmental refugees by the year 2050'.¹⁷¹ Conceivably, this situation has substantive human rights implications.¹⁷² Violence may occur as humans strive to meet their basic necessities of life.¹⁷³

In sum, the effects, for example, of global warming and drinkable water may contribute to peoples becoming progressively susceptible to destitution and collective hardship as once flourishing territories become arid.¹⁷⁴ Irreparable damage to the environment may call in time for 'EHR' to be inviolable and to involve nonderogable *erga omnes* responsibilities.¹⁷⁵ There are limitations with human rights. Notwithstanding this, the conclusion drawn in this paper is that 'EHR' should be protected and promoted in an Australian bill of rights which preserves the nation, its neighbours and broadly the planet for current and future generations.¹⁷⁶

¹⁷⁰ Bates, above n 5, 135.

¹⁷¹ Elaine Hsiao, *Environmental Refugees: the human rights implications of global climate change* (2008) [2] Peace and Conflict Monitor < http://www.monitor.upeace.org/innerpg.cfm?id_article=556 > at 16 April 2009.

¹⁷² von Doussa, above n 16, [8].

¹⁷³ Ibid [9].

¹⁷⁴ Bates, above n 5, 115, 122, 141; von Doussa, above n 16, [8]; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1090; Lyster, Lipman, Franklin, Wiffen and Pearson, above n 75, 21.

¹⁷⁵ Takacs, above n 13, 725, 760-761, 765.

¹⁷⁶ See Advocates for Environmental Human Rights, *Advocates for Environmental Human Rights* (2009) < <http://www.ehumanrights.org/> > at 15 April 2009; Bates, above n 5, 137, 188; *Constitution of the Republic of South Africa 1996 s 24*; Department of Climate Change, 'Summary Carbon Pollution Reduction Scheme: Australia's Low Pollution Future' *White Paper* (2008) [2] Department of Climate Change < <http://www.climatechange.gov.au/whitepaper/foreword.html> > at 29 April 2009; Editorial, above n 91, 4; Editorial, 'The Charter for the Environment' *Ecology and Sustainable Development FrancePressInfo* < http://www.capefrance.com/sig/ecology_1.html#1 > at 17 April 2009; Farrier and Moore, above n 85, 4; DE Fisher, above n 13, 67; Hancock, above n 2, 2, 51-52; Kindred, Saunders, Brunnee, Currie, McDorman, deMestral, Mickelson, Provost, Reif, Toope and Williams, above n 12, 1036; Pederson, above n 48, 9, 14, 16, 38, 40; *Rio Declaration on Environment and Development*, UN Doc A/CONF151/5/Rev.1 (1992) Principle 3; *United Nations Framework Convention on Climate Change*, opened for signature on 9 May 1992, UN Doc A/AC.237/18, 31 ILM 848 (entered into force 21 March 1994) art 3 (1).

Bibliography

1. Articles/Books/Reports

Anton, Donald, K, Kohout, Jennifer and Pain, Nicola 'Nationalizing Environmental Protection in Australia: The International Dimensions' 23 *Environmental Law* 1 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138923# > at 13 April 2009.

Advocates for Environmental Human Rights, *Advocates for Environmental Human Rights* (2009) < <http://www.ehumanrights.org/> > at 15 April 2009.

Atik, Jeffrey, 'Commentary' (2004) 2 *Human Rights Dialogue* 26 Carnegie Council on Ethics and International Affairs < http://www.cceia.org/resources/publications/dialogue/2_11/index.html/res/id=sa_File1/Human_Rights_Dialogue_Environment.pdf > at 13 April 2009

Gerry Bates, *Environmental Law in Australia* (6th ed, 2006) 125.

Boer, Ben and Wiffen, Graeme, *Heritage Law in Australia* (2005).

Brunee, Jutta, Currie, Robert J, McDorman, Ted L, deMestral, Armand LC, Mickelson, Karin, Provost, Rene, Reif, Linda C, Toope, Stephen J and Williams, Sharon A, *International Law Chiefly as Interpreted and Applied in Canada* (2006) 849.

Calma, Tom, Human Rights, Multiculturalism and Indigenous Rights (Speech delivered at Reconciliation Strategy Launch, South Brisbane, 30 July 2008) < http://www.hreoc.gov.au/about/media/speeches/race/2008/20080730_MDA.html > at 17 April 2009.

