

**THE RESPONSIBILITY OF THE U.S. UNDER INTERNATIONAL LAW
FOR THE LEGACY OF TOXIC WASTE AT THE FORMER U.S. BASES IN THE
PHILIPPINES**

by

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ABSTRACT

In 1992, the Americans completed its withdrawal from the Philippines, ending almost a century of U.S. military presence. However, it was soon discovered that the U.S. left behind several contaminated sites at its former military bases in the Philippines due to inadequate hazardous waste management. It appears that the U.S. Department of Defense failed to implement clear and consistent environmental policies at Clark and Subic.

The U.S. maintains that it is under no obligation to undertake further cleanup at its former installations inasmuch as the Philippines has waived its right to do so under the basing agreement. It will be argued that the Philippines made no such waiver under the *Manglapus-Schultz Agreement*. Thus, the U.S. remains responsible under international law for the resulting environmental damage at its former bases.

States have the responsibility under customary international law to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. A state will be responsible if it breaches this international obligation. It will be argued that the U.S. breached its obligation under international law when activities within its effective control caused significant environmental damage to areas forming part of Philippine territory. Such a breach may also result in the violation of the emerging right to a healthy environment. Existing human rights, such as the right to life and health, right to food and water, right to a safe and healthy working environment and right to information, will be applied from an environmental perspective to determine whether the Filipinos' right to a healthy environment was violated.

While a legal claim can be made for the remediation of the environment and compensation of the victims, it will be argued that existing mechanisms for the settlement and adjudication of international claims are inadequate. States are generally reluctant to submit to the jurisdiction of international tribunals and most of these fora do not allow non-state entities to appear before them. Thus, it would be argued that the most promising approach may well be through political and diplomatic means.

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AD MAJOREM DEI GLORIAM.

I. Introduction

For more than a century, the United States has imposed its economic and military interest on the Philippines. The Americans "occupied" the Philippines in 1898 for the purpose of securing a source of raw materials for U.S. industry and a market for U.S.- manufactured goods.¹ More importantly, the U.S. saw the Philippines as a military strong point from which to penetrate the markets of China.² Even as the U.S. kept its pledge to emancipate the Philippines in 1946, it heavily circumscribed its grant of Philippine Independence.³ Greatly devastated as an aftermath of World War II, the Philippines had, in effect, no choice but to enter into economic and military agreements with the U.S. In the long run, these agreements appear to be manifestations of continued domination by the U.S. to further its economic and military interests.⁴ These agreements ensured not only a continuing political relationship of the two countries after independence but also intertwined their destinies for the next fifty years.⁵

¹ The Philippines was a colony of Spain for over three centuries. In April 1898, the Spanish-American war ensued. The war ended with the signing of the Treaty of Paris on 10 December 1898. "Under the treaty: (a) Spain ceded the Philippines, Guam and Puerto Rico to the U.S.; (b) U.S. paid the sum of \$20 million to Spain; (c) Spain withdrew from Cuba; (d) Civil and political status of the inhabitants in the ceded territories would be determined by the U.S. Congress." (Zaide, *infra* note 12 at 259). A resolution issued by the U.S. Senate and House of Representatives clarified the nature of the U.S.'s occupation of the Philippines:

[By] the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the U.S., nor is it intended to permanently annex said islands as an integral part of the territory of the U.S.; but it is the intention of the U.S. to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government and in due time to make such disposition of said islands as will best promote the interests of the U.S. and the inhabitants of said islands. (Cong. Rec. 55th Cong. 3d Sess. Vol. 32, p. 1847).

² D. Schirmer and S. Shalom, eds., *The Philippines Reader, a History of Colonialism, Neocolonialism, Dictatorship and Resistance* (Boston: South End Press, 1987) at 7 [hereinafter, Philippines Reader].

³ *Ibid.*

⁴ *Ibid.*

⁵ G. De la Banda, "Fifty Years of Philippine-American Relations: A Filipino's Perspectives" (Fifty Years of Philippine-American Relations, Ateneo de Davao University, 8 July 1996) at 27.

Perhaps the most significant agreement entered into by the Philippines and the U.S. after the grant of independence in 1946 was the 1947 Military Bases Agreement.⁶ For almost half a century, the Philippines played host to two of the most valuable military bases in the world, namely, Clark Air Force Base ("Clark") and Subic Naval Base ("Subic"), which were crucial to U.S. defense of the Asian region. The U.S. military presence in the Philippines was likewise perceived to be indispensable in preventing the growing threat of communism. The Philippines remained dependent on the U.S. not only for its security but also economically. The Philippines relied heavily on U.S. economic aid as it struggled to rebuild the nation in the aftermath of the war. In the view of some, by making the Philippine economy dependent on the U.S., the U.S. was able to fortify its supremacy over the Philippines.

In September 1991, the Philippine Senate was presented with an opportunity to put an end to the presence of U.S. Bases in the Philippines. The Philippine Senate voted to reject a new bases treaty which would have extended the term of the Bases for another ten (10) years. The complete withdrawal of U.S. military forces from Clark and Subic the following year marked the end of almost a century of American military presence in the Philippines.⁷ It also signified the possibility of forging a more equitable relationship between the two countries.

The conversion of Clark and Subic into flagship economic centers was envisioned to be the answer to the Philippines' ailing economy. Unfortunately, even before these economic zones could take off, it was discovered that the U.S. left behind a legacy of environmental damage brought about by inadequate environmental management at the former Bases.

⁶ *Agreement Between the United States of America and the Republic of the Philippines Concerning Military Bases*, 14 March 1947, 61 Stat. 4019 (hereinafter Military Bases Agreement).

⁷ The Philippines, however, was occupied by Japan from 1941 to 1945.

Preliminary studies indicate the presence of heavy metals and other compounds, which have endangered the lives and health of people residing in communities near the former Bases.

Put simply, the U.S. failed to undertake any cleanup despite knowledge of environmental contamination in Clark and Subic prior to their turnover to the Philippine Government. The U.S. Government has consistently denied its responsibility for the environmental damage at Clark and Subic, maintaining that it is under no obligation to cleanup its former Bases in the Philippines under the 1947 Military Bases Agreement, as amended.⁸ On the other hand, the Philippine Government initially downplayed the contamination problem for fear of scaring away potential foreign investors and eroding the real estate value of the bases. It was only recently that the Philippine Government pushed for full U.S. liability for environmental remediation and compensation to victims.

Notwithstanding the so-called "special relationship" between the U.S. and the Philippines, it is apparent that the U.S. is not inclined to undertake the cleanup and restoration of Clark and Subic. In stark contrast, in 1999 the U.S. Department of Defense ("DoD") recommended the cleanup and disposal of more than three million pounds of polychlorinated biphenyls ("PCBs") stored in capacitors and transformers at military installations in Belgium, Germany, Italy, Japan, Korea, Spain, Turkey and the United Kingdom.⁹ The U.S. is removing hazardous waste or paying to do so at bases in allied countries such as Germany and Canada.¹⁰

⁸ The term "1947 Military Bases Agreement, as amended" shall hereinafter be referred to as "Military Bases Agreement" or "MBA."

⁹ R. Simbulan, "Environmental Injustice: Rectifying America's Poisoned Legacy in the Philippines," online: BoondocksNetcom <http://www.boondocksnets.com/sctexts/simbulan001014.html> (date accessed: 22 November 2000) [hereinafter Environmental Injustice].

¹⁰ "Cleaning Up After the Pentagon" *New York Times* (25 December 1998) A32.

More importantly, in 1998 alone, the U.S. Government spent \$2.13 billion for cleanup of bases in the United States.¹¹

This thesis will examine the United States' responsibility under international law for environmental damage at Clark and Subic. It is divided into 5 main chapters.

Chapter II gives a historical overview of the special relationship between the Philippines and U.S., with particular emphasis on the Military Bases Agreement and the negotiation for its extension. The Chapter likewise describes the functions of Clark and Subic, throughout the course of their operations. It also presents the social and health costs of the U.S. military presence in the Philippines.

Chapter III discusses the presence of hazardous waste contamination at Clark and Subic, summarizing environmental and health studies that have been undertaken. The Chapter presents the individual responses of the U.S. and Philippine Governments to the presence of hazardous waste contamination at Clark and Subic.

Chapter IV discusses the environmental record of DoD installations overseas. This Chapter outlines the development of DoD's Environmental Policy for overseas facilities, with special emphasis on the policies enforced at the time Clark and Subic were in full operation until their closure. Also, the environmental waste management policy implemented at Clark and Subic is analysed vis-à-vis U.S. environmental standards.

¹¹ Environmental Injustice, *supra* note 9.

Chapter V establishes a basic framework in which to understand international responsibility for environmental damage. This Chapter examines some of the relevant emerging principles in international environmental law. It traces the evolution of the duty of states not to cause transboundary environmental damage, from the *Trail Smelter Arbitration* in 1941 to the invocation of this obligation in international agreements, conferences and its recognition in a number of international arbitral and judicial decisions. Thereafter, developments in the area of state responsibility for breach of an international obligation of the state are examined. Particular attention is given to the standard of care required of states to fulfil the obligation to prevent transboundary environmental harm. Forms of reparation when international environmental obligations have been violated are discussed briefly, along with standing and possible remedies for redress.

In Chapter VI, the provisions of the Military Bases Agreement are first interpreted to determine whether the Philippines has waived its right to demand cleanup and restoration of contaminated sites. After determining that no waiver has been made by the Philippines, an analysis of the United States' international responsibility for the environmental contamination at Clark and Subic is made based on the principles discussed in Chapter V. International responsibility of the U.S. for breaching its obligation not to cause harm to the environment of other states is examined in the context of: (i) the U.S.'s unrestricted use and control of the Bases; (ii) the U.S.'s obligation under international law to exercise due diligence; and (iii) the significant environmental damage at Clark and Subic. Thereafter, it will be determined whether the emerging right to respect and preserve the Filipino's right to a healthy environment was violated through the application of existing international human rights instruments. Lastly, this Chapter explores the available international mechanisms to adjudicate and settle environmental disputes.

II. Historical Background

A. Treaty of General Relations between the Republic of the Philippines and the US: The Price of "Independence"

Out of the ashes of World War II emerged the Third Philippine Republic.¹² Never was a republic born in the world with such staggering problems as the newborn Philippine Republic.¹³ The war had devastated the country, especially its capital of Manila. The country badly needed rehabilitation money to revive its economy which was in shambles.

After occupying the Philippines for almost fifty years, the United States declared Philippine Independence on 4 July 1946. As part of the conditions imposed by the U.S. for granting independence, the *Treaty of General Relations* between the Republic of the Philippines and United States of America was signed on 14 July 1946. This Treaty established the legal basis for the continued existence of the U.S. bases in the Philippines, which in effect, rendered the declaration of Philippine independence "meaningless."¹⁴

The 1947 Military Bases Agreement (or "MBA"),¹⁵ signed on the premise of "mutuality of security interest," allows the U.S. to retain, maintain and operate military bases in the Philippines, reserves its right to expand the present bases or, to acquire new ones if necessary,

¹² G. Zaide & S. Zaide, *History of the Republic of the Philippines* (Manila: Cacho Hermanos Inc., 1987) at 360. On 7 December 1941, the forces of Imperial Japan bombed Pearl Harbour. Simultaneously, Japan attacked the Philippines since it was occupied by the U.S. For four years the Philippines was occupied by Japan. On 5 July 1945, U.S. General Douglas MacArthur announced the liberation of the Philippines.

¹³ *Ibid.* at 361-362. The Republic of the Philippines had the following problems at its inception: economic rehabilitation, cultural rehabilitation, financial poverty of the government, peace and order and moral and spiritual fiber of the people has been debased. (*Ibid.*)

¹⁴ R. Simbulan, *The Bases of Our Insecurity* (Quezon City: Balai Fellowship Inc., 1983) [hereinafter *Bases of Insecurity*] at 74.

¹⁵ Military Bases Agreement, *supra* note 6.

and defines the rights and obligations of the two parties in connection with the bases.¹⁶ Originally, the MBA agreement was to last for 99 years with at least 23 base sites covering about 250,000 hectares in a total of 13 provinces in Luzon, Visayas and Mindanao and provided the US “the full exercise of rights, power and authority within these bases.”¹⁷ More importantly, the MBA placed no restrictions on what the U.S. could use the bases for, nor the types of weapons that it could deploy or store there. Two subsequent agreements on military assistance and mutual security were likewise entered into by the U.S. and the Philippines after the grant of independence, namely, the *U.S.-R.P. Military Assistance Agreement* (1947) and the *Mutual Defense Agreement of 1951*.¹⁸

Some controversial provisions of the MBA have been a source of irritation between the countries, specifically the extra-territorial rights given to American servicemen, and the assurance of unhampered use of the Bases granted to the U.S.¹⁹ The provisions of the MBA “clearly negate Philippine sovereignty and independence.”²⁰ The language of the Agreement made it clear that the U.S. bases were U.S. territory in fact, if not, in law.²¹ The MBA “effectively made Philippine sovereignty an empty term.”²²

The lopsidedness of the MBA was such that in subsequent negotiations, both sides strove to reduce the disparity.²³ Between 1947 and 1988, the MBA was amended over 40 times.²⁴

¹⁶ Bases of Insecurity, *supra* note 14 at 76.

¹⁷ R. Simbulan, *A Guide to Nuclear Free Philippines, Primer on U.S. Military Bases, Nuclear Weapons and What the Filipino People are Doing About Them* (Manila: Ibon Primer Series, 1989) at 23 [hereinafter *Nuclear Free Philippines*].

¹⁸ Mutual Defense Treaty, Philippines and U.S., 30 August 1951, 3 U.S.T. 3947, 1951 U.S.T. Lexis 554.

¹⁹ Nuclear Free Philippines, *supra* note 16 at 17-21.

²⁰ *Ibid.*

²¹ A. Bengzon and R. Rodrigo, *A Matter of Honor, The Story of the 1990-1991 RP-US Bases Talks* (Pasig City: Anvil Publishing Inc., 1997) at 18.

²² *Ibid.*

²³ *Ibid.*

²⁴ Nuclear Free Philippines, *supra* note 17 at 23.

These amendments included adding terms under which the Bases would be returned to the Philippines;²⁵ changing the term of the Agreement from 99 years to 25 years;²⁶ turning over to the Philippines the nominal control of much of the U.S. Bases;²⁷ and promising economic aid and military assistance.²⁸ Notably, the provisions in the 1988 *Manglapus-Schultz Agreement* covering the ownership and disposition of buildings, structures and other property if the U.S. left the Bases, would later be used against the Philippines when the latter demanded the Bases be cleaned-up.

Aside from military agreements, the Philippines and the U.S. also entered into economic agreements which defined the economic relations of the two countries. The *Philippine Trade Act of 1946 or the Bell Trade Act*²⁹ established a system of preferential tariffs between the U.S. and the Philippines, while placing various restrictions on the Philippine Government's control over its own economy.³⁰ In effect, the Agreement made the Philippine economy dependent on that of the U.S. Moreover, the Act required the amendment of the Philippine Constitution of

²⁵ *Bohlen-Serrano Memorandum of Agreement*, Philippines and U.S., 14 August 1959 (not printed) and *Exchange of Notes Between the Government of the Philippines and the Government of the United States amending the Military Bases Agreement*, 31 August 1971, TIAS 9224; 30 U.S. T. 863..

²⁶ *Agreement Amending the Agreement of March 14, 1947, as amended*, Philippines and U.S. 16 September 1966, 17 U.S.T. 1212; 1966 U.S.T. LEXIS 329. (hereinafter Ramos-Rusk Agreement) Unless terminated earlier by mutual agreement of the two governments, the Agreement as amended, shall remain in force for a period of 25 years from 16 September 1966. The agreement was set to expire on 16 September 1991 "after which, unless extended for a longer period, shall become subject to termination upon one year's notice by either government (Ibid.).

²⁷ *Agreement Amending the Agreement of March 14, 1947, as amended*, Philippines and the U.S., 7 January 1979, TIAS 9224, 30 UST 863 (hereinafter Romulo-Murphy Exchange of Notes).

²⁸ *Memorandum of Agreement Amending the Agreement of March 14, 1947, as amended*, Philippines and U.S., 1 June 1983, 35 U.S.T. 889; 1983 U.S.T. LEXIS 332 (hereinafter Romualdez-Armacost Agreement); and *Memorandum of Agreement Supplementing and Amending the Agreement of March 17, 1974, as amended* Philippines and U.S., 17 October 1988, TIAS 11633, 1988 U.S.T. LEXIS 96 (hereinafter Manglapus-Schultz Agreement).

²⁹ *Philippine Trade Act of 1946*, 60 Stat. 141 (1946) (repealed 1974).

³⁰ Philippines Reader, *supra* note 2 at 87.

1935 so as to accord U.S. citizens the right to engage in business in the Philippines equally to that of Filipinos.³¹

B. Functions of the Major U.S. Facilities

The Military Bases Agreement allowed the U.S. to retain the use of several bases in the Philippines, among them Fort Stotsenburg, Clark Field and Subic Naval Base. Fort Stotsenburg and Clark Field were subsequently combined to create Clark Air Base.³² The magnitude of military activities inside these Bases provides an insight into the possible environmental effects of the operations over the years.

1. Strategic Role of Clark and Subic

The former U.S. Military Bases in the Philippines served to support and assist in directing all U.S. military operations in Asia and the Middle East. Clark and Subic were considered the most valuable military bases in the world.³³ With the Philippines being strategically located at the 'crossroads' of the South China Sea, Pacific Ocean, Indian Ocean, and Indonesian straits, the U.S. depended heavily on Clark and Subic for military interventions in the Asia region.³⁴ These Bases became staging areas for U.S. troop involvement during the

³¹ *Ibid.* "The Philippine Constitution had reserved the development of public utilities and the exploitation of natural resources to Filipinos or to corporations that were at least 60% Filipino-owned." In 1955, the Bell Trade Act was replaced by the Laurel-Langley Agreement. "Under this agreement, Philippine investors were given the same right to invest in the United States as U.S. Investors had to invest in the Philippines. However, U.S. investors were guaranteed equal treatment with Filipinos in all areas of the economy, not just in the areas of natural resources and public utilities." (*Ibid.* at 94-96).

³² Clark Development Corporation, Background, online: Clark Development Corporation <http://www.clark.com.ph/clark.html> (date accessed: 14 June 2001) (hereinafter CDC).

³³ Bases of Insecurity, *supra* note 14.

³⁴ International Grassroots Summit on Military Base Cleanup, *Country Reports*, online: Foreign Policy In <http://www.foreignpolicy-infocus.org/basecleanup> at 39 (last modified: 3 July 2001) [hereinafter Grassroots Summit].