Campbell, Colm, and Kennedy, Ronan, 'The CHRIS Database Project: A Country-specific Human Rights Information System' (Paper presented at 13th Annual BILETA Conference: 'The Changing Jurisdiction', Dublin, March 27-28 2008) 3 British and Irish Legal Education Technology Association < <http://www.bileta.ac.uk/Document%20Library/1/The%20CHRIS%20Database%20Project%20-%20A%20Country-specific%20Human%20Rights%20Information%20System.pdf> > at 19 February 2009.

Canadian Human Rights Commission, 'The Canadian Charter of Rights and Freedoms', *Human Rights in Canada: A Historical Perspective* (2009) Canadian Human Rights Commission < <http://www.chrc-ccdp.ca/en/timePortals/milestones/113mile.asp> > at 29 April 2009.

Centre for International Environmental Law, *Human Rights and the Environment* (2009) < <http://www.ciel.org/Hre/programhre.html> > at 13 April 2009.

Chimni, BS, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 27 *Melbourne Journal of International Law* The Australasian Legal Information Institute < <http://www.austlii.edu.au/au/journals/MelbJIL/2007/27.html> > at 23 February 2009.

Choo, Kristen 'Chasing a Dream Living up to the Universal Declaration of Human Rights remains a struggle' (2009) *ABA Journal* 65, 67.

Citizenship and Immigration Canada, *A Look at Canada* (2008) Citizenship and Immigration Canada < <http://www.cic.gc.ca/english/resources/publications/look/look-20.asp> > at 17 April 2009.

Commission of Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine Occupied Arab Territories, Including Palestine* (2004) [11] Economic and Social Council, United Nations < <http://domino.un.org/unispal.nsf/1ce874ab1832a53e852570bb006dfaf6/631c8deb907650e985256e6000520f3b!OpenDocument> > at 25 February 2009.

Department of Climate Change, 'Summary Carbon Pollution Reduction Scheme' *Green Paper* (2008) 2 Department of Climate Change < <http://www.climatechange.gov.au/greenpaper/index.html> > at 28 April 2009.

Department of Climate Change, 'Summary Carbon Pollution Reduction Scheme: Australia's Low Pollution Future' *White Paper* (2008) [2] Department of Climate Change < <http://www.climatechange.gov.au/whitepaper/foreword.html> > at 29 April 2009.

Eagle, Stephen J, *The Role of the Common Law in Defining and Protecting the Environment: A Prolegomenon* (2008) 2-3 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103984 > 26 February 2009.

Editorial, 'Dramatic environmental change is a human rights issue, says 50+50 speaker' (2009) *Y File* [1] York University < <http://www.yorku.ca/yfile/archive/index.asp?Article=12332> > at 16 April 2009.

Editorial, 'The Charter for the Environment' *Ecology and Sustainable Development* FrancePressInfo < http://www.capefrance.com/sig/ecology_1.html#1 > at 17 April 2009.

Editorial, 'Water and International Water Law' (2003) *Hot Topics* 3.

Environment Canada, 'Vienna Convention for the Protection of the Ozone Layer' *Multilateral Environmental Agreements Environment Canada* (2006) < http://www.ec.gc.ca/international/multilat/ozone_e.htm > at 13 April 2009

Farrier, David, and Moore, Katrina, 'The scope of environmental law' in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse in Australia* (4th ed, 2002) 1.

Fisher, D, E, *Australian Environmental Law* (2003).

Fisher, Sherry, *Political theorist calls for recognition of environmental human rights* (2009) 1 University of Connecticut < <http://advance.uconn.edu/2009/090323/09032309.htm> > at 15 April 2009.

Fonteyne, Jean-Pierre, L, McNaughton, Anne, Stellios, James, Stephen, *Harris – Cases and Materials on International Law: An Australian Supplement* (2003).

Geary, Jen, *Mabo v Queensland No 2 1992 (Cth), Native Title* (2006) University of Calgary < <http://breeze.ucalgary.ca/p73407298/> > at 26 April 2009.

Giorgetta, S, 'Abstract The Right to a Healthy Environment, Human Rights and Sustainable Development' (2002) 2 (2) *International Environmental Agreements* 171 Ingenta < <http://www.ingentaconnect.com/content/klu/inea/2002/00000002/00000002/05091973?crawler=true> > at 19 February 2009.

Godden, Lee, 'Indigenous Heritage and the Environment: "Legal Categories are Only One Way of Imagining the Real"' (2002) 19 (4) *Environment and Planning Law Journal* 87 258.

Gullet, Warwick, 'Fisheries' in D Farrier and P Stein (ed) *The Environment Law Handbook Planning and Landuse* (4th ed, 2002) 633.

Hancock, Jan, *Environmental Human Rights: power, ethics and law* (2003) 1 Google < http://books.google.com/books?id=668ntVpdhUOC&dq=environmental+human+rights&printsec=frontcover&source=bl&ots=iPVimbPJhG&sig=z6xgnGfzxYpMiWf_A0TDJh9LKXs&hl=en&ei=NmXnSZS6B4-UswPt5Lz1AQ&sa=X&oi=book_result&ct=result&resnum=9 > at 14 April 2009.

Harris, D, J, *Cases and Material on International Law* (6th ed, 2004).

Health Canada (2009), 'Rotterdam Convention on Prior Informed Consent Procedure' *Consumer Product Safety* Health Canada < <http://www.hc-sc.gc.ca/cps-spc/pest/part/int/pic-icp-eng.php> > at 13 April 2009.

Hessing, Melody, Howlett, Michael, Summerville, Tracy, *Canadian natural resource and environmental policy: political* (2005) 251 Google < http://books.google.com/books?id=qHF160KzwcC&pg=PA251&lpg=PA251&dq=The+Environment+and+the+Canadian+Charter+of+Rights+and+Freedom&source=bl&ots=TRtmrzy2b5&sig=ou-LWLmsKhwcCbJGehv9JvAWc4&hl=en&ei=JJfoSdvLJYWitgPXrLH1AQ&sa=X&oi=book_result&ct=result&resnum=8 > at 17 April 2009.

Hodginson, David, and Garner, Renee, *Global Climate Change* (2008).

Hsiao, Elaine, *Environmental Refugees: the human rights implications of global climate change* (2008) Peace and Conflict Monitor < http://www.monitor.upeace.org/innerpg.cfm?id_article=556 > at 16 April 2009.

International POPs Elimination Network, *Stockholm Convention in Action in Jordan Land and Human to Advocate Progress (LHAP)* (2006) 8 International POPs Elimination Network < www.ipen.org/ipepweb1/library/ipep_pdf_reports/1jor%20stockholm%20convention%20in%20action%20in%20jordan.pdf > at 19 February 2009.

Jessup, Brad, *Questioning the sustainability paradigm* (2008) Brad Jessup Online < <http://bradjessup.wordpress.com/> > at 18 April 2009.

Jóhannsdóttir, Aðalheiður, *The significance of the default* (2009) 25, 38 DiVA portal Uppsala University < http://www.diva-portal.org/diva/getDocument?urn_nbn_se_uu_diva-9546-2_fulltext.pdf > at 23 February 2009.

John Humphrey Centre, *Youth Guide to the Canadian Charter of Rights and Freedoms* (2009) Docstoc < <http://www.docstoc.com/docs/3879610/Guide-to-Canadian-Charter-of-Rights-and-Freedoms> > at 17 April 2009.

Johnston, Barbara, Rose, 'Commentary' (2004) 2 *Human Rights Dialogue* 12 Carnegie Council on Ethics and International Affairs < http://www.cceia.org/resources/publications/dialogue/2_11/index.html/res/id=sa_File1/Human_Rights_Dialogue_Environment.pdf > at 13 April 2009.

Josling, Tim, Roberts, Donna and Hassan, Ayesha, *The Beef-Hormone Dispute and its Implications for Trade Policy* (2009) 12 Freeman Spogli Institute for International Studies < <http://iis-db.stanford.edu/pubs/11379/HORMrev.pdf> > at 22 February 2009.

Kindred, Hugh, M, Saunders, Phillip, M, Brunnee, Jutta, Currie, Robert, J, McDorman, Ted, L, deMestral, Armand L, C, Mickelson, Karin, Provost, Rene, Reif, Linda, C, Toope, Stephen, J, Williams, Sharon, A, *International Law Chiefly as Interpreted and Applied in Canada* (7th ed, 2006).