Korean War in the 50s, the Vietnam War in the '60s and '70s, and interventions in the Persian Gulf War in the '80s and 90's.³⁵

a. Clark Air Base

Clark Air Base ("Clark"), located in Pampanga province, about 50 miles north of Manila on the MacArthur National Highway was reputed to be the largest U.S. military installation in Asia and second largest base in the U.S. Air Force.³⁶ The Base proper consisted of 49,000 hectares, enclosed within a 22-mile perimeter.³⁷ Its assets included petroleum, oil and lubricant storage capacity of 25 million gallons, a large bombing range and approximately 200,000 square feet of ammunition storage space, located in 34 igloos.³⁸ Clark had a 10,500 foot runway with parallel taxiway, which was suitable for the largest military or commercial transport in the US Air Force or Naval Inventory.³⁹ The Base also had almost 600,000 square yards of usable parking apron, and 79,000 square feet of hangar base.⁴⁰ Clark functioned as (1) a Command and Control of the Pacific Air Force operations in the Western Pacific;⁴¹ (2) a major nodal point for communications between US forces in the Pacific and the Indian Oceans;⁴² (3) a strategic enroute base offering itself as a jump-off point for contingency deployments in the South and Southeast Asia and in Eastern Africa or the Middle East;⁴³ and (4) a training ground for US forces.⁴⁴

³⁵ Grassroots Summit, *supra* note 34 at 39..

³⁶ Bases of Insecurity, *supra* note 14 at 131.

³⁷ *Ibid.* at 132.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 134.

⁴² *Ibid.* at 135.

⁴³ *Ibid.* at 137.

⁴⁴ *Ibid.* at 138.

b. Subic Naval Base

Subic Bay is a deep-water harbour, formed by volcanic activity, about 50 miles northwest of Manila.⁴⁵ The Base covered 62,000 acres altogether, 36,000 acres of land (15,000 hectares) and 26,000 acres (11,000 hectares) of water.⁴⁶ Berthing space, at three major wharves, totals over 6,000 feet, at depths ranging from 20 to 40 feet, which can accommodate the US Navy's largest aircraft carrier or submarine.⁴⁷

Subic supported the operating units of the US Seventh Fleet in the Western Pacific, handling one million tons of supplies per year.⁴⁸ Subic boasted of being the largest naval supply depot in the world with a stock of 180,000 different items ranging from sea rations to five-inch barrels.⁴⁹ It handled one million barrels of fuel each month, providing storage and distribution of fuel and other consumable goods for the US Seventh Fleet, the US Medical Center, Clark and Camp John Hay.⁵⁰ It was a major repair facility for the US Seventh Fleet, covering all US combat ships in the Asian Region.⁵¹ Subic's geographical location near the demarcation line between the Indian and Pacific Oceans, at the very centre of the US Seventh Fleet's areas of responsibility, gave it the advantage for rapid projection of naval power and logistical support for all ships in the region.⁵²

2. Post Cold War

⁴⁵ Bases of Insecurity, *supra* note 14 at 117.

⁴⁶ *Ibid.* 120-121.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 119.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.* at 119-120.

It cannot be denied that Clark and Subic were tremendous in size and capability. With the crumbling of the Berlin Wall and collapse of the Soviet Union, it was clear that the U.S. military would be downsized. As the expiration of the Military Bases Agreement drew to a close, it became apparent that these installations exceeded the actual military needs of the U.S. military.⁵³

In fact, some of the facilities inside Clark had not been used to their full capacity after the peak of the Vietnam War nearly 20 years earlier.⁵⁴ A U.S. Congressional Study conducted during U.S. President Carter's Administration confirmed that the U.S. did not need Clark.⁵⁵ Evidently, Clark was dispensable and its assets could be readily redeployed to U.S. bases elsewhere in the Pacific. The story was different, however, for Subic. Its shipping facilities, with three large wharves and three dry-docks, were vital to the U.S. Navy's operations in the Pacific. Subic could repair almost any ship in the U.S. fleet, at far less cost than any other U.S. naval base in the Pacific. Subic's advantage was its cheap and skilled labour force.⁵⁶ In any case, studies showed that if necessary, the facilities in Subic could be relocated to other areas, though at some cost to the U.S.⁵⁷

C. Social and Health Cost of the U.S. Military Presence in the Philippines

The existence of the Bases inflicted tremendous social cost on the Filipino people. These military installations were the breeding grounds of "sin cities" where prostitution, black

⁵³ Bengzon, *supra* note 21 at 16.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ The labour cost of ship repair job in the Philippines would be between one-fourth to one-tenth of the cost of the same job done in Yokosuka, Guam or Pearl Harbor (*Ibid.* at 17).

⁵⁷ *Ibid.* American studies showed that the cost of relocating could range from \$2 billion to as much as \$ 8 billion (*Ibid.*).

marketing, extortion and drug trafficking flourished, eroding the moral fabric of Philippine society.⁵⁸ “The towns of Olongapo and Angeles were fleshpots pegged to a miniature boom-and-bust cycle, with long droughts of little business alternating with brief bursts of activity when another flotilla of ships would dock.”⁵⁹ “Townpeople, whether in legitimate or illegitimate businesses, pegged all their hopes on the next incoming Navy vessel, the next big military contingent.”⁶⁰ In Olongapo, estimates of the number of entertainment centers, such as bars and nightclubs, range from 300 to 500.⁶¹ Government sources estimated that there were 6,000 or 9,056 hospitality girls registered or licensed while others approximated that there might be as many as 20,000 if the unregistered and unlicensed were counted. Lamentably, 50% of the 300-500 hospitality girls tested annually by the city clinic were found positive for venereal diseases while almost all reported AIDS cases in the Philippines come from Angeles and Olongapo.⁶²

Street children in the host cities were also rampant during U.S. occupation of the bases. The Olongapo City’s rest-and-recreation industry bred thousands of Amerasians, of whom reportedly only 25% are acknowledged by their American fathers.⁶³ Abandoned by their fathers and raised by a single mother, these group of children are a particularly stigmatised group.⁶⁴ They live with severe prejudice and suffer discrimination in education and employment due to their physical appearance and their mother’s low status.⁶⁵ Those with African-American fathers face even worse treatment than those having white fathers.⁶⁶ Unfortunately, most Status Of

⁵⁸ Nuclear Free Philippines, *supra* note 17 at 52.

⁵⁹ Bengzon, *supra* note 21 at 21.

⁶⁰ *Ibid.*

⁶¹ R. De Guzman, “The Social Benefits and Cost of the U.S. Military Bases” *Manila Bulletin* (29 May 1989) at 32.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ G. Kirk, et al., “Women and the U.S. Military in East Asia” Vol. 4 No. 9, March 1999-revised July 2000, online: Foreign Policy In Focus http://foreignpolicy-infocus.org/briefs/vol4/v4n09wom_body.html (date accessed: 18 June 2001).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Forces Agreements make no reference to Amerasian children abandoned by their fathers.⁶⁷ No government takes responsibility for the dire situation of these children. Sadly, these children do not have legal standing in the United States as their birth would not have been registered in the U.S.⁶⁸

D. Closure of the US Military Bases

Pursuant to the *Ramos-Rusk Exchange of Notes*, Philippine and U.S. panels prepared to negotiate the extension of the Military Bases Agreement set to expire on 21 September 1991.

1. History Leading Up to the Negotiations

The fate of the U.S military facilities in the Philippines was sealed as far back as February 1987 when the new Constitution was ratified. The Constitution provides:

*After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning the military bases, foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when Congress so requires, ratified by a majority of votes cast by the people in a national referendum held for that purpose and recognized as a treaty by the other contracting state.*⁶⁹

More significantly, the Constitution had incorporated a provision banning nuclear weapons in Philippine territory: *"The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory."*⁷⁰

⁶⁷ Kirk et al., *supra* note 64.

⁶⁸ *Ibid.*

⁶⁹ 1987 Constitution of the Philippines, Art. XVIII, Sec. 25 Transitory Provisions.

⁷⁰ *Ibid.* Art. II, Sec. 8, Declaration of Principles and State Policies.

Although the US military neither denied nor confirmed the presence of nuclear weapons at Clark and Subic, it was evident that these weapons were in fact stored in the Bases, in contravention of the Philippine Constitution. On 6 June 1988, to implement the constitutional mandate and the national policy banning nuclear weapons from the Philippine territory, the Philippine Senate approved the *Freedom from Nuclear Weapons Act*.⁷¹ This Act effectively killed any hope for renewal of anything like the existing security arrangements.⁷²

In the meantime, changes in the international order were taking place very swiftly.⁷³ The end of the Cold war and the lifting of the Iron Curtain had profound implications on the United States' position at the start of the bases treaty negotiation to extend the Military Bases Agreement. The Philippine negotiating panel had to deal realistically with the reduction in the U.S. defense budget in response to Soviet initiatives that reduced its forces worldwide.⁷⁴ Before the negotiations began, the Philippine panel acknowledged that it would be difficult for the Philippines to obtain from the U.S. economic concessions on the same level as had been received in prior negotiations considering the budget constraints.⁷⁵ More importantly, with the break up of the former Soviet Union, the Philippine's so-called strategic location was no longer of paramount interest to the Americans.

2. Negotiations to Extend U.S. Use of the Bases

⁷¹ R. Simbulan, "How The Battle of the Bases Was Won" online: BoondocksNet.com <http://www.boondocksnet.com/sctexts/simbulan.html> (date accessed: 8 July 2001).

⁷² C. Buss, "The United States and Philippines A New Look at old Problems" *Philippine Free Press* (16 March 1991) at 29.

⁷³ See also A. Doronilla, "Longest Process of Decolonization," *Manila Chronicle* (14 May 1990).

⁷⁴ Doronilla, *supra* note 73 at 1.

⁷⁵ *Ibid.*

At the beginning of negotiations, Philippine President Corazon Aquino outlined the Philippine Panel's position. The Philippine Government would uphold 16 September 1991 as the termination date; it would call for an eventual U.S. pullout and prepare for life without the Bases and it would strive to forge a relationship built on respect.⁷⁶ On 15 May 1990, pursuant to the constitutional mandate, the Philippines served notice of termination of the Military Bases Agreement on the U.S. negotiating panel. From all indications, it seemed that the Philippine Government was determined to recast the nature of RP-U.S. relationship. During the course of the negotiations, however, the Philippine panel's position was repeatedly undermined, both internally and externally.⁷⁷ Even the forces of nature had an overwhelming effect on the last stages of negotiation when on 12 June 1991, the long dormant Mt. Pinatubo unleashed one of the most devastating eruptions of the last century, which caused significant damage to the facilities at Clark.

In the end, the Philippine Government succumbed to U.S. pressure and acquiesced again to an inequitable agreement. The *Treaty of Friendship, Cooperation and Security* provided for a ten-year extension for Subic alone, with an option to renew at the end of the ten years. Should the Philippine Government decide in the future for a phase out, it would begin only at the end of the tenth year.⁷⁸ The offer of the U.S. was adopted almost in toto. After the President had signed this Agreement, the Philippine Senate still had to "ratify" it.⁷⁹

3. The Philippine Senate's Rejection of the Treaty of Friendship, Peace and Cooperation

⁷⁶ Bengzon, *supra* note 21 at 63.

⁷⁷ For an insightful background on the U.S. Bases Treaty negotiations, please see Bengzon, *supra* note 21.

⁷⁸ *Ibid.* at 251.

⁷⁹ *Ibid.*

As provided for in the 1987 Philippine Constitution "*No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.*" While the U.S. was able to pressure the Philippine Executive into agreeing to the Treaty, the U.S. had not anticipated the fierce battle which lay ahead at the Philippine Senate. For its part, The U.S. regarded the document as an executive agreement rather than a treaty. Thus, it was not required to submit it to the U.S. Senate, in contravention of the Philippine Constitution which likewise required the U.S. to concur to the agreement as a treaty by passing it through the U.S. Senate.⁸⁰

On 16 September 1991, the Philippine Senate prepared to vote on the Treaty. To be "ratified" in a 23- man Senate, it had to receive 16 votes in favor of the treaty. Only eight (8) votes were required to reject it. By a vote of 12-11 against the Treaty, the Philippine Senate failed to get the 2/3 majority necessary to "ratify" it.

4. Bases Closure

On 31 December 1991, the Philippine Government gave the United States Government a year to complete its military withdrawal from the Philippines. On November 24, 1992, the last U.S. Navy ship, the helicopter carrier Belleau Wood, sailed out of Subic Bay.⁸¹

Soon after the Philippine Senate rejected the *Treaty of Friendship, Peace and Cooperation*, the Philippine Government embarked on a special conversion program. The Government created an entity that would oversee the development and conversion into civilian

⁸⁰ Bengzon, *supra* note 21 at 253.

⁸¹ *Ibid.*

uses of the former US military bases. Base conversion development authorities were set up at both Clark and Subic. On 13 March 1993, Subic Bay Freeport was created under Republic Act 7227. It is said that private investment in Subic annually now exceeds the peak level of compensation received from the U.S. for the Bases.⁸² On 3 April 1993, President Fidel Ramos declared the former Clark Air Base and its contiguous lands a Special Economic Zone, and authorized the establishment of the Clark Development Corporation as the entity tasked to manage the Clark Special Economic Zone.⁸³ Today, the Clark Special Economic Zone boasts of an international airport, modern industrial parks, tourism and commercial attractions.

All these developments came about without a comprehensive investigation of the extent of the toxic contamination at either Clark or Subic. The limited studies undertaken so far confirm severe environmental damage in some identified contaminated sites. Unfortunately, the full threat facing communities inside and outside the Bases remains to be uncovered.⁸⁴

⁸² Bengzon, *supra* note 21. at 298. Under the *Manglapus-Schultz Agreement*, the Philippines was to receive \$962 million in financial assistance from the U.S. for the remaining two years of the Military Bases Agreement. [G. Galang, "R.P. U.S. Bases Agreement Breach of Promise" *Philippine Free Press* (3 February 1990) at 10]. It must be clarified, however, that the U.S. failed to fulfil some of its financial commitments to the Philippines (See *Ibid.* at 43).

⁸³ CDC, *supra* note 32.

⁸⁴ Grassroots Summit, *supra* note 34 at 40.

III. Legacy of Environmental Damage and Manifold Hazards to Human Life, Health and Safety⁸⁵

The U.S. Military's environmental record, both domestically and internationally, has been dismal. Normal operation of U.S. Department of Defense ("DoD") installations generate hazardous waste. In fact, in 1989, the U.S. General Accounting Office ("GAO") reported that the U.S. military is a major generator of hazardous waste in the United States,⁸⁶ generating more than 400,000 tons each year.⁸⁷ Hazardous waste management and past disposal practices at U.S. bases have resulted in environmental problems, such as unexploded ordnances, PCB contamination, soil and ground water contamination, unlined landfills, toxic spills, leaking underground storage tanks and off-base migration of contaminants.

The situation at overseas U.S. bases, such as in Clark and Subic, is no different.⁸⁸ Given that bases overseas have basically the same functions that produce hazardous wastes and are as environmentally destructive as the bases in the United States, there is reason to believe that hazardous waste generation, management and disposal practices at the former U.S. Bases in the Philippines were no better, if not worse, than those in the U.S.⁸⁹ Considering the magnitude of

⁸⁵ This title was adopted from the introduction of Wagner, *infra* note 168 at 403.

⁸⁶ Hazardous wastes include solvents, paints, contaminated sludges, contaminated fuel and oil, phenols (poisonous acidic compounds), munitions, polychlorinated biphenyls (PCBs), metals, cyanides and other poisons which are dangerous to humans and the environment. These wastes are generated by motor pools, paint shops, fire department, hospitals, medical clinics, laundries and industrial processes used mainly to repair and maintain weapon systems and equipment. (U.S. General Accounting Office, *Hazardous Waste, Management Problems Continue at Overseas Military Bases* (1991) GAO/NSIA-91-231 (hereinafter '91 GAO Report). See also Emmanuel *infra* note 87 at 5.

⁸⁷ J. Emmanuel, "Environmental Destruction Caused by U.S. Military Bases and the Serious Implications for the Philippines" (Crossroads 1991: Towards a Nuclear Free , Bases Free, Philippines, Manila Philippines, May 14-16,1990) at 5. "The GAO study, however, pointed out that data in the Defense Environmental Status Report are often unreliable and there are reasons to believe that the figure is much higher." (*Ibid.*)

⁸⁸ Further discussion of the environmental record of U.S. DoD installations overseas will be found in Chapter IV, below.

⁸⁹ Emmanuel, *supra* note 87 at 13.

activities inside Clark and Subic during their operation, the discovery of hazardous waste inside the former Bases was inevitable.

The presence of toxic contamination at domestic U.S. military bases was a growing concern during the Philippine campaign to close Clark and Subic and was one of the arguments against their continuation. Unfortunately, it was never discussed during negotiations for the extension of the Bases.⁹⁰ Thus, when the Philippine Senate rejected the *Treaty of Friendship, Cooperation and Security*, the U.S. Military proceeded to close Subic in November 1992, without the Philippine Government demanding environmental cleanup of Clark and Subic. Fortunately in 1992, a U.S. based non-governmental organization (“NGO”) obtained a declassified Bases Closure Report on Clark and Subic that had been done by GAO. The report identified several contaminated sites at the Bases that had caused “significant environmental damage.”⁹¹ From then on, both local and U.S. based NGOs began pressuring the U.S. Government to release all environmental records on Clark and Subic and to assume full responsibility for the cleanup and remediation of the former U.S. Bases.⁹²

⁹⁰ Grassroots Summit, *supra* note 34 at 40.

⁹¹ *Ibid.*

⁹² In 1994 the People’s Task Force for Bases Clean-up (a network of concerned citizens and organizations from Clark, Subic and Manila area) was formed to press the U.S. government to assume full responsibility for the cleanup and restoration of the former U.S. bases in the Philippines. The People’s Task Force, in coordination with the U.S. Working Group for Philippine Base Cleanup (a network of American non-governmental organizations and individuals who provide scientific and education support to the Philippine effort, formed in Washington, D.C. on September 1994), has led most of the advocacy for U.S. responsibility, awareness building, research, lobbying, organizing, facilitating medical support to the victims and networking efforts. The U.S. Working Group worked on the identification of the contaminants present in the former bases while the People’s Task Force focused on documenting health cases and identifying individual victims. On the other hand, the Filipino/American Coalition for Environmental Solutions (FACES), a U.S. based NGO formed in February 2000, “raises public awareness, mobilizes grassroots support, and educates U.S. policymakers to make changes to prevent any more deaths at the former U.S. military bases in the Philippines.” [FACES, *U.S. Campaign to Clean Up the Former U.S. Military Bases in the Philippines* (New York: FACES)].

A. Findings of Contamination: A Review of Environmental and Health Studies in Clark and Subic

This section briefly discusses the different environmental and health studies of Clark and Subic undertaken by the U.S. Government, Philippine Government, and by private interest groups. It must be emphasized, however, that due to the prohibitive cost of comprehensive environmental studies, no comprehensive environmental assessment of Clark and Subic has yet been carried out. As for the health impact of the contaminants found thus far, there have not been any epidemiological studies to confirm a causal link between health problems in nearby communities and environmental contamination at Clark and Subic.