Koe, Adriana, 'Damming the Danube: The International Court of Justice and the Gabcíkovo Nagymaros Project (Hungary v Slovakia)' (1998) 27 *Sydney Law Review* s 4 The Australasian Legal Information Institute < <http://www.austlii.edu.au/au/journals/SydLRev/1998/27.html> > at 13 April 2009.

Koskenniemi, Martti, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *EUROPEAN JOURNAL OF LEGAL STUDIES* 3 European University Institute < <http://www.ejls.eu/1/3UK.pdf> > at 22 February 2009.

Koskenniemi, Martti, *Occupied Zone* (2007) 9 Harvard Law School < <http://blogs.law.harvard.edu/hltf/files/2009/02/mktel-aviv-07e.doc> > at 24 February 2009.

Lucy, Juliet, *Water Regulation The Laws of Australia* (2008).

Lyster, Rosemary and Bradbrook, Adrian, *Energy Law and the Environment* (2006).

Lyster, Rosemary, Lipman, Zada, Franklin, Nicola, Wiffen, Graeme, Pearson, Linda, *Environmental and Planning Law in New South Wales* (2007).

MacDonald, Karen, 'Booknotes' Constitutional Environmental Rights by Tim Hayward. Oxford: Oxford University Press, 2005. 236pp. (2005) [2].

McAdam, Jane, Climate Change 'Refugees' and International Law (2007) 2 New South Wales Bar Association < <http://www.nswbar.asn.au/circulars/climatechange1.pdf> > at 19 February 2009.

McKay-Panos, Linda, Mae, *The Public's Right of Effective Access to Information in the Environmental Assessment Process* (Master of Laws), University of Calgary (2000) c 1.

McKay-Panos, Linda, Mae, 'Foreward' in Ibironke Odumosu (ed), 'Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement' *Human Rights and Resource Development Project* (2006) iii, iii.

McLeod, Glen, and Newman, Peter 'Climate change law and the real world' in Wayne Gumley and Trevor Daya-Winterbottom (ed), *Climate Change Law: Comparative, Contractual and Regulatory Considerations* (2009) 45.

McRae, Heather, Nettheim, Garth, Beacroft, Laura and McNamara, Luke, *Indigenous Legal Issues Commentary and Materials* (2003).

Morijn, John, *Conflicts between Fundamental Rights or Conflicting Fundamental Rights Vocabularies? An Analysis of Diverging Uses of 'Fundamental Rights' In the Context of International and European Trade Law* (2008) 22 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1076647 > at 8 May 2009.

National Human Rights Consultation Secretariat, 'About the Consultation' *Human Rights* (2009) [3] < National Human Rights Consultation Secretariat < http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation > at 19 April 2009.

Nelson, Rebecca 'Legislation for ICM: advancing water resources sustainability?' (2005) 22 2 *Environmental and Planning Law Journal* 96.

Northern Alliance for Sustainability, *Environmental Human Rights* (2009) Northern Alliance for Sustainability < <http://www.anped.org/index.php?part=71> > at 16 April 2009.

Odumosu, Ibronke, 'Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement' *Human Rights and Resource Development Project* (2006).

Office of the United Nations High Commissioner for Human Rights (2001) 1, 'Introduction'. *Human Rights and the Environment* Office of the United Nations High Commissioner for Human Rights < <http://www.unhchr.ch/environment/> > at 13 April 2009.

Pahuja, Sundhya, *Operationalising the Universal: Development and the Rule of Law* (Paper Presented at the Human Right and Global Justice Conference, Warwick, 29-31 March) 5 The University of Warwick < <http://www2.warwick.ac.uk/fac/soc/law/events/past/2006/rightsandjustice/participants/papers/pahuja.doc> > at 24 February 2009.

Pederson, Ole, W, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 (1) *Georgetown International Environmental Law Review* 11 Social Science Research Network < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122289# > at 13 April 2009.

Peel, Jacqueline, *The Precautionary Principle in Practice: Environmental Decision Making and Scientific Uncertainty* (2005).

Phillips, Susan, 'Land rights and native title in NSW' in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse in Australia* (4th ed, 2002) 661.

Ridge, Kathy, 'Water Supply' in D Farrier and P Stein (ed), *The Environment Law Handbook Planning and Landuse* (4th ed, 2002) 515.

Ryland, Diane, 'Abstract The Evolution of Environmental Human Rights in Europe' (2005) 47 *Managerial Law* 1 < <http://www.emeraldinsight.com/Insight/viewContentItem.do;jsessionid=6A570E6E1B1126AEAF7FF4FBDA540356?contentType=Article&contentId=1519760> > at 14 April 2009.

Seidenberg, Steven, 'Where's the Revolution?' (2009) *ABA Journal* 50.

Soden, R, J, and Prager, D, 'Broken Promises: Environmental Rights Regimes as Human Rights Guarantees in Latin America and Sub-Saharan Africa' (*Paper presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, 5 February 2009*) All Academic Inc < http://www.allacademic.com/meta/p69664_index.html > at 13 April 2009.

Skolnik, Richard, L, *Essentials of Global Health* (2007) Google < <http://books.google.com/books?id=XBARu3KzSNAC&pg=RA1-PA60&lpg=RA1->

[PA60&dq=ICESR&source=bl&ots=7FXd74-XHQ&sig=YCcDzXKRktiXyTtG6nozIWNeZkQ&hl=en&ei=onDnSZfWH52wtgOTzrXlAQ&sa=X&oi=book_result&ct=result&resnum=6](#) > at 14 April 2009.

Spyke, Nancy, Perkins, 'The Land Use - Environmental Law Distinction: A Geo-Feminist Critique', (2002) 13 *Duke Environmental Law & Policy Forum* 55, 85 *Duke Law* < <http://www.law.duke.edu/shell/cite.pl?13+Duke+Envtl.+L.+&+Pol'y+F.+55#F39> > at 19 February 2009.

Takacs, David, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' [2008] *New York University Environmental Law Journal* 711, 712, 722, 725, 728-729, 733, 763 *New York University* < <http://www3.law.nyu.edu/journals/envtlaw/issues/vol16/Takacs.pdf> > at 16 April 2009.

United Nations, *Water for Life 2005-2015* (2006) *United Nations* < <http://www.un.org/waterforlifedecade/>> at 17 April 2009.

Vlavianos, Nickie, 'The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis' *Human Rights and Resource Development Project* (2006).

THE HONOURABLE von Doussa QC, John, 'Human Rights and Climate Change: A Tragedy in the Making' *HREOC Seminar Series for the 60th Anniversary of the Universal Declaration of Human Rights* (2008) [6] < http://www.hreoc.gov.au/legal/seminars/speeches/john_von_doussa08.html > at 23 April 2009.

Vukasovic, Vid, 'Human rights and environmental issues' *Human rights and scientific and technological development* (1990) Pt 4 (9) *United Nations University* < <http://www.unu.edu/unupress/unupbooks/uu06he/uu06he0i.htm#9.%20human%20rights%20and%20environmental%20issues> > at 13 April 2009.

Weiss, Edith, Brown, International human rights law and environmental problems *Environmental change and international law: New challenges and dimensions* (1992) *United Nations University* < <http://www.unu.edu/unupress/unupbooks/uu25ee/uu25ee0k.htm#international%20human%20rights%20law%20and%20environmental%20problems> > at 19 February 2009.

Yablokov, Alexey V, *Ecology and Human Rights in Russia* (2000) *The Online Gladfly* < <http://gadfly.igc.org/russia/yablokov1.htm> > at 16 April 2009.

2. Case Law

Commonwealth v Tasmania ("*Tasmanian Dam case*") [1983] HCA 21; (1983) 158 CLR 1.

E H P v. Canada, UN Doc CCPR/C/OP/1 at 20 (1984).

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540 3.

Kelo, et al, v. City of New London, et al, (Conn, 2005) (04-108) 545 U.S. 469 268.

Mabo v Queensland (No 2) ("*Mabo case*") [1992] HCA 23; (1992) 175 CLR 1.

Ruckelshaus v Monsanto Co (1984) 467 US 986.

3. Legislation

African Charter on Human and Peoples' Rights 1986.

Carbon Pollution Reduction Scheme Bill 2009 (Cth)

Canadian Charter of Rights and Freedoms 1982.

Charter for the Environment 2005.

Commonwealth of Australia Constitution Act 1900 (Imp).

Constitution of the Republic of Costa Rica 1825 (as amended)

Constitution of India 1950.