1. Environmental Studies

In 1992 a report on the potential financial obligations of the U.S. to the Philippines was prepared by the GAO upon the request of the Chairman and the Ranking Minority Member of the Subcommittee on Defense, Senate Committee on Appropriations.⁹³ The GAO considered, among others, the nature of any environmental damage and consequently, the U.S. obligation for any environmental cleanup or restoration at Clark and Subic.⁹⁴

The GAO report revealed that "environmental officers at both Clark Air Base and the Subic Bay Navy Facility have identified contaminated sites and facilities that would not be in

⁹³ U.S. General Accounting Office, *Military Base Closures, U.S. Financial Obligations in the Philippines* (1992) GAO/NSIAD-92-51 at p. 2 [hereinafter '92 GAO Report].

⁹⁴ *Ibid.*

compliance with U.S. environmental standards.”⁹⁵ The extent of contamination was not ascertained since the identification of contamination was based on limited environmental surveys of both Bases. According to Base officials, both Clark and Subic have common environmental problems with underground storage tanks and fire-fighting training facilities that do not comply with U.S. standards.⁹⁶ More importantly, Navy environmental officials identified some sites at Subic, which they believe represent significant environmental damage:

- *The Subic Bay Navy Facility does not have a complete sanitary sewer system and treatment facility. Instead, sewage and process waste waters from the naval base and air station industrial complexes are discharged directly into Subic Bay. Only 25 percent of the 5 million gallons of sewage generated daily is treated.*
- *Lead and other heavy metals from the ship repair facility’s sandblasting site drain directly into the bay or are buried in the landfill. Neither procedure complies with U.S. Standards, which require that lead and heavy metals be handled and disposed of as hazardous waste.*
- *The Subic Bay Navy Facility’s power plant contains unknown amounts of polychlorinated biphenyl (PCP) and emits untreated pollutants directly into the air. No testing has been performed to analyze the content of emissions, but officials stated that air emissions would not meet U.S. clean air standards.⁹⁷*

While the 1992 GAO Report confirmed the presence of contaminated sites at both Bases, it maintained that the current Military Bases Agreement does not impose any well-defined environmental responsibility upon the U.S., either while it operates the bases or for cleanup upon withdrawal. The GAO Report emphasized that DOD regulations require that services comply with the environmental pollution control standards generally applicable in the host country, but the regulations do not impose any specific responsibility for environmental restoration.⁹⁸ The GAO Report underscored the fact that the *Treaty of Friendship, Cooperation*

⁹⁵ '92 GAO Report, *supra* note 93 at 27.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at 27- 28.

⁹⁸ *Ibid.*

and Security, which was rejected by the Philippine Senate on 16 September 1991, included a specific provision for dealing with hazardous and toxic waste.⁹⁹ The Report implied that the rejection of the new treaty rendered moot the issue of potential liability. The GAO Report also revealed that even if the U.S. unilaterally decided to cleanup the Bases according to U.S. standards, the cost of environmental cleanup and restoration could approach Superfund proportions.¹⁰⁰

In May 1993, the WHO confirmed the initial findings of the '92 GAO Report in its Mission Report which identified areas or operations in Subic Bay with considerable pollution potential, such as those which used or stored toxic chemicals, fuels, pesticides, herbicides, polychlorinated biphenyl ("PCB"), chlorinated solvents and explosives, produced hazardous wastes, as well as those which involved heavy engineering operations and sandblasting.¹⁰¹

The following year, an Environmental and Health Impact Report ("Bloom Report") on specific sites in the former U.S. bases was undertaken by the Philippine Program of the Unitarian Universalist Service Committee ("U.U.S.C").¹⁰² The Bloom Report analysed the following U.S. DoD documents provided by the U.S. State Department: "*Potential Restoration Sites on board the U.S. Facility, Subic Bay*" October 1992;¹⁰³ "*Underground Storage Tank*

⁹⁹ '92 GAO Report, *supra* note 93 at 30.

¹⁰⁰ *Ibid.* at 27. The Superfund is administered by the Environmental Protection Agency to cleanup the United State's worst hazardous waste sites. At the time of the GAO report, the average cost of construction per site was about \$25 million. (*Ibid.*)

¹⁰¹ D. Cramer and R. Graham, *Subic Bay Environmental Risk Assessment and Investigation Program* (1993) ICP/CEH/003, RS/93/0187, World Health Organization, Regional Office for the Western Pacific. The Mission Report revealed that: (1) landfills on site were used for all kinds of wastes, including hazardous waste materials; (2) industrial wastewaters, untreated sewage and polluted storm water drains were all discharged to Subic Bay, mostly without treatment; (3) very large volumes of fuel and oil were stored, transferred and used around the site. The Report recommended further sampling and analysis programs of near-surface and deeper soil, groundwater and sediments in waterways and Subic Bay, costing around U.S.\$ 600,000.00. (*Ibid.*)

¹⁰² A non-governmental organization based in Cambridge, Massachusetts.

¹⁰³ This report identified 28 potentially-contaminated sites at Subic, as well as 28 potentially-contaminated training areas and ranges utilized by U.S. Naval forces. At many sites, contamination had been documented, but no cleanup had occurred; at others, a limited cleanup had occurred but was found to be insufficient; and for some sites, no

Inventory: Subic Bay, Philippines"; and "*Environmental Review of the Drawdown Activities at Clark Air Base, Republic of the Philippines*," September 1991;¹⁰⁴ and Attachments. The Bloom team also visited Clark and Subic between June 21 to July 6 1994.¹⁰⁵ The Bloom Report focused on the presence of toxic contamination at the former Bases and the potential risks of these contaminants to human health.¹⁰⁶ It identified at least 14 known contaminated sites and more than a dozen potentially contaminated sites at Subic. On the other hand, at least five contaminated sites and more than ten potentially contaminated sites were identified at Clark based on the very incomplete DoD reports for that Base. The authors concluded that the serious problems of toxic contamination at the former Bases and consequential human exposure to hazardous contaminants should be addressed immediately by beginning the process of site assessment and cleanup.

These findings of environmental contamination were made public at a time when Clark and Subic were being developed into economic development zones. The former Bases were perceived to be the answer to the Philippines' ailing economy. The favorable investment climate in Clark and Subic was aggressively promoted overseas. However, considering that the toxic campaign had been receiving considerable media attention, Freeport Zone authorities also had to allay the fears of potential investors. Accordingly, the Subic Bay Metropolitan Authority

investigation had occurred but contamination was suspected due to records indicating many years of toxic discharge. (Environmental Injustice, *supra* note 9).

¹⁰⁴ This is a preliminary and incomplete study conducted by the U.S. Air Force which identified some sites where hazardous materials were stored, used and disposed of; sites where spills had taken place and where samples were taken showing varying levels of contamination. (*Ibid.*)

¹⁰⁵ P. Bloom et al, *Environmental and Health Impact Report on Known and Potentially Contaminated Sites at Former U.S. Military Bases in the Philippines* (August 1994), online: Filipino/American Coalition for Environmental Solutions http://www.face-solutions.org/background/reports/bloom_report2.htm (date accessed: 6 July 2001) at 3 [hereinafter Bloom Report].

¹⁰⁶ The Bloom Report identified at least 14 known contaminated sites and more than a dozen potentially contaminated sites at Subic based on the DoD documents and site visits. On the other hand, at least five contaminated sites and more than ten potentially contaminated sites were identified at Clark based on the very incomplete DoD reports for that base. (*Ibid.*)

("SBMA") and the Clark Development Corporation ("CDC") had no choice but to hire environmental experts to conduct environmental baseline studies.

The SBMA commissioned an Environmental Baseline Study ("EBS") to assist in land-use planning and to address the persistent speculation regarding the presence of hazardous wastes at the former military Base. An EBS was undertaken by Woodward-Clyde International on behalf of the SBMA, funded by a loan from the World Bank.¹⁰⁷ Woodward-Clyde found that the level of contamination detected at most of the sites investigated did not pose a significant risk to human health and the environment if the land use in these areas remain the same.¹⁰⁸ The Study concluded that "despite speculation of significant toxic contamination at Subic Bay based on previous desk top studies, the results of the Environmental Quality Survey have not identified widespread severe contamination of soils, groundwater or sediments as a result of the former U.S. Navy activities."¹⁰⁹ Remediation, however, was recommended for seven specific areas with contamination,¹¹⁰ with an estimated cost range from 175 million to 250 million pesos. Based on the Woodward-Clyde Report, the SBMA announced that "there is no severe widespread contamination in the soil and groundwater of the 44 sites which were investigated and that the concentration of chemicals found in soils pose a negligible risk to health and the current and future non-residential occupiers/users due to lack of identified exposure pathways."¹¹¹ As for the water supply in the Freeport Zone, SBMA claims that contamination is not possible inasmuch as all the water sources are from rivers upstream. Moreover, annual

¹⁰⁷ Woodward-Clyde International, *Environmental Baseline Study Conducted at the Subic Bay Freeport Zone in the Philippines, Executive Summary* (November 1996) at E-1. [hereinafter Woodward-Clyde Report].

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at E-1.

¹¹⁰ The seven specific areas with contamination are as follows: (1) Subic landfill; (2) the main Explosives Ordnance Disposal area at Camayan Point; (3) the old landfill near the Osir Basin; (4) the former NEX Taxi Compound, DRMO and Deltic Year; (5) oil in the PWC Vehicle Maintenance; (6) small volumes of ash at the Navy Hospital, the fire fighting training area and the ammunition demilitarization areas; and (7) the former sandblasting yard at Causeway Bay

¹¹¹ M. Musngi, *Locator Advisory on the Issue of the Presence of Hazardous Wastes in the Freeport*, Ecology Center, Subic Bay Metropolitan Authority (28 July 2000).

tests for heavy metals and organic compounds undertaken by internationally accredited laboratories have consistently confirmed that there is no contamination of the water sources. The SBMA, however, admits that there are ten (10) areas that need to be remediated before development is undertaken and another thirteen (13) sites which warrant further investigation.

The reliability of the findings of Woodward–Clyde Report was put to test in a technical review conducted by Clear Water Revival Company (“CRC”).¹¹² According to the CRC, the “EBS does not accurately characterize contamination at the Subic Bay Freeport Zone, and the potential for adverse impacts to human health and the environment.”¹¹³ CRC concluded that the results of the sampling performed during the EBS indicate that “existing environmental conditions within the Freeport Zone present an imminent and substantial endangerment to human health and the environment.”¹¹⁴

In 1997, the CDC hired Weston International to undertake a Soil and Water Baseline Study.¹¹⁵ The Groundwater Baseline Study found 22 sites to be contaminated by various chemicals and compounds, such as arsenic, dieldrin, lead, total dissolved solids, sulfate, coliform bacteria, volatile organic compounds, nitrate, mercury, petroleum fuel and solvents. The Study recommended, among other things: the installation of shallow monitoring wells; the rehabilitation or proper abandonment of a decommissioned well and other water supply wells; and the development of a thorough sampling program for the water distribution system. On the other hand, the Soil Baseline Study revealed that seven out of the 13 sites had contamination

¹¹²Clear Water Revival Company, *Technical Review Report: Environmental Baseline Survey, Former United States Navy Installation, Subic Bay, Philippines* (6 May 1998). CRC was commissioned by Arc Ecology on behalf of the United States Working Group for Philippine Bases Clean-up and the People’s Task Force for Bases Cleanup for the purpose of determining whether the conclusions of the EBS were technically sound.

¹¹³*Ibid.* at 1-2.

¹¹⁴*Ibid.* at 2.

¹¹⁵Weston International, *Soil and Water Baseline Study Report, Final Report* (August 1997) [hereinafter Weston Report].

exceeding Risk-Based Concentration (“RBC”) criteria.¹¹⁶ While potential for human exposure was low for most of these sites, it was possible that contaminants might migrate via the groundwater. Thus, further soil and groundwater characterization was recommended for most of the sites.

Once again, CRC questioned the technical soundness of the conclusions and recommendations in the Weston Report.¹¹⁷ CRC criticized Weston’s recommendation to continue using the drinking water supply system as being premature, cautioning that until a more detailed investigation of uncontrolled hazardous waste sites at Clark was completed, no conclusions can be reached about the present or future safety of the groundwater supply basin.¹¹⁸ CRC pointed out that Weston’s recommendations in its Soil Baseline Study, however, put little emphasis on potential human exposure at spill sites.¹¹⁹ CRC concluded that the “soil baseline study was neither designed to evaluate the potential for soil contamination to impact underlying groundwater, nor are the Risk-Based Criteria (“RBC”)s useful for evaluating the potential for surface soil contamination.”¹²⁰

CDC officials confirmed the presence of contaminated sites at Clark as revealed by the Weston Report but maintained that the contamination was localized, identified and secure. The CDC has been lobbying for financial and technical help from the U.S. Government for the clean-up of toxic waste. The CDC is concerned with a landfill near Clark’s Mabalacat gate, known to be contaminated with levels of toxic wastes, particularly chlordane which causes cancer, which

¹¹⁶ Weston Report, *supra* note 115 at ES-12 to ES-17.

¹¹⁷ Clear Water Revival Company, *Technical Review Report, Soil and Water Baseline Study Report Former United States Air Force Installation* (21 August 1998) at 1.

¹¹⁸ *Ibid.* at 2.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

might have already seeped into the ground.¹²¹ A pumping station of a local water firm which services thousands of households in Mabalacat and Angeles City is located near the landfill. CDC officials, with the assistance of a German group, are coordinating a \$350,000 grant from the European Union for a thorough study of the extent of toxic contamination of underground water aquifers.¹²²

2. Health Studies

In response to a request from the Nuclear Free Philippine coalition and the People's Task Force, a participatory health survey was undertaken under the direction of world-renowned epidemiologist Dr. Rosalie Bertell of the International Institute of Concern for Public Health.¹²³ A total of 761 women in 13 communities surrounding Clark were surveyed on February 1996. The survey looked into health problems, household practices, effects of the Mt. Pinatubo eruption, economic conditions, social factors and environmental quality.¹²⁴ The Bertell Study revealed that the dominant health problems of 20 – 50 year old women in the study communities were: reproductive system problems (irregular menstrual cycle, premenstrual syndrome and early or late menarche), nervous system problems and urinary tract problems.¹²⁵ The Bertell Study noted that there is a marked difference in the overall level of ill health between those in the six communities and those located in other study areas; notably these same six communities were located close to landfill sites or next to known contaminated sites.¹²⁶ A high proportion of growth retardation and respiratory problems were noted in children in each of the communities

¹²¹ D. Cervantes, "Clark Execs Turn to EU for Help on Toxic Wastes" *The Philippine Star* (11 June 2001) at 15.

¹²² *Ibid.*

¹²³ Dr. R. Bertell, *Health For All Health Survey of the Former Clark Air Force Base Residents, Philippines* (1996-1997) at 1 [hereinafter Bertell Study].

¹²⁴ O'Lola & Zamora-Olib, eds., *Inheritors of the Earth* (Quezon City: People's Task Force for Bases Clean-up, 2000) at 44.

¹²⁵ Bertell Study, *supra* note 121 at iv.

¹²⁶ *Ibid.*

surveyed. The Bertell Study recommended the improvement, remediation, and cleanup of the six communities or alternatively, the evacuation of the areas until cleanup had taken place.¹²⁷

In 1999 a "Preliminary Study on the Health Effects of Selected Chemicals among the Residents of CABCOM Evacuation Center in Clarkfield, Pampanga" ("DOH Study") was conducted by the Philippine Department of Health, in collaboration with the UP-National Poison Control and Information Service.¹²⁸ The DOH Study was aimed at establishing preliminary or baseline data on the health effects of selected chemicals on the health of residents of communities closest to the contaminated sites, which had reported a high incidence of reproductive disorders, kidney and lung problems.¹²⁹ The DOH Study did not establish causality but only association. It concluded that some of the results were inconclusive and recommended that further study be undertaken. The DOH Study emphasized that "the presence of hematologic, reproductive and development problems is highly suggestive of source(s) of exposure in the area".¹³⁰ These results were further confirmed by an on-site investigation and medical examination conducted by the Philippine Commission on Human Rights. Those persons examined showed signs and symptoms consistent with hazardous or toxic chemical exposure, such as birth defects, neurological disorder, spontaneous abortions and still births, central nervous system disorder, kidney disorder and cyanosis.¹³¹ The presence of mercury and nitrates was revealed through the laboratory analysis of water samples collected from different deep well sites at CABCOM.¹³² Thus, the Commission recommended the immediate removal of the residents from the contaminated sites, a thorough diagnostic work up

¹²⁷ Bertell Study, *supra* note 123 at v.

¹²⁸ C. U Calalang, et al, *Preliminary Study on the Effects of Selected Chemicals Among the Residents of CABCOM Evacuation Center in Pampanga Executive Summary* (1999) at Executive Summary [hereinafter DOH Study].

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* at Executive Summary.

¹³¹ Senate Report, *infra* note 146 at 18.

¹³² RTC case, *infra* note 149 at 70.

and treatment of the patients. It also recommended that the Philippine Government persuade the U.S. Government to conduct a massive cleanup of the contaminated areas and to compensate those suffering the effects of toxic waste.¹³³

B. U.S.'s Denial of Responsibility

The U.S. has consistently maintained that it is under no obligation to cleanup its former installations at Clark and Subic.¹³⁴ Former President Clinton denied that there were any environmental problems but vaguely committed to find “the facts now, and when we find them, deal then with the facts as they are.”¹³⁵ At one point, U.S. Secretary of State Warren Christopher stated that the U.S. was ready to assist the Philippines in the cleanup of former American military facilities provided that no legal action be taken against the U.S. Government.¹³⁶ This statement was later denied by the State Department. Former U.S. State Secretary Madeleine Albright likewise evaded the issue of contamination and the Philippines’ request for the establishment of a joint Philippine-U.S. task force to assess the degree of contamination at the former Bases and to formulate plans for remedial action, if warranted.¹³⁷ U.S. Defense Deputy Undersecretary Sherri W. Goodman, on the other hand, maintained that the “Philippine Government expressly agreed to waive any right to demand cleanup in return for the agreement of the U.S. not to seek compensation for the value of the substantial improvements

¹³³ RTC case, *infra* note 149 at 71.

¹³⁴ Please see '92 GAO Report, *supra* note 93.

¹³⁵ M. Marfega and M. Baldonado, “Country Report: Philippines” (U.S. Military Bases and the Environment: A Time for Responsibility, 1996 International Forum, Manila, Philippines, 22-26 November 1996) at 50.

¹³⁶ Filipino American Coalition for Environmental Solutions, *Chronology*, online: FACES <http://www.facessolutions.org/background/chronology/chronology.html>. (date accessed: 15 July 2001).

¹³⁷ U.S. State Secretary Madeline Albright’s letter to Philippine Secretary of Foreign Affairs Domingo Siazon Jr. (8 April 1998).

[the U.S.] left behind.”¹³⁸ She further stated, “In the absence of legal authority, our laws do not permit U.S. to spend funds for the purposes you have requested.”¹³⁹

The U.S. Government is denying not only demands for cleanup and remediation but also the continued requests for base records and documents. Many of the documents necessary to determine the severity of the problem have yet to be released by the U.S. Government. For example, the Weston Report failed to determine how certain chemicals got into the deep aquifer because the construction plans of the wells inside Clark were not available. When asked by Philippine Officials to release information on surveys of unexploded ordnance, U.S. Secretary of State Madeleine Albright’s replied: “It is our belief that the information contained in the documentation previously made available to you will allow your economic and environmental planners to make informed decisions about future land use at Clark and Subic.”¹⁴⁰

The single breakthrough in the toxic campaign thus far is a *Joint Statement By the Republic of the Philippines and the United States of America on a Framework for Bilateral Cooperation in the Environment and Public Health* issued on 27 July 2000. The two Governments announced that they would cooperate to increase the sharing of information and to enhance Philippine institutional and technical capacity to address environmental and public health problems throughout the Philippines through on-going capacity building programs among government and non-governmental experts.¹⁴¹ Under the joint statement, the U.S. agreed to provide financial and technical assistance to address environmental problems in the Philippines, without however identifying any specific problem. However, the Philippine Government was

¹³⁸ Grassroots Summit, *supra* note 34 at 46.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* citing a letter of U.S. State Secretary Madeline Albright to Philippine Foreign Affairs Secretary Domingo Siazon (8 April 1998).

¹⁴¹ *Joint Statement on a Framework for Bilateral Cooperation in the Environment and Public Health* (27 July 2000) Washington, D.C [hereinafter Joint Statement].

given the prerogative to prioritise the proposed cooperation activities. Notably, the statement does not explicitly mention the environmental problems at the former U.S. facilities. Evidently, capacity building, technical and financial assistance are as far as the U.S. Government can commit for now.

C. Philippine Government's Response

The Philippine Government initially refrained from acknowledging the presence of contamination in Clark and Subic for fear that any acknowledgment would greatly sabotage the investment potential of the Freeport zones. It was only after 5 years of campaigning that the People's Task Force, with the help of some legislators, the media and the Commission on Human Rights, was finally able to convince the Government that a serious contamination problem exists at the Freeport Zones.¹⁴² Sometime in August 1998, the Department of Environment and Natural Resources confirmed that toxic and hazardous wastes from the U.S. military have been found "in significant quantity" and requested U.S. assistance for the remediation of confirmed contaminated sites at the former military Bases.¹⁴³ This request remains unheeded.

In response to U.S. Deputy Secretary of Defense Sherri Goldman's claim that the Philippines waived its right to cleanup, the Philippine Department of Foreign Affairs boldly declared that "toxic contamination is now a given," and that the Philippine Government never waived the right to demand cleanup.¹⁴⁴ A Philippine Task Force on Hazardous Wastes in the

¹⁴² Joint Statement, *supra* note 141.

¹⁴³ Senate Report, *infra* note 146 at 18.

¹⁴⁴ Grassroots Summit, *supra* note 34 at 45.

Former U.S. Military Installations was formally created on 18 January 2000 to coordinate and direct cleanup activities at Clark and Subic.

The Philippine Congress has likewise recognized the existence of the problem of toxic contamination at Clark and Subic.¹⁴⁵ After assessing the impact of toxic waste presence at Subic and Clark, the Philippine Senate Joint Committees on Environment and Natural Resources, Health and Demography and Foreign Relations, submitted a report to the Senate on 16 May 2000. The Senate Report concludes: (1) there is substantial environmental contamination at Clark and Subic caused by the hazardous activities, operations and improper waste management practices of the U.S. forces; and (2) the U.S. has the corresponding duty to repair and compensate for the damage caused considering that the activities, conducted at the Bases and under the effective control of the U.S., caused substantial harm not only to the environment but also to human health and the economy.¹⁴⁶ The Committees recommended, among other things, that diplomatic means be pursued with the U.S. Government to negotiate the remediation of contaminated sites at Clark and Subic, initiate preventive and curative measures to address the increasing number of victims of toxic waste and create a Joint RP-U.S. Task Force.¹⁴⁷ In the U.S. Government refused to remediate, the Committees recommended that a suit be filed by the Philippines, against the United States, before the International Court of Justice.¹⁴⁸

¹⁴⁵ At least 30 House and Senate resolutions have been filed by approximately 15 legislators to urge inquiry by various congressional committees on the environmental, health and other aspects of the issue. (Grassroots Summit, *supra* note 33 at 46-47).

¹⁴⁶ Committees on Environment and Natural Resources, Health and Demography, and Foreign Relations, *Senate Committee Report No. 237* (16 May 2000) Eleventh Congress of the Republic of the Philippines, Second Regular Session (hereinafter Senate Report).

¹⁴⁷ *Ibid.* at 47-48.

¹⁴⁸ *Ibid.* at 48.

D. Filing of Civil Action by Victims in Philippine Courts (2000)

To address the displacement of thousands of Filipino communities in the aftermath of the Mt. Pinatubo eruption, the National Disaster Coordinating Council (“NDCC”) of the Philippine Department of National Defense (“DND”), in coordination with the Office of the President and Department of Social Welfare and Development, designated Clark Air Base Communications Center (“CABCOM”) as the temporary evacuation center for all families displaced by the Mt. Pinatubo eruption.¹⁴⁹ An estimated twenty thousand (20,000) families were temporarily resettled in CABCOM while the Philippine Government rushed the construction and completion of six (6) permanent resettlement areas where the displaced families would eventually be relocated.¹⁵⁰ These displaced families temporarily resided in CABCOM for various lengths of time from 1991 to 1999.¹⁵¹

The evacuees at CABCOM were allowed to install more than a hundred pump wells where they drew their water for drinking, cooking, milk mixing, bathing, laundry and other daily requirements.¹⁵² Unfortunately, a few months after using water drawn from these wells, the evacuees started experiencing stomach and skin discomforts. Worse, some pregnant women suffered spontaneous abortions, still births, birth defects or deformities.¹⁵³ Since then, many evacuees have reportedly died due to various disorders of the heart, lung, kidney and blood.¹⁵⁴ By June 2000, the People’s Task Force recorded that a total of 272 evacuees had suffered

¹⁴⁹ *Karen Lacson, et al. v. Sec. of Defense et al.*, Regional Trial Court, Third Judicial Region, Branch 56, Pampanga, Case No. 9847 at 58 [hereinafter RTC case].

¹⁵⁰ *Ibid* at 59.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

serious illness presumably due to the presence of toxic contaminants in the water at CABCOM.¹⁵⁵

On 20 July 2000, the victims, through their counsel served demand letters to the appropriate agencies of the Philippine and U.S. Governments, demanding the cleanup of the affected areas and the payment of damages to the victims. After the lapse of one month, the Governments did not reply. Thus, on 18 August 2000, two separate damage suits were filed by Filipino victims of hazardous wastes in Pampanga and Zambales against the U.S. and Philippine Governments.¹⁵⁶ The plaintiffs are asking for a total of \$102 billion from the U.S. Government and \$52 billion pesos (U.S.\$ 1.1 billion) from the Philippine Government, in actual, moral and exemplary damages for allegedly failing to enforce environmental laws. Aside from monetary compensation, the lawsuits demand that (a) a new baseline study be conducted at the former U.S. bases; (b) immediate medical and financial assistance be rendered to the victims, to help resettle those affected; and (c) the Philippine Government be compelled to seek immediate reparation from the U.S. Government and conduct an immediate cleanup of the bases.¹⁵⁷ Unfortunately, the U.S. Government has ignored the jurisdiction of Philippine Courts by refusing to answer the Plaintiffs' complaint despite receipt of summons. In August 2001, the trial court dismissed the case on the ground of lack of jurisdiction.¹⁵⁸

The studies presented in this Chapter, while not comprehensive, overwhelmingly show that the U.S. left a legacy of hazardous waste at Clark and Subic. In the next chapter, DoD's

¹⁵⁵ RTC Case, *supra* note 149 at 59.

¹⁵⁶ The following are the defendants named in the civil case: U.S. Government: The U.S. Department of Defense, U.S. Air Force and U.S. Navy; Philippine Government: Office of the President of the Philippines, Department of National Defense, Mount Pinatubo Commission, National Disaster Coordinating Council, Department of Health, Department of Foreign Affairs, Department of Environment and Natural Resources, Department of Social Welfare and Development, Clark Development Corporation and Subic Bay Metropolitan Authority.

¹⁵⁷ RTC case, *supra* note 149 at 108-109.

¹⁵⁸ The plaintiffs filed a Motion for Reconsideration which was subsequently denied by the Court. A Petition for Relief from Judgment is now pending before the same court.

environmental policy for overseas installations will be examined to determine the level of hazardous waste management that should have been implemented at the former U.S. Bases at the time of their closure.

IV. Environmental Management at Clark and Subic

The findings of contamination and its effect on the environment and human health presented in the previous chapter established that the U.S. Navy and U.S. Air Force inadequately stored and disposed of tons of military and industrial wastes in and around Clark and Subic. To understand how such poor environmental performance is possible, it may be well to examine the U.S. Department of Defense's (DoD) environmental policy for overseas installations and the effects of such policy on the environment of host countries.¹⁵⁹

A. Environmental Management of Overseas Installations

1. The Environmental Record of U.S. DoD Installations Overseas

As early as 1986, the GAO acknowledged that the DoD was inadequately managing hazardous waste at U.S. military bases overseas. In the 1986 report, GAO recommended that

DoD establish clearer standards for bases to follow in handling storing, and disposing of hazardous waste, giving appropriate consideration to host country laws; require overseas bases to develop plans for managing hazardous waste; require oversight of base activities through external inspections; include overseas bases in its waste reduction plans; and provide hazardous waste management training to all appropriate staff.¹⁶⁰

From March 1989 to November 1990, the GAO reviewed the corrective actions taken in response to the '86 GAO report to determine if DoD bases overseas were protecting human

¹⁵⁹ The environmental record of domestic U.S. DoD installations is not within the scope of this paper.

¹⁶⁰ 91 GAO Report, *supra* note 86 at 9.

health and the environment.¹⁶¹ The study revealed that the DoD “has made limited progress in implementing the GAO’s 1986 recommendations and in improving its management of hazardous waste overseas.”¹⁶² In the course of the GAO’s inspection of overseas bases, it discovered that most bases did not have adequate hazardous waste management plans, that hazardous waste management training was below par and that there was minimal DoD oversight of activities generating hazardous waste.¹⁶³

As stated in the previous chapter, the legacy of environmental damage left behind by the U.S. military in the Philippines is not an isolated incident. Around the globe, the U.S. military has received numerous complaints of environmental problems from host governments, community groups, and environmental organizations.¹⁶⁴ In Germany, environmental groups are particularly concerned with the U.S. training area Grafenwoehr, said to be contaminated with chemicals, heavy metals and depleted uranium, and groundwater that is contaminated by a military landfill.¹⁶⁵ At Yokosuka Naval Base in Japan, the groundwater is seriously contaminated with lead, arsenic and mercury while toxic lead, mercury and organic chlorine compound were detected in the soil samples, in levels exceeding Japanese standards.¹⁶⁶ In South Korea, activities of the U.S. forces have resulted to severe noise pollution at U.S. Air Force Weapons Range, burial of tons of wastes (such as asphalt, tar, concrete and asbestos) and

¹⁶¹ '91 GAO Report, *supra* note 86 at 9.

¹⁶² *Ibid.* at 2.

¹⁶³ *Ibid.* at 2 to 3.

¹⁶⁴ J. Lindsay-Poland & N. Morgan, “Overseas Military Bases and Environment,” Volume 3 Number 5 (June 1998), online: Foreign Policy In Focus http://foreignpolicy-infocus.org/briefs/vol3/v3n15mil_body.html (date accessed: 18 June 2001). U.S. bases overseas are encountering increasing number of cases in which host countries are bringing claims for damages caused by poor environmental practices. Please see '91 GAO Report, *supra* note 84, at 4 and 46: “As of October 1990, the Claims Center, which handles claims for U.S. forces, had received 1,259 claims totalling about \$25.8 million. Of the 1,259 claims, 18 claims that totalled \$21.8 million were identified by GAO as being the direct result of improper handling, storage, or disposal of hazardous waste. The Department (DOD) has accepted responsibility for portions of some of these claims, and as of October 1990, it had partially reimbursed some of the claimants about \$50,000.” From 1984 to 1991, 1,289 host country claims related to toxic waste contamination were filed against the U.S. government, amounting to \$25.8 million. (*Ibid.*)

¹⁶⁵ Grassroots Summit, *supra* note 34 at 7-8.

¹⁶⁶ *Ibid.* at 15-17.

oil spillage.¹⁶⁷ In Panama, thousands of hectares of land formerly used as bombing areas and firing ranges are affected with unexploded ordnance and other contaminants due to military activity.¹⁶⁸ In the Island of Vieques, Puerto Rico, the U.S. Navy's bombing practices have resulted in the destruction of the ecosystem in the island and serious environmental contamination due to toxic residues.¹⁶⁹

The U.S. Department of Defense Inspector General admitted that DoD presence in other countries has resulted in environmental damage that will require eventual cleanup and disposal, involving substantial costs.¹⁷⁰ The U.S. Army estimates that the total cleanup cost of soil and groundwater pollution at its overseas installations could reach more than \$3 billion.¹⁷¹

2. U.S. Department of Defense's (DoD) Environmental Policy for Installations Overseas

Unlike the well developed and clearly structured regulatory system governing DoD operations in the United States, the "environmental law" applicable to DoD installations and facilities overseas is quite complex.¹⁷² The DoD policy on overseas environmental compliance, cleanup, and impact analysis is derived from a combination of executive orders, U.S. domestic and host nation environmental standards, DoD policy and international

¹⁶⁷ Grassroots Summit, *supra* note 34 at 19-22.

¹⁶⁸ Please see J. Wagner and N. Popovic, "Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free From Contamination and Explosives" (1998) 38 Va. J. Int'l L. 401.

¹⁶⁹ Grassroots Summit, *supra* note 34 at 55- 57.

¹⁷⁰ D. Armstrong, "US Presence on Foreign Soil is Tainted", Boston Globe (15 November 1999) online: Boston Globe <http://www.boston.com/globe/nation/packages/pollution/day2bar1.htm> (date accessed: 2 July 2001).

¹⁷¹ Lindsay-Poland, *supra* note 164.

¹⁷² R.A. Phelps, *Environmental Law for Department of Defense Installation* (on file with author) (hereinafter Phelps).

agreements.¹⁷³ Until the 1990s, the U.S. Government's environmental policy for overseas installations was ambiguous. Significantly, policy reforms were introduced only in the early '90s, after the closure of the U.S. Bases in the Philippines.

Initially, environmental protection regimes for overseas military installations were derived from Executive Orders (E.O.).¹⁷⁴ It was only in 1973, that a policy on overseas environmental compliance was given consideration.¹⁷⁵ Even then, the directive merely required federal facilities outside the U.S. to comply with "the environmental pollution standards of general applicability in the host country or jurisdictions concerned."¹⁷⁶ In October 1978, overseas federal facilities were ordered to comply with the host-nation's standards only if those standards were generally applied by the host-nation to its own civilian industries and military forces.¹⁷⁷ This policy, however, was not immediately implemented at overseas DoD installations and facilities.¹⁷⁸

a. Environmental Assessment

On 4 January 1979 an environmental assessment program for overseas activities was set up akin to the requirements of *National Environmental Policy Act* ("NEPA").¹⁷⁹ Environmental

¹⁷³ S. Teresa, *Environmental Law Primer, Environmental Law for Overseas DoD Installations*, Rev. 20 December 2000 (on file with author).

¹⁷⁴ M. Carlson, "Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas" (2000) 47 *Naval L. Rev.* 62 at 71. See also *Environmental Law Overseas*, *infra* note 171 at 52. Presidential interest on environmental protection at federal facilities in the U.S has been reflected in executive orders dating back to 1948. (*Ibid.*)

¹⁷⁵ *Prevention Control and Abatement of Environmental Pollution at Federal Facilities*, E.O. No. 11752 (1973) .

¹⁷⁶ *Ibid.*, Sec. 3 (c).

¹⁷⁷ *Federal Compliance with Pollution Control Standards*, E.O. 12088, 43 F.R. 47707 (13 October 1978) (hereinafter E.O. 12088).

¹⁷⁸ R.A. Phelps, "Environmental Law for Overseas Installations", 40 *A.F. L. Rev.* 49 (1996) at 53 (hereinafter, *Environmental Law Overseas*).

¹⁷⁹ *Environmental Effects Abroad of Major Actions*, E.O. 12114, 44 F. R. 1957 (4 January 1979). The NEPA shall be discussed briefly below.

impact analysis requirements were created to be applicable to specific categories of major federal actions affecting the environment outside the United States, its territories and possessions.¹⁸⁰ Unlike NEPA, the environmental assessment program for overseas installations contained numerous exceptions and exemptions allowing overseas installations to forego environmental assessment in certain circumstances.¹⁸¹ Environmental analysis was required only for major federal activities that significantly harm the environment of: (1) the global commons, (2) a foreign nation not involved in the action, (3) a foreign nation because of toxic or radioactive releases, and (4) regarding designated natural and ecological resources of global importance.¹⁸²

b. Environmental Compliance

Environmental compliance, on the other hand, was a major predicament at overseas bases since guidelines on the applicable environmental standards remained unenforced for more than a decade. The GAO found that "confusion existed at base-level regarding the standards applicable to hazardous waste storage and disposal at overseas bases."¹⁸³ Such confusion was due to DoD's failure to provide clear guidance on how U.S. and host country environmental standards apply and how they are to be incorporated in daily operations.¹⁸⁴ The U.S. Congress addressed this matter in the *National Defense Authorization Act for Fiscal Year 1991*.¹⁸⁵ The U.S. Secretary of Defense was directed to "develop a policy for determining the applicable

¹⁸⁰ Teresa, *supra* note 173.

¹⁸¹ Carlson, *supra* note 174 at 74-75. Please see P2-5 of E.O. No. 12114,

¹⁸² Teresa, *supra* note 173. See also *Environmental Effects Abroad of Major Department of Defense Actions* DoD Directive 6050.7 (31 March 1979) which implements the overseas environmental impact analysis requirements of E.O. 12114.

¹⁸³ Environmental Law Overseas, *supra* note 178 at 54, note 44.

¹⁸⁴ '91 GAO Report, *supra* note 86 at 25.