Constitution of the Republic of South Africa 1996.

Environmental Impact Assessment Act [Gesetz über die Umweltverträglichkeitsprüfung – UVPG] 2001

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

4. Treaties

American Convention on Human Rights, opened for signature 22 November 1969, 114 UNTS 123 (enacted into force 18 July 1978).

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, opened for signature on 22 March 1989, 28 ILM 657, 1673 UNTS 57 (enacted into force 5 May 1992).

Charter of the United Nations, opened for signature 26 June 1945, 59 Stat 1031 (enacted into force 24 October 1945).

Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, opened for signature on 25 June 1998, ECE/CEP/43 (enacted into force 30 October 2001).

International Covenant on Civil and Political Rights, opened for signature on 16 December 1966, UN Doc A/6316 (enacted into force 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, opened for signature on 16 December 1966, UN Doc A/6316, (enacted into force 3 January 1976).

International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, opened for signature on 29 December 1972, 11 ILM 1294, (enacted into force 30 August 1975).

Kyoto Protocol, opened for signature on 16 March 1998, 37 ILM 32 (enacted into force 16 February 2005).

Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature on 16 September 1987, 26 ILM 1550, 1522 UNTS 3 (enacted into force 1 January 1989).

Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature on 16 December 1966, 2200A (XXI) (enacted into force 23 March 1976).

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, opened for signature in 1998 (enacted into force 24 February 2004)

Stockholm Convention on Persistent Organic Pollutants, opened for signature on 23 May 2001, UNEP/POPS/CONF/4, 40 ILM 532, 535 (enacted into force 17 May 2004).

UN Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 31 ILM 1312 (1992).

United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc A/51/869.

United Nations Framework Convention on Climate Change, opened for signature on 9 May 1992, UN Doc A/AC.237/18, 31 ILM 848 (entered into force 21 March 1994).

Vienna Convention for the Protection of the Ozone Layer, 26 ILM 15, UN Doc A CONF 39/27 opened for signature on 22 March 1985 (enacted into force 22 September 1988).

5. Other Sources

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 ILM 1542 (1995).

American Declaration on the Rights and Duties of Man, OEA/Ser.L.V/II.82 1948

Canada-United States Agreement on Air Quality, 30 ILM 676 (1991).

Cth, David R Boyd, *Right to clean air, clean water, and a healthy environment*, Petition: No 163A (2006) 1 Office of the Auditor General of Canada < http://www.oag-bvg.gc.ca/internet/English/pet_163A_e_28897.html .> at 17 April 2009.

Cth, Joint Standing Committee on Treaties Rotterdam Convention — *Notification of Certain Hazardous Chemicals and Pesticides* c 7 (2003) Parliament of Australia < <http://www.aph.gov.au/HOUSE/committee/jsct/September2003/report/chapt7.pdf> > at 13 April 2009.

Declaration on the Right to Development, GA Res 41/128 1986.

European Communities — Measures Concerning Meat and Meat Products (Hormones), WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body).

Gabcikovo-Nagymaros Project (*Separate Opinion of Vice President Weeramantry*) [1993] ICJ International Court of Justice < <http://www.icj-cij.org/docket/files/92/7383.pdf> > at 13 April 2009.

Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee, Australia*, UN Doc A/55/40 (2000).

Rio Declaration on Environment and Development, UN Doc A/CONF151/5/Rev.1 (1992).

Standing Committee on Environment Communications, Information Technology and the Arts, Parliament of Australia, *Water Bill 2007 [Provisions] Water (Consequential Amendments) Bill 2007 [Provisions]* (2007).

Stockholm Declaration on the Human Environment, UN Doc A/Conf/48/14/Rev, 1 (1973).

Submission to Independent review of the *Environment Protection and Biodiversity Conservation Act 1999* Parliament of Australia, Canberra, 16 December 2008 (Derek Fenton) < <http://www.environment.gov.au/epbc/review/submissions/pubs/043-derek-fenton.pdf> > at 18 April 2009.

UN Draft Declaration on the Rights of Indigenous Peoples. UN Doc E/CN.E/Sub.2/1994/2/Add.1 (1994).

Universal Declaration of Human Rights, GA Res 217A (111), UN Doc A/810 at 71 1948.

WTO Agreement on the Application of Sanitary and Phytosanitary Measures (1995).