¹⁸⁵ Carlson, *supra* note 174 at 77. See *National Defense*, *infra* note 186.

environmental requirements for military installations located outside the U.S.”¹⁸⁶ Suffice it to say, the concern of the U.S. Congress was focused on the protection of the health and safety of military and civilian personnel assigned to such installations.¹⁸⁷

In 1991, the DoD established a framework for developing the environmental standards for overseas installations.¹⁸⁸ Minimum environmental protection standards applicable to DoD installations and facilities overseas were created based on “generally accepted environmental standards” applicable to DoD facilities in the U.S.¹⁸⁹ Environmental protection standards in such areas as air emissions, drinking water, waste water, hazardous materials, hazardous waste, solid waste, medical waste management, petroleum oil and lubricants, etc., are embodied in an “overseas environmental baseline guidance document” (“OEBGD”). In nations with significant DoD presence, DoD Environmental Executive Agents were designated to formulate “final governing standards” by comparing the OEBGD and host-nation environmental standards of general applicability to determine which is most protective of human health or the environment.¹⁹⁰ Unfortunately, much of the progress in the establishment and implementation of environmental standards at overseas installations came after the decision to close Clark and Subic was finalized. Thus, final governing standards outlining the applicable environmental protection standards for Clark and Subic were not prepared.

¹⁸⁶ *National Defense Authorization Act for Fiscal Year 1991*, Pub L. No. 101-510. at Sec. 342, para (b) (2) (hereinafter *National Defense*).

¹⁸⁷ Carlson, *supra* note 174 at 77. The protection of the environment of the host nation did not seem to be a major consideration in the policy.

¹⁸⁸ *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations*, DoD Directive 6050.16 (20 November 1991) and *Management of Environmental Compliance at Overseas Installations*, DoD Instruction 4715.5 (22 April 1996).

¹⁸⁹ Environmental Law Overseas, *supra* note 178 at 55. One writer notes that while U.S. domestic environmental standards were considered in developing environmental standards to be used overseas, these were not incorporated verbatim allegedly to allow for more “flexibility” overseas. (Carlson, *supra* note 174 at 78)

¹⁹⁰ *Ibid.* at 55.

c. Cleanup

The DoD policy on cleanup was likewise slowly taking shape amidst the lack of Congressional funding.¹⁹¹ In 1991, the U.S. Congress mandated the DoD to develop a “policy for determining the responsibilities of the DoD with respect to cleaning up environmental contamination that may be present at military installations located outside the U.S.” taking into account “applicable international agreements (such as SOFAS), multinational or joint use and operation of such installations, relative share of the collective defense burden and negotiated accommodation.”¹⁹² The cleanup of past contamination at overseas installations was first addressed by the DoD in the context of installations and facilities designated for closure.¹⁹³ In January 1992, the Secretary of Defense released a message barring the spending of U.S. funds “for maintenance, repair or environmental restoration beyond the minimum necessary to sustain current operations and/or eliminate known imminent risks to health and safety.”¹⁹⁴ DoD made it clear that it will not fund any remediation after a facility has been returned to the host country unless required by an international agreement or a cleanup plan negotiated before the transfer. The message was the first overseas cleanup policy for bases selected for closure. The cleanup policy was subsequently made more stringent by prohibiting the expenditure of any U.S. funds on cleanup following the decision to return an installation or facility, “beyond the minimum necessary to sustain current operations or eliminate known imminent and substantial dangers to human health and safety.”¹⁹⁵ One author opined that the new policy was designed to limit the

¹⁹¹ Please see also Lindsay-Poland, *supra* note 164. “Overseas base cleanup has no program element in the federal budget, limiting military commanders to efforts paid out of each installation’s operations and maintenance accounts, even if they want to do more.” (Ibid.) See also C. Hamilton, “Status of the U.S. Bases Program: Governmental Perspective” (Grassroots Summit, *supra* note 34).

¹⁹² National Defense, *supra* note 186, at Section 342, para (b) (2).

¹⁹³ Environmental Law Overseas, *supra* note 178 at 56.

¹⁹⁴ *DOD Policy and Procedures for the Return to Host Government of Overseas Sites and Facilities*.

SECDEF MSG 131758 JAN 92 (January 1993).

¹⁹⁵ *DOD Policy and Procedures for the Realignment of Overseas Sites*, SECDEF MSG 1421592 DEC 93 (December 1993). A thorough understanding of this standard “known imminent and substantial dangers to human health and

expenditure of funds for cleanup at installations and facilities designated for closure and to ensure consistency of remediation decisions among components in a host-nation.¹⁹⁶

On 18 October 1995 the DoD finally released a comprehensive environmental remediation policy. The *Environmental Remediation Policy for DoD Activities Overseas* applied “to remediation of environmental contamination on DoD installations or facilities overseas (including DoD activities on host nation installations or facilities) or caused by DoD operations ... that occur within the territory of a nation other than the U.S.”¹⁹⁷ Local commanders were given wide discretion in determining whether to fund additional remediation. Initially, remediation off the installation was limited to contamination caused by “current DoD operations” to abate known imminent and substantial endangerments to human health and safety or to “maintain operation”.¹⁹⁸ However, in 1998 the expenditure of funds to remediate contamination located off the installation, but which originates on the installation was allowed, under enumerated circumstances which includes the “protection of human health and safety”, regardless of whether the contamination was caused by current or past DoD operations.¹⁹⁹ As for DoD installations designated for return or that are already returned, the DoD maintains that it will not fund any environmental remediation in excess of that required by binding international agreements or an approved remediation plan.²⁰⁰

safety” is necessary to properly apply the DoD policy. See also Teresa, *supra* note 165: The contamination must be known; there is no authority to search for contaminated sites. The endangerments must be both imminent (close in time) and substantial (magnitude of harm). The risk must be to humans and necessarily to the environment only. And finally cleanup levels are deemed satisfactory when they remove the imminence or substantive nature of the endangerment; there is no requirement to restore sites to their original condition.” Such remediation may be completed after the return to the host nation, but shall be limited to essential elements of the remediation plan approved before the return. (Teresa, *supra* note 173).

¹⁹⁶ *Environmental Law Overseas*, *supra* note 178 at 78.

¹⁹⁷ *Ibid.* at 56.

¹⁹⁸ *Ibid.* at 79.

¹⁹⁹ *Ibid.* See *Environmental Remediation for DoD Activities Overseas*, DoD Instruction 4715.8 (2 February 1998).

²⁰⁰ Please see Teresa, *supra* note 173 for the environmental policy for DoD Installations and facilities that have been designated for return or that are already returned.

3. International Agreements

International agreements between the U.S. and host nations are the primary legal authority for activities at DoD installations overseas. These agreements may be broad in scope, such as status of forces agreements (“SOFAs”) or narrowly drafted basing agreements.²⁰¹ These agreements define the rights and responsibilities of the U.S. and the host nation with regard to the presence and activities of DoD personnel in that country.²⁰²

Agreements between the U.S and host countries generally contain a provision that it is the duty of the members of U.S. armed forces and its civilian personnel as well as their dependents to respect the law of the host country. It is only in the German SOFA that a host nation’s law is applied to the United States’ use of military installations. Moreover, unlike the other agreements, in case of emergency, German authorities shall be given immediate access to the installations without notification. Panama’s SOFA, on the other hand, is stronger than many of the other agreements since it lists specific areas and installations where the law of Panama shall apply.²⁰³

SOFAs generally do not contain any provision on environmental standards considering that most of these agreements were entered into at a time when the protection of the environment was not yet a major concern. The German Supplemental Agreement cures this defect by including a requirement that the U.S. is to apply German environmental law to all activities on the installations except those deemed to be strictly internal and having no effect on German

²⁰¹ Teresa, *supra* note 173 at 57.

²⁰² *Ibid.*

²⁰³ A. Grunder, “Legal Issues: Treaties, SOFAs and ACSAs” (Grassroots Summit, *supra* note 34).

nationals or property.²⁰⁴ The Panama treaty also contains provisions on environmental protection.²⁰⁵

As for the transfer of the bases after the expiration of the agreement, some SOFAs have provisions stating the U.S. is not obliged to return and restore facilities and areas to the host country in their original condition. In their respective SOFAs, Japan²⁰⁶ and Korea²⁰⁷ have relieved the U.S of any obligation to restore properties to their previous condition in exchange for a U.S. waiver of any obligation by the host nation to pay residual value. Panama's treaty is unique in that it has a provision on responsibility for cleanup after the termination of the agreement.²⁰⁸

Most international agreements basically contain the same provisions regarding claims for damages. Generally, a host country waives its right to sue the U.S. for damage to government property formerly used for military purpose. On the other hand, claims for damages resulting from military activities to government properties that were not used by forces shall be settled through arbitration. Damages claimed by third parties arising from performance of an official duty, act, omission or occurrence shall be settled in accordance to the laws of the host country. The host nation shall pay damages and thereafter be compensated by the other parties.

The pertinent provisions of the Military Bases Agreement will be discussed in Chapter 6, below.

²⁰⁴ Carlson, *supra* note 174 at 82.

²⁰⁵ *Ibid.* See Articles 54A and 54 B of 1993 Amendment to *Supplementary Agreement of 1959 (Federal Republic of Germany)*, 3 August 1959, 481 U.N.T.S. 262, 330 and Article XXI of *Agreement in Implementation of Article IV (SOFA)*, United States and Panama, 7 September 1977, 1280 U.N.T.S. 201 (hereinafter Panama SOFA) and Articles VI and XIV of *Panama Canal Treaty of 1977* United States and Panama, 7 September 1977, 1280 U.N.T.S. 3.

²⁰⁶ *Status of Forces Agreement of 1960 (Japan)*, 19 January 1960, 373 U.N.T.S. 278, at Article I

²⁰⁷ *Status of Forces Agreement of 1966*, United States and Korea, 9 July 1966, 674 U.N.T.S. 163, at Article IV.

²⁰⁸ Panama SOFA, *supra* note 205 at Article IV (3) and (4).

B. Environmental Waste Management Policy at Clark and Subic

The uncertainty as to which environmental standard to apply in overseas facilities led to a very lax environmental management at the bases.²⁰⁹ Worse, absent clear environmental guidelines, there was no proper management of the hazardous wastes at Clark and Subic.

1. Vague Environmental Management Policy

The GAO studies commissioned by U.S. Congress revealed serious flaws in the hazardous waste management at military bases abroad. Throughout the “occupation” of Clark and Subic by U.S. forces, the environmental management policy of the DoD was very unclear. DoD policy mandated overseas bases to comply with the environmental laws of host countries and, to the extent practicable, U.S. laws.

a. Applying Philippine Environmental Laws

To recall, E.O. 12088 required federal facilities abroad to comply with host country environmental pollution control standards only if those standards were applied within the host country to its own civilian industries and military forces. It may be well to note that the following Philippine laws and regulations existed at the time the Americans occupied Clark, Subic and the other bases: *National Pollution Control Decree of 1976* (P.D. 984), *Philippine Environmental Policy* (P.D. 1151.), *Philippine Environment Code* (P.D. 1152), *Establishment of the Environmental Impact Statement System of the Philippines* (P.D. 1586), *Toxic Substances &*

²⁰⁹ B. Pimentel & L. Lasola, “Filipinos Failed To Impose Environmental Standards in Bases” *Manila Chronicle* (24 November 1992) at 7.

*Hazardous & Nuclear Wastes Control Act of 1990 (R.A. 6969) and Implementing Rules & Regulations of R.A. 6969 (DENR Administrative Order No. 29, Series 1992).*²¹⁰ From the late 1970s onwards, environmental standards were already established in the Philippines with regard to air quality, emissions standards, noise standards, water quality, solid waste disposal and liquid waste disposal. As for environmental assessment, the Philippine Environmental Policy (“P.D. 1151”) is the first policy issuance on Environmental Impact Statement (EIS) System in the Philippines.²¹¹ Effective since 1977, section 4 of P.D. 1151 explicitly requires:

*[A]ll agencies and instrumentalities of the national government, including government-owned and controlled corporations, as well as private corporations, firms and entities to prepare an environmental impact system (EIS) for every action, project or undertaking which significantly affects the quality of the environment.*²¹²

By 1978, the Environmental Impact Statement (EIS) System was established requiring an EIS for environmentally critical projects (ECPs) and projects within environmentally critical areas (ECAs).²¹³ Under the system, “no person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate ...”²¹⁴ In 1990, the *Toxic Substances & Hazardous & Nuclear Wastes Control Act of 1990* was enacted. This statute pertained to the control of toxic

²¹⁰The scope of this thesis, however, will not cover a detailed discussion of each of these laws. These environmental policies and regulations may be accessed through the Philippine Environmental Management Bureau, online: Environmental Management Bureau http://www.emb.gov.ph/Laws/law1_main_all.htm (date accessed: 10 October 2001).

²¹¹ Environmental Policies and Regulations, online: Environmental Management Bureau <http://www.emb.gov.ph/Laws/dao96-37/Chapter.html> (date accessed: 6 December 2001).

²¹² *Ibid.*

²¹³ The term “environmentally critical projects” and “environmentally critical areas,” however, were not defined under the statute. It is the President who has the authority to proclaim a project or area as environmentally critical, on his own initiative or upon the recommendation of the National Environmental Protection Council. Since the issuance of P.D. 1586, the EIS system has undergone several refinements to further streamline the EIS system and to strengthen the process of its implementation. See DENR Administrative Order No. 37 Series of 1992 and DENR Administrative Order No. 94, Series of 1994. (*Ibid.*)

²¹⁴ Section 4, P.D. No. 1586.

substances and hazardous waste, mirroring the standards provided for in the United States' *Resource Conservation and Recovery Act* ("RCRA")²¹⁵ and the *Toxic Substances Control Act*.²¹⁶

It is evident that Philippine environmental legal standards were in place at the time the U.S. was occupying Clark and Subic and during the closure of these Bases. The contamination at Clark and Subic could have been prevented, if not, minimized, had the U.S. applied existing Philippine environmental standards which were mostly based on U.S. environmental standards. However, as can be inferred from the '92 GAO Report that U.S. service officials did not enforce Philippine environmental standards within the Bases claiming that the Philippine Government did not appear to enforce these laws, either on its own citizens or on military bases within the Philippines.²¹⁷

Some GAO officials and environmentalists blame the Philippine Government's failure to monitor the environmental situation at Subic and Clark for the hazardous waste left behind by the U.S. forces. They claim that the environmental regulatory bodies in the Philippines, who have the authority to come onto the bases to conduct surveys and to make assessments, never did so.²¹⁸ It must be emphasized that under the Military Bases Agreement, Clark and Subic were effectively within the exclusive jurisdiction and control of the U.S. While the Philippine Government did not have the right to enter the Bases in certain limited circumstances, this did not apply to entering the Bases in order to enforce Philippine environmental laws.

²¹⁵ To be discussed below.

²¹⁶ See *An Act to Control Substances and Hazardous and Nuclear Wastes, Providing Penalties for Violations Thereof and for Other Purposes*, R.A. 6969 (26 October 1990).

²¹⁷ '92 GAO Report, *supra* note 93 at 29.

²¹⁸ Pimentel, *supra* note 209.

b. Applying U.S. Environmental Laws Extra-territorially

Considering that existing Philippine environmental laws were not enforced inside the Bases, it would have been incumbent upon the DoD under DoD policy to apply the more stringent U.S. environmental standards. The extra-territorial application of the U.S. environmental laws, such as the NEPA,²¹⁹ Comprehensive Environmental Response, Compensation, Liability Act of 1980 (“CERCLA”)²²⁰ and RCRA,²²¹ should have been pursued by the U.S. DoD.²²² However, as can be inferred from the findings of contamination discussed in the previous Chapter, U.S. environmental standards were likewise not implemented at Clark and Subic.

The NEPA reflects the U.S. Congress’ concern over the global environment by requiring major Federal agencies to prepare an environmental impact statement (EIS) for major actions significantly affecting the human environment.²²³ The question of the NEPA’s extra-territorial application to Federal agency actions that take place overseas has been widely debated in recent years. The Courts, however, have been inclined to rule that while the Congress was concerned about the global environment, the language of NEPA does not expressly provide for its application to federal actions overseas.²²⁴ Some writers argue that the application of NEPA

²¹⁹ *National Environment Policy Act of 1969 (NEPA)*, 42 U.S.C. s. 4321-4347 (1988 & Supp V 1993).

²²⁰ *Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA)*, 42 U.S.C. s. 9602-9675 (1988& Supp V 1993).

²²¹ *Resource Conservation and Recovery Act (RCRA)*, 42 U.S.C. 6901-6986 (1988 & Supp. V. 1993).

²²² Notably, the U.S. has attempted to enforce U.S. environmental policies, i.e. wildlife conservation, outside their jurisdictions through trade measures. See the (Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna (Tuna Dolphin I) (1991), 30 I.L.M. 1594; Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna (Tuna-Dolphin II)(1994), 33 I.L.M. 839; and Report of the Appellate Body in U.S. – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle)(1998), 38 I.L.M. 121.

²²³ 42 U.S.S. ss 4332 (2) (c).

²²⁴ Please see *Babcock & Wilcox* (1977), 5 N.R.C. 1332; *Sierra Club v. Adams* (1978), 578 F.2d 389, D.C. Cir.; *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* (1981), 647 F. 2 1345, D.C. Cir.; *Greenpeace U.S.A. v. Stone*, 748 F. Supp. (D. Hawaii 1990); *Environmental Defense Fund Inc. v. Massey*, 772 F. Supp. 1296 (D.D.C. 1991) rev’d 986 F.2d 528 (D.C.Cir. 1993); and *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

extraterritorially could infringe on the sovereignty of other nations by imposing U.S. law on foreign soil.²²⁵ On the contrary, NEPA process ensures that environmental considerations are taken into account in every federal agency decision thereby helping the U.S. do its part in the prevention of environmental degradation.²²⁶ Also the preparation of an EIS should be viewed as an attempt to respect foreign sovereignty by providing information to the host nation.²²⁷ The EIS requirement does not *per se*, infringe on the sovereignty of the Philippines. "While an EIS would evaluate conditions in a foreign country, it does so with a U.S. action, and provides the other nation with information on alternatives which may preserve its environmental quality."²²⁸ E.O. 12114 and DoD 6050.7, both of which purport to further the purpose of NEPA, provide numerous exceptions and exemptions to the preparation of an EIS. It must be emphasized that under NEPA such exemptions do not exist for domestic military installations.

Pursuant to NEPA, an Environmental Baseline Survey ("EBS") is required for domestic bases subject to closure. An EBS is conducted "based on all existing environmental information related to storage, release, treatment or disposal of hazardous substances or petroleum products on the property to determine or discover the obviousness of the presence or likely presence of a release or threatened release."²²⁹ If the EBS identifies a release or threatened release of hazardous substances, the provisions of CERCLA are applied.

²²⁵ Carlson, *supra* note 174 at 91.

²²⁶ S.M. Riechel, "Government Hypocrisy and the Extraterritorial Application of NEPA" (1994) 26 Case W. Res. J Int'l L 115 at 140-141.

²²⁷ "NEPA's Role on Protecting the World Environment" (1982) 131 U of Penn L Rev 352 at 368.

²²⁸ *Ibid* at 369.

²²⁹ *Ibid*.

CERCLA establishes a framework for assessing and addressing the risks posed by hazardous substances that have been, or may be released into the environment.²³⁰ It establishes prohibitions and requirements concerning closed and abandoned hazardous waste sites; provides for liability of persons responsible for releases of hazardous waste at these sites; and establishes a trust fund to provide for cleanup when no responsible party could be identified.²³¹ Unlike the NEPA, CERCLA's extraterritorial application has not been the subject of litigation. Once the EBS ascertains that hazardous substances have been or are threatened to be released, the DoD is required under CERCLA to conduct a preliminary assessment of the base to determine whether it poses a threat to public health or the environment.²³²

More importantly, U.S. law requires the disclosure of any information gathered relating to hazards to health and the environment to those who will be potentially affected by the closure so that they may be able to participate in the decision making process. NEPA requires that environmental impact statements be made available to the public in accordance with the *Freedom of Information Act*. On the other hand, CERCLA encourages public participation by providing access to factual information, including sampling and testing data; preliminary assessment, site inspection and site evaluation reports; health assessments; workplans for the remedial investigation and feasibility studies; and guidance documents.²³³ Comments to the plan and supporting documents submitted by the public are taken into consideration in the selection of the appropriate remedial action.²³⁴ Evidently, U.S. laws require "real opportunity for the public to be involved in the investigation of hazards present on military bases and in the

²³⁰ U.S. Environmental Protection Agency, "CERCLA Overview" online: United States Environmental Protection Agency <http://www.epa.gov/superfund/action/law/cercla.htm> (last modified: 28 March 2001).

²³¹ *Ibid.*

²³² Wagner, *supra* note 168 at 428, citing 42 U.S.C. 9620 (1994); 40 C.F.R. 300.420(b)(1)(i) (1997).

²³³ *Ibid.* at 431 citing 40 C.F.R. 300.805, 300.810.

²³⁴ 40 C.F.R. 300.430(e)(H)-(I), (f)(4)(i) (1997).

selection of appropriate remedies ensuring that information is thoroughly developed and that the military does not avoid its cleanup obligations.”²³⁵ Unfortunately, the closure of DoD installations overseas do not require compliance with these standards.

It is claimed by some writers that the level of contamination at Clark and Subic is so severe that these properties would never have qualified for turnover if they had been located in the U.S. and if RCRA or CERCLA standards were applied.²³⁶ RCRA establishes a system for controlling hazardous waste from creation to disposal. RCRA requires generators of hazardous waste to have a program that will reduce the volume and toxicity of waste generated to the degree it is economically practicable.²³⁷ It requires federal facilities to meet the same standards as private entities. Unfortunately, RCRA does not explicitly apply to overseas military bases.²³⁸ Even so, the '91 GAO study reviewed DoD's implementation of provisions of RCRA and the implementing regulations that would be practicable for overseas bases to use to ensure protection of U.S. personnel and the environment. This would imply that even the GAO endorsed the application of RCRA to installations overseas. However, only one out of the seven bases visited by GAO had hazardous waste management plans required by RCRA. Clearly, most overseas facilities were not applying RCRA in their hazardous waste management programs.

²³⁵ Wagner, *supra* note 168 at 432.

²³⁶ Carlson, *supra* note 174 at 81.

²³⁷ '91 GAO Report, *supra* note 84 at 29.

²³⁸ *Ibid.* at 8. Please see L. Levy, "Stretching Environmental Statutes to Include Private Causes of Action and Extraterritorial Application: Can it be done?" (1997) 6 Dick. J. Env. L. Pol. 65 at 88. "The extraterritorial application of the RCRA has been the subject of litigation in the leading cases of *Amlon M. Metals, Inc. v. FMC Corp* (775 F. Supp. 668 [D.S.N.Y. 1991]). The Court held that RCRA did not apply extraterritorially to endangerment and waste located within the territory of another sovereign nation. Ultimately, the court felt that the legislative history and structure of RCRA were not sufficient to show Congressional intent to apply extraterritorially. The impact of the *Amlon* decision is that the RCRA citizen suit provision does not apply when the alleged endangerment has occurred abroad." (*Ibid.*)

As revealed in the '91 GAO Report, "overseas bases could not always abide by the more stringent law - whether U.S. or host country - because of the political problems that might result."²³⁹ DoD Officials believed that enforcing the more restrictive U.S. laws at overseas bases such as Clark and Subic could result in political or diplomatic problems.²⁴⁰ Perhaps the foremost concern of the U.S. Government was the possible violation of the principle of national sovereignty of nations. Yet the extra-territorial application of U.S. environmental laws would not have encroached on the sovereignty of the Philippines inasmuch as these standards would not have been enforced off the Bases but only to the operations inside the Bases.²⁴¹

2. Actual Practice

The ambiguity of DoD environmental policies overseas affected the manner in which environmental matters were dealt with at Clark and Subic. At the time Clark and Subic were used as staging areas for the Korean, Vietnam and the Gulf Wars, environmental management of overseas bases was not given much attention. As admitted by a retired Navy Rear Admiral who was in and out of Subic, the U.S. Navy was environmentally abusive, particularly during the Vietnam War. He recalled that as commanding officer of an aircraft carrier in 1970, aircraft carriers and other Navy vessels were being closely monitored in U.S. ports to insure proper control and disposal of waste material.²⁴² The situation in Subic was different however. Ships, aircrafts and industrial facilities were spewing polluted materials into the air, water and soil with no regard for the short term and long term effects.²⁴³ They would dock at Subic with only a 24-

²³⁹ '91 GAO Report, *supra* note 86 at 12.

²⁴⁰ *Ibid.*

²⁴¹ See discussion on the Obligation of Due diligence in Chapter 6, below.

²⁴² E. J. Carroll, "US Military Bases and the Environment: A Time for Responsibility" (U.S. Military Bases and the Environment: A Time for Responsibility, 1996 International Forum, Manila, Philippines November 22-26, 1996) at 18.

²⁴³ *Ibid.*

hour workday period allotted for maintenance of the ships and the aircrafts.²⁴⁴ As a result “cutting, welding, sand blasting, corrosion control, paint stripping, painting and tank flushing both of ship and aircraft, went on around the clock and the debris was simply flushed into the ground and the bay.”²⁴⁵ In the rush to meet operational commitments during the height of wars, environmental issues were not given consideration. Clearly, the urgency of the support operation far outweighed any environmental considerations.

Even during times of peace, the lack of a hazardous waste management program was apparent in both Bases, particularly in Subic. A former Filipino worker at Subic disclosed that there were two rules of thumb for hazardous waste produced at the Naval Magazine, where bombs and ammunitions were stored and destroyed.²⁴⁶ He confirmed that if the amount of toxic waste was less than a full barrel, the waste was dumped into a local stream.²⁴⁷ On the other hand, if there was enough waste to fill several barrels, it was trucked to a local landfill and dumped.²⁴⁸ Furthermore, some Base workers described improper practices, such as pouring cyanide out of drums directly into a landfill, which were not documented in the records turned over to the Philippine Government.²⁴⁹ Filipino scavengers from Olongapo and nearby towns were allowed by Base authorities to work the dumpsite, knowing fully well that the landfill was contaminated with hazardous waste.²⁵⁰

²⁴⁴ Caroll, *supra* note 242 at 18.

²⁴⁵ *Ibid.*

²⁴⁶ Armstrong, *supra* note 170.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Pimentel, *supra* note 209.

More disturbing is the apparent double standard practiced with regard to the handling of hazardous materials. Filipino workers at Subic were likewise exposed to asbestos²⁵¹ and polychlorinated biphenyl (PCB),²⁵² both of which have long been banned in the U.S.²⁵³ A former worker at the Ship Repair Facility said that Base officials never warned them of the dangers of asbestos and other heavy metal wastes which they inhaled while repairing or cleaning Navy ships. Another former worker confirmed that workers soaked their gloved hands in PCB contaminated fuel and did not use respirators. Others took soil samples from Subic's transformers, with rubber gloves and paper masks as protection. It was only when the Base was about to be closed that they learned about the dangers of handling PCBs. They observed that whenever PCB contaminated fuel was spilled, the soiled ground was dug up and isolated by hazardous waste workers wearing full protective clothing and respirators.

Given that the normal operation of military installations involve the generation of hazardous wastes, the U.S. was expected to exercise an extra degree of care in its hazardous waste generation, management and disposal practices at the bases. Instead, the U.S. failed to establish and implement clear and effective environmental standards at Clark and Subic.

²⁵¹ For a discussion of the history of the ban on asbestos see <http://www.epa.gov/opptintr/asbestos/asb-ban2.pdf>. (date accessed: 8 December 2001).

²⁵² Growing concerns over health and environmental problems caused by PCBs led to the passage of the *Toxic Substances Control Act of 1976* which banned the production and many uses of this family of chemicals (Environmental Protection Agency online: <http://www.epa.gov/history/topics/tsca/02.htm>) (date accessed: 8 December 2001).

²⁵³ Pimentel, *supra* note 209.

V. State Responsibility for Environmental Harm

This Chapter will examine some of principles of international environmental law which are relevant in determining whether the U.S. is responsible for the environmental harm at Clark and Subic.

A. Customary Law and General Principles Concerning Transboundary Pollution and Environmental Harm

International law prohibits states from conducting activities within their territories, or in common spaces, without regard for other states or for the protection of the global environment.²⁵⁴ The obligation not to cause transboundary pollution reflects the obligation of all states to respect the rights of other states, especially the rights to national integrity and inviolability during times of both peace and war.²⁵⁵ States are thus required by international law to take adequate steps to control and regulate sources and activities that may cause serious global environmental damage or transboundary harm within their territory or subject to their jurisdiction.²⁵⁶ This obligation evolved through general rules of international law and case law precedents.²⁵⁷

²⁵⁴ P.W. Birnie & A. E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 89.

²⁵⁵ F. Perrez, "The Relationship between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage" (1996) 26 *Env't'l L* 1187 at 1198.

²⁵⁶ Birnie, *supra* note 254 at 89.

²⁵⁷ A. Kiss & D. Shelton, *International Environmental Law* (New York: Transnational Publishers Inc., 2000) at 280. Please note, however, that in international law there is no formal *stare decisis* doctrine and hence, international courts are not obliged to follow previous decisions, although they almost always take previous decisions into account. (Malanczuk, *infra* note 301 at 51)

The general rules of international environmental law developed within the context of two fundamental objectives: the sovereign right of states over their natural resources and the duty of states not to cause damage to the environment.²⁵⁸ At the U.N. Stockholm Conference on the Human Environment in 1972,²⁵⁹ these two seemingly conflicting concepts were integrated into one of the most basic rules of international environmental law as articulated in Principle 21 of the *Stockholm Declaration*:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

The sovereign right of states over their natural resources, pronounced in various UN General Assembly resolutions,²⁶⁰ is reaffirmed in the first part of Principle 21.²⁶¹ Subsequently, the principle of permanent sovereignty over natural resources has been invoked in various international environmental agreements.²⁶²

²⁵⁸ P. Sands, *Principles of International Environmental Law, Vol. I Frameworks, Standards and Implementations* (United Kingdom: Manchester University Press, 1995) at 186. See also M. V. Soto, "General Principles of International Environmental Law" (1996) 3 ILSA J Int'l & Comparative Law 193 at 194.

²⁵⁹ *Declaration of the United Nations Conference on the Human Environment (Stockholm)*, UN Doc A/CONF/48/14 REV.1. (hereinafter *Stockholm Declaration*). GA Res. 2994 (XXVII) (15 December 1992). The Conference formally enacted three non-binding instruments: a resolution on institutional and financial arrangements, a Declaration on the Human Environment listing 26 principles and an Action Plan with 109 recommendations (Perrez, *supra* note 255 at 1200. See n 117 & n 118)

²⁶⁰ Permanent Sovereignty over Natural Resources, GA Res. 1803(XVII) (1962); *The New International Economic Order* GA Res. 3201(S-VI) (1974); *Charter of Economic Rights and Duties of States* GA Res. 3281 (XXIX) (1974), U.N. GAOR 29 Sess., Suppl. No. 31 (A/9631), at 50.

²⁶¹ Kiss, *supra* note 257 at 280.

²⁶² Article 9 (6) of the 1933 London Convention, Article 2 (3) of the 1971 Ramsar Convention, Article 1 of the 1983 International Tropical Timber Agreement, Preamble of the 1989 Basel Convention, Preamble to the 1992 Climate Change Convention and Article 15 (1) of the 1992 Biodiversity Convention.

The second part of Principle 21 reformulates the traditional principle *sic utere tuo ut alienum non laedas*²⁶³ by obligating states to ensure that activities within their jurisdiction do not cause transboundary harm.²⁶⁴ States are responsible not only for their own activities but are obligated to exercise due diligence with regard to all activities under their control. States must apply the same rules not only within their jurisdiction but everywhere they exercise control, such as on “ships, airplanes, and spacecraft having nationality of the state, as well as for missions to Antarctica, troops stationed in foreign territories, and any occupied or dependent territories.”²⁶⁵

In 1992, the United Nations convened the Conference on Environment and Development in Rio de Janeiro. This conference produced the *Rio Declaration on Environment and Development* (“Rio Declaration”).²⁶⁶ Principle 2 of the Rio Declaration reaffirms the responsibility not to cause damage to the environment of other states or areas beyond the limits of national jurisdiction and declares that states have “the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.”²⁶⁷ Principle 2 is essentially the same as Principle 21 of the Stockholm Declaration, save for the inclusion of developmental concerns. The addition of this phrase has been interpreted in different ways. Those critical of the inclusion of this phrase claim that the focus on the right to development weakens the obligation not to cause transboundary damage and “upsets the delicate balance struck in Stockholm between the sovereign use of natural resources and the duty to care for the environment.”²⁶⁸ However, others claim that the inclusion of developmental policies in the definition of a state’s right to use its natural resources may also be seen as an extension of the

²⁶³ Use your own property so as not to injure that of another.

²⁶⁴ The development of the second part of Principle 21 can be traced to earlier environmental treaties such as the 1951 International Plant Protection Convention, the 1963 Nuclear Test Ban Treaty, 1968 African Conservation Convention, 1972 World Heritage Convention.

²⁶⁵ Kiss, *supra* note 257 at 281.

²⁶⁶ *U.N. Conference on Environment and Development, Rio Declaration on Environment and Development A/CONF.151/26* (Vol. 1), 8; 31 I.L.M. 874 (1992) (hereinafter Rio Declaration). GA Res. 47/190 (1992).

²⁶⁷ Perrez, *supra* note 255 at 1203.

²⁶⁸ *Ibid.* at 1203-1204.

scope of the obligation not to cause transboundary damage.²⁶⁹ Principle 2 has not changed the fundamental principle to refrain from causing transboundary harm but has adapted with the times, by recognizing the importance of sustainable development. Under this interpretation, national development policies should likewise adhere to the duty not to cause transboundary pollution. As appropriately put, “while the Rio Declaration does not represent a bold advance, it still is an important step forward and a valuable improvement on the Stockholm Declaration”.²⁷⁰

The principle that a state has an obligation not to cause significant transboundary environmental damage is now considered as a rule of international law. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration have been widely accepted and adopted in a U.N. General Assembly resolution and in numerous treaties, conventions and agreements, leading to their recognition as general principles of international environmental law.²⁷¹ Principle 21 and Principle 2 are generally recognized to reflect a rule of customary international law, placing international legal limits on the right of states with respect to activities carried on within their territory or under their jurisdiction.²⁷²

Even prior to the 1972 Stockholm Conference, the duty of states not to cause environmental harm has been acknowledged in a number of arbitral and judicial decisions, including the often cited *Trail Smelter* arbitration case.²⁷³ This case involved transboundary air pollution caused by sulphur dioxide fumes emitted from a smelter in Canada which damaged

²⁶⁹ Perez, *supra* note 255 at 1204.

²⁷⁰ *Ibid.*

²⁷¹ Please see UNGA Res. 2996, Article 30 of the Charter of Economic Rights and Duties of States, 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe, Principle 3 of the 1978 UNEP Draft Principles 1979 Geneva Convention on Long Range Transboundary Air Pollution, 1982 World Charter for Nature, Convention on the Law of the Sea, UNCLOS Article 193 and 194 (2), 1985 ASEAN Convention on the Conservation of Nature and Natural Resources, Preamble of the 1992 UN Framework Convention on Climate Change and Article 3 of the 1992 Convention on Biological Diversity.

²⁷² Sands, *supra* note 258 at 190-191.

²⁷³ *U.S. v. Canada* (1941), 3 R.I.A.A. 1911, 1965 (hereinafter *Trail Smelter Arbitration*).

crops in the United States. The arbitral tribunal awarded damages to the United States and prescribed a regime for controlling future emissions from the smelter. The Arbitral Tribunal held that:

*...under the principles of international law, as well as the law of the United States, no state has a right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or properties therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*²⁷⁴

The general rule enunciated in the *Trail Smelter* case is derived from the extension of the principle of good-neighbourliness. The *Trail Smelter* award is frequently cited for its role in laying down basic principles concerning transboundary pollution, which are accepted by most qualified authors as establishing a rule of customary international law.²⁷⁵ The judgment of the International Court of Justice in the *Corfu Channel*²⁷⁶ case supports a similar principle, although the context is rather different and its application to the environment more doubtful.²⁷⁷ In this case the Court held Albania responsible for damage to British warships caused by a failure to warn Britain of mines in Albanian territorial waters. The Court noted that the principle of sovereignty embodies the obligation on a state "not to allow knowingly its territory to be used for acts contrary to the rights of other States."²⁷⁸ While this judgment does not comment on environmental rights of other states, it establishes the duty of a state to warn others of known dangers.²⁷⁹ Similarly, in the *Lac Lanoux* arbitration, the tribunal reaffirmed that a state has an obligation when exercising its rights, to consider the interests and respect the rights of another

²⁷⁴ Trail Smelter Arbitration, *supra* note 273.

²⁷⁵ Perrez, *supra* note 255 at 1198.

²⁷⁶ *Corfu Channel (U.K. v. Albania)*, 1949 I.C.J. Rep. 4 (Apr. 9).

²⁷⁷ Birnie, *supra* note 254 at 90.

²⁷⁸ Perrez, *supra* note 255 at 1199.

²⁷⁹ Birnie, *supra* note 254 at 90.

state.²⁸⁰ This case involved the proposed diversion of an international river by an upstream state. The Arbitral Tribunal held that while France was entitled to exercise her rights, she could not ignore the interests of Spain: "Spain is entitled to demand that her rights be respected and that her interests be taken into consideration."²⁸¹

The invocation of these principles in international agreements and conferences subsequent to the Stockholm Conference has prompted the International Court of Justice to proclaim that it now forms part of the body of international law. In the 1974 *Nuclear Tests* case,²⁸² Australia asked the International Court of Justice to declare that the carrying out of further atmospheric nuclear tests by France was "inconsistent with applicable rules of international law and would be unlawful in so far as it involves the modification of the physical conditions of and over Australian territory and pollution of the atmosphere and of the resources of the seas."²⁸³ In an advisory opinion in the 1996 case on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice notes "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."²⁸⁴ The *Restatement (Third) of Foreign Relations Law of the United States* likewise acknowledged that state responsibility for environmental harm is entrenched in customary international law.²⁸⁵

²⁸⁰ *Affaire du Lac Lanoux* (1963)12 R.I.A.A. at 316.

²⁸¹ *Ibid.*

²⁸² *Australia v. France* (1974) I.C.J. Rep. 253.

²⁸³ Sands, *supra* note 258 at 191 citing I.C.J. Pleadings, *Nuclear Tests* Cases, I, 27.

²⁸⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) I.C.J. Rep. 241-242, para. 2. In addition, in the dissenting opinion of Judge Weeramantry in the 1974 *Nuclear Tests* case, he stated that a fundamental principle of modern environmental law is that "no nation is entitled by its own activities to cause damage to the environment of other nations." (Wagner, *supra* note 168 at 441.)

²⁸⁵ Kiss, *supra* note 257 at 610, citing *Restatement (Third) Foreign Relations Law of the United States* (1986), at Introductory Note, Part VI: The Law of the Environment. Customary law results from consistent practice of states out of a sense of legal obligation.

B. State Responsibility for Environmental Harm

International practice shows that States have now accepted a general principle of responsibility for environmental harm: that is, the principle that they must answer for environmental harm outside their boundaries caused by activities they have carried out or allowed within their jurisdiction or control.²⁸⁶ However, despite the wide acceptance of this principle, only a very small percentage of international environmental accidents or injuries seem to give rise to claims.²⁸⁷ While states proclaim the principle of responsibility, they have been hesitant to develop detailed norms on remedying environmental damage.²⁸⁸ Thus, while the prevention of transboundary pollution is deemed part of customary international law, there is as of yet no effective system of rules on responsibility.²⁸⁹

1. State/International Responsibility and International Liability

At this point, it may be well to define two important concepts in the evolving field of international environmental law: (i) state or international responsibility; and (ii) international liability.²⁹⁰ These concepts are often used interchangeably since they refer to obligations and duties incumbent upon states as a result of environmental harm. In simple terms, "international

²⁸⁶ "Introductory Document Prepared by the Italian Government," Forum on International Law of the Environment, Sienna 17-21 April 1990 at 53. But see K. Zemanek, "State Responsibility and Liability," in W. Lang, H. Neuhold and K. Zemanek, eds., *Environmental Protection and International Law* (United Kingdom: Graham & Trotman, 1991) at 188. The author disagrees with this statement claiming that there is no "widespread, constant and consistent practice" by states of the principle of responsibility for environmental harm adequate to generate a rule of customary law, citing the Chernobyl accident.

²⁸⁷ Kiss, *supra* note 257 at 611.

²⁸⁸ *Ibid.* at 617.

²⁸⁹ R. Pisillo-Mazzeschi, "Forms of International Responsibility for Environmental Harm," in F. Francioni and T. Scovazzi eds., *International Responsibility for Environmental Harm* (United Kingdom: Graham and Trotman Ltd., 1991) at 15.

²⁹⁰ See S. Sucharitkul, "State Responsibility and International Liability Under International Law" (1996) 18 *Loy. L.A. Int'l Comp. L.J.* 821.

responsibility” refers to the obligations of states, while “international liability” pertains to the consequences when those obligations have been breached.²⁹¹

There is no single instrument setting forth generally applicable international rules governing state responsibility and international liability for environmental damage. The *Stockholm Declaration* recognized the need for states to develop international law regarding liability and compensation for environmental damage caused by activities within a state’s jurisdiction or control.²⁹² Since then, limited progress has been achieved in this regard considering that states have generally been reluctant to agree to rules concerning responsibility and liability. At the Rio Conference twenty years later, states were once again called upon “to develop national law regarding liability and compensation for the victims of pollution and other environmental damage” and also to:

*[C]ooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.*²⁹³

In conventional international law, there have been attempts to include precise rules on responsibility, indicating the form of responsibility applicable in case of breach of treaty obligations or in case of damage, such as the *1972 Convention on International Liability for Damage Caused by Space Objects* and the *1982 Montego Bay Convention on the Law of the*

²⁹¹ Birnie, *supra* note 254 at 139, note 6. The Institut de Droit has made a legal distinction between state responsibility and international liability (“Final Report Prepared for the Eight Committee of the Institut de Droit International By Professor Francisco Orrego Vicuna, Rapporteur on the Subject of Environmental Responsibility and Liability,” (1998) 10 *Geo. Int’l Envtl. L. Rev.* 279). See also *State responsibility and International Liability*, *infra* note 290 for the various uses of the terms responsibility and liability.

²⁹² Stockholm Declaration, *supra* note 259 at Principle 22.

²⁹³ Rio Declaration, *supra* note 266 at Principle 13.

*Sea.*²⁹⁴ However, agreements on environmental protection basically have general or vague rules on responsibility, if any rules at all.²⁹⁵

The International Law Commission (“ILC”) has attempted to draw the line between state responsibility and international liability by developing a new regime of international liability for transboundary harm which are not *per se* unlawful. The ILC’s work to codify the topic of “Responsibility of States for Internationally Wrongful Acts” (“Draft Articles on State Responsibility”) and the “International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law”²⁹⁶ (“Draft Articles on International Liability”) attempts to address some of the inadequacies within the current rules on state responsibility and liability for damage including environmental damage. Writers have debated the necessity of distinguishing between liability for lawful activities and responsibility for wrongful ones.²⁹⁷ Distinguishing these two concepts is an arduous task inasmuch as the concept of state responsibility and international liability are essentially intertwined. Moreover, the practicality of reconceptualizing existing law and practice relating to environmental harm remains doubtful.²⁹⁸ In August 2001, the ILC adopted the entire draft articles on State Responsibility and also a set of 19 draft articles on International Liability, along with their accompanying

²⁹⁴ Pisillo-Mazzeschi, *supra* note 289 at 17.

²⁹⁵ *Ibid.* at 18.

²⁹⁶ To separate the topics of international liability from that of state responsibility, the International Law Commission limited the scope of these articles to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences. The draft articles on International Liability are “primarily concerned with the management of risk and emphasizes the duty of cooperation and consultation among all states concerned.”

²⁹⁷ Boyle argues that at a theoretical level, it is not clear that the conceptual bases on which international liability is distinguished from State liability is either sound or necessary [A. Boyle, “State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited By International Law: A Necessary Distinction?” (1990) 39 I.C.L.Q.1. (hereinafter *State Responsibility and International Liability*)]

²⁹⁸ As Boyle observes, “much of what the Commission is now proposing could be conceptually contained within the regime of obligations whose breach entailed responsibility.” (*State Responsibility and International Liability*, *supra* note 297 at 22).

commentaries.²⁹⁹ For purposes of this discussion, only the principle of state responsibility, as opposed to international liability, will be considered.

2. Principle of State Responsibility

State responsibility is the principle by which states may be held accountable in interstate claims under international law.³⁰⁰ Some features of state responsibility have developed historically on the basis of cases concerning the unlawful treatment of aliens and international minimum standards.³⁰¹ It was in the *Trail Smelter* arbitration that the principle of state responsibility was first extended to the field of transboundary pollution. Consequently, a principle emerged that states may be held responsible to private parties or other states for pollution that causes significant damage to persons or property.³⁰²

a. International Wrongful Act or Omission

Every international wrongful act or omission of a state entails the international responsibility of that state.³⁰³ To establish the existence of an internationally wrongful act of a state, the act or omission must be attributable to the state under international law and must constitute a breach of an international obligation of the state.³⁰⁴ For purposes of the international law of state responsibility, the state is treated as unity, consistent with its

²⁹⁹ Report of the International Law Commission on the work of its Fifty Third Session (23 April- 1 June and 27 July – 10 August 2001) online: <http://www.un.org/law/ilc/reports/2001/2001report.asp> (date accessed: 8 October 2001) [hereinafter ILC Report].

³⁰⁰ Birnie, *supra* note 254 at 139.

³⁰¹ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Rev. ed., (London: Routedledge, 1997) at 256.

³⁰² Kiss, *supra* note 257 at 610.

³⁰³ Draft Articles on Responsibility of States for Internationally Wrongful Act, Article 1 (hereinafter Draft Articles).

³⁰⁴ *Ibid.* at 296, Article 2. See also *Phosphates in Morocco*, Preliminary Objections (1938) P.C.I.J., Series A/B, No. 74; *United States and Consular Staff In Techrان* (1980) I.C.J. 1980 at 3; and *Dickson Car Wheel Company* (1931) UNRIAA, vol. IV, 669, at 678.

recognition as a single legal person in international law, regardless of whether the internationally wrongful act was committed by one its state organs (i.e. ministries, departments, or other legal entities).³⁰⁵ There is a breach of an international obligation when the act in question does not conform with the requirements of the obligation, regardless of its origin or character.³⁰⁶ International obligations of the state cover those established by a treaty, by a customary rule of international law or by a general principle applicable within the international legal order. Simply put, international obligation refers to all processes for creating legal obligations recognized by international law.³⁰⁷ The ILC explains that the breach of an international obligation consists in the incongruity between the conduct required of the State by that obligation and the conduct actually adopted by the state.³⁰⁸ Thus, a state which does not act in conformity with its obligation to prevent transboundary pollution incurs responsibility. A state's breach of an international obligation is determined by comparing its actual conduct with the conduct legally prescribed by the international obligation.³⁰⁹

b. Standard of Care

As to the standard of care or form of responsibility required in environmental damage cases, fault-based responsibility, strict liability and absolute liability are often considered.³¹⁰ Fault-based responsibility requires that one show that an obligation has been violated and that harm resulted from such violation.³¹¹ Generally, a state is not held responsible when it has taken necessary and practicable measures to comply with the obligation; but despite of its measures the

³⁰⁵ ILC Report, *supra* note 299 at 71.

³⁰⁶ Draft Articles, *supra* note 303 at Article 12.

³⁰⁷ ILC Report, *supra* note 299 at 126.

³⁰⁸ *Ibid.* at 125.

³⁰⁹ ILC Report, *supra* note 299 at 125.

³¹⁰ Please see Pisillo-Mazzeschi, *supra* note 289 at 22-26 for a discussion of the basis and form of international responsibility for environmental harm in customary law.

³¹¹ Kiss, *supra* note 257 at 611.

obligation nevertheless was breached. This is known as the “due diligence test.”³¹² Fault-based responsibility is generally expressed in terms of the due diligence test and is considered the preferred approach for determining responsibility under international law.³¹³ On the other hand, traditionally, objective responsibility or strict responsibility arose from the mere breach of an international obligation and hence, does not require fault.³¹⁴ Strict liability eventually allowed the defendant state to invoke circumstances to excuse the breach of international law. In some instances, strict liability may imply placing the onus on the defendant state to show that it was not negligent or otherwise at fault.³¹⁵ Strict liability may likewise imply that a failure of due diligence or subjective fault are not required but that other defences are available.³¹⁶ Liability arises based on the mere causal link between activities deemed unlawful and the resulting damage. The injured state need not prove anything except the causal connection between the activity in question and the damage suffered.³¹⁷

The standard of care to be shown in fulfilling the obligation to prevent transboundary environmental harm remains inconclusive.³¹⁸ Some writers claim that strict liability is emerging as a general principle of international law based on the *Corfu Channel* and *Lac Lanoux* cases.³¹⁹ Other writers, however, consider ultra-hazardous activities as a distinct category for which strict or absolute responsibility is the applicable standard.³²⁰ Although Principle 21 incorporates the obligation of states to ensure that activities within their jurisdiction or control do

³¹² Kiss, *supra* note 257 at 611.

³¹³ F. Vicuna, “Responsibility and Liability for Environmental Damage Under International Law: Issues and Trends” (1998) 10 *Geo. Int’l Env’tl L. Rev.* 279 at 283-284.

³¹⁴ Pisillo-Mazzeschi, *supra* note 289 at 17.

³¹⁵ Birnie, *supra* note 254 at 142.

³¹⁶ *Ibid.*

³¹⁷ L. Kaplan, “International Responsibility of an Occupying Power for Environmental Harm: The Case of Estonia” (1999) 12 *Transnat’l. Law* 153 at 185.

³¹⁸ Sands, *supra* note 258 at 637.

³¹⁹ Birnie, *supra* note 254 at 143 citing Goldie (1965) 14 *ICLQ* 9; Schneider, *World Public Order of the Environment* (London, 1975), Ch. 6; and Kelson (1972) 13 *Harv. Int’l L. J.*, 235 ff.

³²⁰ *Ibid.* at 144. Please see Sands, *supra* note 258 at 638.

not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction, it does not provide a conclusive basis "to the nature of responsibility for environmental damage and must be interpreted within the framework of customary rules on which it is based."³²¹ Neither can the decisions of international tribunals in the *Trail Smelter* case, the *Corfu Channel* case, the *Lac Lanoux* case and the *Nuclear Tests* cases be interpreted to support conclusions of absolute /strict liability or fault-based liability.³²² As one commentator notes:

*International case law does not offer any argument in favour either of objective responsibility or of liability without wrongful act on the protection of the environment and offers instead various arguments favouring responsibility for a wrongful act and for lack of due diligence.*³²³

In general, it would seem that international case law, treaty practice and general principles of law have not consistently applied any standard of liability. Thus, every case of environmental harm should be examined on a case by case basis. As aptly put by Pisillo-Mazzeschi:

Hence, the investigation cannot be limited to ascertaining that State responsibility exists even if the State cannot be charged with fault or lack of due diligence; the investigation must also be extended to evaluating the nature of the primary obligations that have been breached, in order to establish whether it is a question of responsibility without fault for a wrongful act (objective responsibility) or of liability without a wrongful act....

For this reason, we must first establish whether or not real binding international obligations to prevent pollution exist. If the answer is yes, their breach creates responsibility for a wrongful act. We must then establish the nature of such obligations, that is, whether they required only that States use due diligence in preventing pollution or required it not to pollute in any way whatsoever. The solution to this problem make it possible to affirm the existence of a corresponding makes it possible to

³²¹ Birnie, *supra* note 254 at 146.

³²² Sands, *supra* note 258 at 637.

³²³ Pisillo-Mazzeschi, *supra* note 289 at 31.

*affirm the existence of a corresponding responsibility for fault (lack of due diligence) or without fault, but still within the framework of responsibility for wrongful act.*³²⁴

In any case, the dominant theory supported by state practice is that states are in general responsible for environmental damage only if it results from a lack of due diligence.³²⁵ The actual practice of states and the present state of customary law indicates that, at least in environmental matters, the due diligence test is preferred over findings of fault based on any form of strict or absolute liability.³²⁶ Pisillo-Mazzeschi notes: "These conclusions are confirmed in judicial and arbitral practice, in diplomatic practice, in treaty practice and in numerous acts adopted in conferences, international organizations or agencies and by prestigious scientific institutions."³²⁷ Significantly, Section 601 of the Restatement of the Foreign Relations Law of the United States likewise acknowledges the due diligence rule in the protection of the environment:

601 (1) A State is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control,

- (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and*
- (b) are conducted so as not to cause significant injury to the environmental of another state or of areas beyond the limits of national jurisdiction; and*

(2) A State is responsible to all other States

- (a) for any violation of its obligation under Subsection (1)(a) and*

³²⁴ Pisillo-Mazzeschi, *supra* note 289 at 27-28.

³²⁵ Birnie, *supra* note 254 at 144. Please see ILC Report at 392, "An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions as well as from the resolutions and reports of international conferences and organization."

³²⁶ State Responsibility and Liability, *supra* note at 15 citing Dupuy, in M. Bothe, ed., *Trends in Environmental Policy and Law* (1980) at 363.

³²⁷ Pisillo-Mazzeschi, *supra* note 289 at 29 to 33. See *Ibid.* at 29-33.

(b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.

(3) A State is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another State or to its property, or to persons or property within the State's territory or under its jurisdiction or control;³²⁸

The concept of due diligence developed in international case law at the end of the 19th century evolving out of the common law.³²⁹ Generally, 'due diligence' implies the introduction of legislative and executive controls capable of effectively protecting other states, and it can be expressed as the conduct to be expected of a good government,³³⁰ i.e. from a government mindful of its international obligations.³³¹ The Organization of Economic Cooperation and Development's ("OECD") Environmental Committee has observed that there is a 'custom based rule of due diligence imposed on all states in order that activities carried out within their jurisdiction do not cause damage to the environment and other states,' which includes establishing and implementing an effective system of environmental law and regulations, and principles of consultation and notification.³³² The concept of due diligence serves to establish the objective standard of behavior required of the state in fulfilling its duty not to cause transboundary pollution.³³³

c. Reparation

³²⁸ Restatement of Law (Third): The Foreign Relations Law of the United States (1987), Section 601.

³²⁹ OECD, "Observations of the Concept of the International Responsibility of States in Relation to the Protection of the Environment", in *Legal Aspects of Transfrontier Pollution* (France: OECD, 1977) at 383.

³³⁰ A. Boyle, "Nuclear Energy and International Law: An Environmental Perspective" (1989) 1989 Brit. Y.B. Int'l L. 257 at 272-273. See also, OECD, *supra* note 329 at 385 and Dupuy, *ibid.* at 369.

³³¹ OECD, *supra* note 329 at 369.

³³² Sands, *supra* note 258 at 638 citing OECD, Report by the Environment Committee, Responsibility and Liability of States in Relation to Transfrontier Pollution (1984) at 4.

³³³ R. Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992) 35 GYIL 9 at 44.

It is well established that the perpetrator of an internationally wrongful act is under an obligation to remedy the consequences of the violation. The Permanent Court of Justice elaborated on the obligation of reparation in the *Charzow Factory* case:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award need not be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.³³⁴

Violations of international environmental obligations have generally evoked different forms of remedies, such as formal apologies, declaratory judgments by international tribunals, punishment of individuals whose acts occasioned the violation of international law, adoption of preventive measures to ensure that the wrongful act will be not be repeated, restitution and compensation. Once state responsibility is established, it is incumbent upon the responsible state to make a full reparation. Ideally, the goal of any reparation is to restore the environment to its original state, if not identical to that which existed before the damage occurred, at least to maintain its necessary permanent function.³³⁵ “However, while restitution in kind might involve restoring living resources to a polluted river or cleaning up a toxic site, often damage may not be easily remediable, if at all.”³³⁶ In case it is not possible to restore the environment to its prior condition, compensation for the environmental harm is the alternative.

³³⁴ *Factory at Charzow* (Germ. V. Pol) (1928) P.C.I.J. (ser. A) No. 17 at 47.

³³⁵ Sands, *supra* note 258 at 639 citing Communication from the EC Commission to the EC Council and European Parliament on Environmental Liability, para 5.2, at 32 (1993)

³³⁶ Kiss, *supra* note 257 at 613.

Normally, an injured state will seek financial reparations to cover the cost associated with material damage to environmental resources and consequential damage to people and property, including restoration and reinstatement.³³⁷ However, there are some obstacles to obtaining compensation. The causal link between a given activity and its supposed harmful effects on the environment must first be established.³³⁸ Thereafter, the author of the damage must be identified in legal terms which can be difficult in cases where the pollution emanates from different sources.³³⁹ Once these hurdles are overcome, the damage must be evaluated so that a claim may be presented in the proper fora.³⁴⁰ However, it is often difficult to estimate damage in terms of monetary compensation as environmental damage is not always capable of economic valuation. As pointed out by the ILC:

However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity amenity, etc- sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.³⁴¹

In some cases where compensation has been awarded or agreed upon, payments have been directed to reimbursing the injured state for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of the polluted property.³⁴²

³³⁷ Sands, *supra* note 258 at 639.

³³⁸ A. Kiss, "Present Limits to the Enforcement of State Responsibility for Environmental Damage," in *International Responsibility for Environmental Harm*, F. Francioni & Tulio Scovazzi, eds. (London: Graham & Trotman, 1991) at 5 (hereinafter *Responsibility for Environmental Harm*). See generally Article 31, para. 2 of the Draft Articles on State Responsibility which addresses the causal link between the internationally wrongful act and the injury. "It is only injury ...caused by the internationally wrongful act of a state for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act." (ILC Report, *supra* note 299 at 227).

³³⁹ *Ibid.* at 5-6.

³⁴⁰ *Ibid.* at 6.

³⁴¹ ILC Report, *supra* note 299 at 252.

³⁴² *Ibid.* at 253.

d. Standing to Bring Claims

Another issue in state responsibility involves who has standing to bring claims for environmental damage. In principle, the standing to bring international claims is confined to 'injured states'.³⁴³ Diplomatic protection is exercised by an injured state where an individual suffers harm from transboundary pollution.³⁴⁴ An individual who suffers harmful environmental effects must first exhaust local remedies to obtain compensation.³⁴⁵ If local remedies are not successful, the individual may request its state to present an international claim to the government on whose territory or under whose control the activities originated.³⁴⁶ Diplomatic protection may be exercised only under two conditions: (i) the claimant must be a national of the state taking up his claim;³⁴⁷ and (ii) local remedies must first have been exhausted. Commentators maintain that these conditions need not be fulfilled in case of transboundary environmental damage.³⁴⁸ The victim of the environment damage need not be a national of the injured state. In transboundary environmental damage, the injury suffered by an individual is merely incidental to the pollution suffered by the state. As put by Kiss and Sheldon:

All who are situated on the territory or territories where the injury occurs, including human beings and their movable and immovable goods, whether private property or public domain of the state, are

³⁴³ Birnie, *supra* note 254 at 154. "The term 'injured state' has been defined by the ILC in broadly comparable terms, to include one whose legal rights or interest, including those arising under multilateral treaties, are directly or indirectly infringed by the defendant state." See also Article 42 of the Draft Articles of State Responsibility on the invocation of responsibility by the injured State.

³⁴⁴ Diplomatic Protection is the "protection given by one country's representatives to a person, usually an individual, against another country's violation of international law." But see W. K. Geck, "Diplomatic Protection" in 1 *Encyclopedia of Public International Law* 1046 (1992) (the term diplomatic protection is not altogether precise).

³⁴⁵ Kiss, *supra* note 257 at 613.

³⁴⁶ *Ibid.*

³⁴⁷ Please note, however, that an exception has developed in states which do not permit their nationals to denounce their citizenships even if those citizens have already acquired new permanent residences and new nationalities. In this case, diplomatic protection may be exercised by the state based on the "real connection" of the individual to that state.

³⁴⁸ Responsibility for Environmental Harm, *supra* note 338 at 7. See also Kiss, *supra* note 257 at 614-615.

*similarly situated. Moreover, even if no individual complains, even if there is no victim among the inhabitants of the territory of the states, the latter suffers damage because of act of pollution originating in the other states. It is clear that the injured state has the right to assert the responsibility of the state under whose jurisdiction or control the polluter is found. The claimant state will proceed in order to protect its territorial sovereignty violated by the act of pollution and not its personal competence exercised in favour of one of its subjects.*³⁴⁹

In their view, the nationality of the victim is inconsequential. What is relevant is that the victim was under the jurisdiction of the injured state at the time the environmental damage occurred. As for the exhaustion of local remedies, following the same reasoning that under international law the damage is not that suffered by a person but by a state,³⁵⁰ it would seem that this requirement need not be fulfilled. When a state exercises its right of diplomatic protection to intervene on behalf of victims of transboundary pollution within its territory, the latter need not exhaust internal remedies.³⁵¹ The Draft Articles on Responsibility, however, require the exhaustion of local remedies before the international responsibility of a state may be invoked.³⁵² Before invoking the responsibility of a state, only those local remedies which are “available and effective” have to be exhausted.³⁵³ The Draft Articles, however, do not provide a detailed discussion of the scope and content of the exhaustion of local remedies rule. It can be inferred that recourse can be made to the applicable rules of international law.³⁵⁴

³⁴⁹ Kiss, *supra* note 257 at 614.

³⁵⁰ Responsibility for Environmental Harm, *supra* note 338 at 7.

³⁵¹ Kiss, *supra* note 257 at 615. See also Article 11 of the “1972 Convention on International Liability for Damage Caused by Space Objects” on the non-exhaustion of local remedies.

³⁵² Under Article 44 - Admissibility of claims:

“The responsibility of a State may be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.”

³⁵³ ILC Report, *supra* note 299 at 306.

³⁵⁴ *Ibid.* at 307.

e. Settlement of Environmental Claims

Initially, states use diplomatic means to press claims and negotiate settlement for breaches of international environmental norms. It is only when diplomatic efforts fail that the claim is brought before an international tribunal for adjudication. Among the numerous international fora that are capable of settling environmental disputes relating to the question of breach of customary international or general principles of international law, the ICJ and the International Court of Environmental Arbitration and Conciliation ("ICEA") stand out.³⁵⁵

States are encouraged to have recourse to the ICJ to resolve environmental disputes.³⁵⁶ In view of the developments in the field of international environmental law and protection³⁵⁷ the ICJ has indicated its readiness to address environmental aspects of international law by establishing a seven-member Chamber of the Court for Environmental Matters ("CEM") in 1993. So far states have been reluctant to bring environmental disputes before the CEM.

Another possible forum is the ICEAC, formed in 1994 by a group of environmental organizations with permanent seats in Mexico and Spain. The ICEAC facilitates, by conciliation and arbitration, the settlement of environmental disputes between states, natural or legal persons, submitted to it by agreement of the parties to the dispute.³⁵⁸

³⁵⁵ It may be well to note that the Permanent Court of Arbitration will soon provide the international community with a procedural machinery for addressing environmental disputes. The Permanent Court of Arbitration's (PCA) advisory council has recently adopted by consensus the Optional Arbitration Rules for Arbitrating Disputes Resulting to the Environment and/or Natural Resources. The PCA is currently drafting optional rules for conciliation of disputes relating to natural resources and/or environment. Please see <http://www.pca-cpa.org/PDF/envrulesPR.PDF> (date accessed: 23 November 2001).

³⁵⁶ Kiss, *supra* note 257 at 601, citing Agenda 21, Chapter 39.10.

³⁵⁷ S. Murphy, "Does the World Need a New International Environmental Court?" (2000) 32 GW J. Int'l L. and Econ. 333 at 343, citing International Court of Justice, Yearbook 1994-1995 at 17.

³⁵⁸ P. Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 Colo. J. Int'l Env't. L. & Pol'y 191 at 214.

C. Right to a Healthy Environment

Another important emerging principle in international environmental law is the right to a healthy environment.

1. Human Rights and the Environment

Two of the fundamental values and aims of modern international society are international protection of human rights and international protection of the environment.³⁵⁹ At the time international concern for human rights gained support, environmental protection was not an issue of international, regional or national significance.³⁶⁰ Consequently, neither the U.N. Charter nor the Universal Declaration expressly referred to the link between human rights and the environment.³⁶¹

While human rights and environmental protection have developed in large part independently of each other, the earlier evolution of human rights law has influenced and sometimes inspired innovations in international environmental law.³⁶² Conversely, the emergence of concern for the environment has encouraged international lawyers and activists, at least since the 1972 Stockholm Conference on the Human Environment, to explore and attempt to understand the interrelationship and even independence of human rights and environmental protection.³⁶³ As this understanding has grown, the two fields have undergone a degree of

³⁵⁹ Kiss, *supra* note 257 at 141.

³⁶⁰ P. Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 *Geo. Int'l Env'tl. L. Rev.* 309 at 337.

³⁶¹ *Ibid.* at 337.

³⁶² Kiss, *supra* note 257 at 141.

³⁶³ *Ibid.*

convergence.³⁶⁴ At the same time, differences in goals and priorities have also become apparent, demonstrating the difficulty of merging or fully integrating either subject into the framework of the other.³⁶⁵

Different views on the relationship of human rights and the environment have emerged through the years. There are basically four alternative approaches to address the linkage between human rights and environmental protection: (a) applying established or existing human rights; (b) invoking the rights of environment or nature; (c) invoking procedural environmental rights; and (d) invoking the right to a healthy environment.³⁶⁶

a. Established Human Rights

Established human rights have been asserted to protect victims of environmental abuse. This approach focuses on the consequences of environmental harm to existing human rights. Specifically, human rights directly threatened by environmental deterioration include the rights to life, health, privacy, suitable working conditions, adequate standard of living, and political participation and information.³⁶⁷ A primary advantage of this approach is that existing human rights complaints machinery may be invoked against those states whose level of environmental protection falls below that necessary to maintain any of the guaranteed human rights.³⁶⁸ Individuals before international human rights committees such as the United Nations Human Rights Committee and the European Commission of Human Rights have alleged the violation of

³⁶⁴ Kiss, *supra* note 257 at 141.

³⁶⁵ *Ibid.*

³⁶⁶ Some commentators suggest that the right to a healthy environment is one of several "third generation" or "solidarity rights". Please see J. Downs, "A Healthy & Ecologically Balanced Environment: An Argument for a Third Generation Right" (Spring 1993) 3 Duke J. Comp. & Int'l L. 351.

³⁶⁷ D. Shelton, "Human Rights, Environmental Rights and the Right to Environment" (1991) 28 Stan J. of Int'l L. 103 at 112. See also Taylor, *supra* note 360 at 338 - 343.

³⁶⁸ Kiss, *supra* note 257 at 143.

some of these rights as a result of poor environmental practice.³⁶⁹ However, the scope of protection of the environment based on existing human rights norms remains narrow considering that environmental degradation is not itself a cause for complaint unless linked to an existing human right.³⁷⁰ The environmental harm to individuals cannot constitute a cause of action in and of itself, but must be linked to a substantive human right. Invoking existing human rights limits the scope of environmental protection as threats to non-human species or to ecological processes are not covered by this anthropocentric approach.

b. Right of Environment or Nature's Right

From the notion that the environment possesses rights derived from its own intrinsic value, separate and distinct from human use of the environment³⁷¹ emerged the right of environment or the so-called nature's right. The objective of this approach is to "implement an eco-centric ethic in a manner which imposes responsibilities and duties upon human kind to take intrinsic values and the interests of the natural community into account when exercising its human rights."³⁷² Proponents of the right of environment argue that an anthropocentric approach to the protection of the environment (as evidenced by a narrow interpretation of the substantive right to environment) is inherently flawed, and that the best approach to protect the environment

³⁶⁹ J. Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, And The Human Right to a Healthy Environment" (1997) 15 B.U. Int'l L. J. 261 at 293. See also Shelton, *supra* note 367 at 113 citing Communication No. 67/1980, in United Nations, 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol at 20, U.N. Doc. CCPR/C/OP/2 (1990). Several petitions filed before the European Commission on Human Rights have raised violations of protected rights under the European Convention on Human Rights such as the right to enjoyment of property and the right to privacy and family life. See *Arrondelle v. United Kingdom* (1985), App. No. 7889/77, 26 Eur. Comm'n H.R. Dec. & Rep. 5; *Boggs v. United Kingdom* (1985), App. No. 0 9310/81, 44 Eur. Comm'n H.R. Dec. & Rep 13; *Freden v. Sweden* (1991), 192 Eur. Ct. H.R. (ser.A) at 6; *Powell & Rayner v. United Kingdom* (1990), 172 Eur. Ct. H.R. (ser. A) and *Lopez-Ostra vs. Spain* (1994), 303c Eur. Ct. H.R. (ser. A).

³⁷⁰ Shelton, *supra* note 367 at 116.

³⁷¹ Rodriguez-Rivera, "Is the Human Right to Environment Recognized Under International Law? It Depends on the Source" (2001) 12 Col. J. Int'l Env'tl. L and Pol'y 1 at 13.

³⁷² Kiss, *supra* note 257 at 144.

is by conferring rights directly upon the environment.³⁷³ However, this approach is limited by the fact that nature itself cannot invoke its rights. In the end, the right of environment would need a human component to assert its rights.

c. Procedural Environmental Rights

Aside from asserting established substantive rights and rights of environment, procedural “environmental rights,” embodied in several international instruments, are likewise invoked, such as the right to receive environmental information, right of the public to participate in environmental decision making and right to receive a remedy for environmental harm. In essence, this approach would require: (i) a right to prior knowledge of actions which may have a significant environmental impact, together with a corresponding state duty to inform; (ii) a right to participate in decision making; and (iii) a right to recourse before administrative and judicial organs.³⁷⁴ Environmental rights, however, are inherently weak inasmuch as they can only effectively protect the environment if coupled with substantive international regulation.

d. Right to Healthy Environment

To address the limitations of approaches (a) to (c), the formal recognition in international law of a human right to a healthy environment is necessary. Such right should recognize: (i) the reciprocal relationship between human rights and the environment; (ii) that environmental damage affects enjoyment of human rights and that human rights affect environmental conditions; and (iii) that protection of either human rights or the environment

³⁷³ Kiss, *supra* note 257 at 144.

³⁷⁴ Taylor, *supra* note 360 at 343, citing Shelton, *supra* note 367 at 117.

necessarily requires that the other be protected as well.³⁷⁵ Rodriguez-Rivera's conceptual definition of an expansive right to environmental protection will be adopted in defining the term "right to environment":

In sum, the content of the human right to environmental protection or the expansive right to environment includes: qualitative environmental standards (substantive and intergenerational formulation of the right to environment), intrinsic value of the environment (expansive formulation of the right to environment that incorporates this fundamental element of the right of environment), and procedural guarantees (expansive formulation of the right to environment that incorporates the concept of environmental rights).³⁷⁶

The term "right to environment" is not found in the fundamental expression of human rights such as the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR")³⁷⁷ and the *International Covenant on Civil and Political Rights* ("ICCPR").³⁷⁸ While there is no definitive norm establishing an international human right to a particular quality of environment, the importance of environmental protection to international human rights is now recognized.³⁷⁹ The "right to environment" albeit phrased differently,³⁸⁰ has been incorporated in United Nations- sponsored conferences, regional human rights covenant, in several environmental agreements and in a variety of draft international legal principles and instruments.³⁸¹ Since the 1972 Stockholm Declaration on the Human Environment, a large number of national, regional and international instruments have

³⁷⁵ N. A. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1996) 27 Col Human Rts L Rev 487 at 491, citing Ksentini Report (hereinafter Environmental Human Rights).

³⁷⁶ Rodriguez-Rivera, *supra* note 371 at 16.

³⁷⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (hereinafter ICESCR).

³⁷⁸ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (hereinafter ICCPR).

³⁷⁹ M. A. Geer, "Foreigners in Their Own Land: Cultural Land and Transnational Corporations- Emergent International Rights and Wrong" (1998) 38 Vi Journal Int'l Law 331 at 377.

³⁸⁰ In this thesis the phrase "right to a healthy environment" will be used.

³⁸¹ O. Lynch and G. Maggio, "Existing and Emerging Standards in International Law and Global Society," online: The International Ombudsman for Environment and Development http://www.ecouncil.ac.cr/ombud/wri/wri_rights.htm (date accessed: 9 October 2001).

been drawn up that stress “the intrinsic link that exists between the preservation of the environment, development and the promotion of human rights.”³⁸²

The interdependence between the quality of human environment and the enjoyment of basic human rights was first recognized by the UN General Assembly in 1968.³⁸³ In 1972, at the Stockholm Conference, 114 nations affirmed the link between human rights and the environment and declared in Principle 1:

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

While Principle 1 fell short in proclaiming a right to a healthy environment, it however “sees human rights as a fundamental goal and environmental protection as an essential means to achieve the adequate conditions for a life of dignity and well being that are guaranteed.”³⁸⁴ In 1989, the Hague Declaration recognized “the fundamental duty to preserve the ecosystem” and the “right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations to do all that can be done to preserve the quality of the environment.”³⁸⁵ While the 1992 Rio Conference made no mention of a human right to a healthy environment, it did declare in Principle 1 that “human beings are entitled to a healthy and productive life in harmony with nature.”³⁸⁶ Notably, the language of

³⁸² Environmental Human Rights, *supra* note 375 at 491, citing Ksentini Final Report.

³⁸³ Sands, *supra* note 258 at 222 citing UNGA res. 2398 (XXII) and Proclamation of Tehran, UN doc. A/CONF.32/41, para. 18 recognizing the dangers posed by scientific discoveries and technological advances for the rights and freedoms of individuals. See also Kiss, *supra* note 257 at 142.

³⁸⁴ Kiss, *supra* note 257 at 146.

³⁸⁵ *Declaration of the Hague on the Environment* (11 March 1989) 28 I.L.M. 1308.

³⁸⁶ Rio Declaration, *supra* note 266, Principle 1.

Principle 1 was reproduced verbatim, and accepted without reservation in subsequent conferences.³⁸⁷

In 1994, the Final Report prepared by the rapporteur, Ms. Fatma Zohra Ksentini,³⁸⁸ for the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) marked a turning point in the United Nation's consideration of the linkage between human rights and the environment.³⁸⁹ The Final Report revealed that there has been a growing global awareness of the widespread, serious and complex character of environmental problems since the Stockholm Conference in 1972 resulting in numerous national, regional and international instruments stressing the intrinsic link between the preservation of the environment, development and the promotion of human rights.³⁹⁰ The Final Report concluded that there exists presently "universal acceptance of the environmental rights recognized at the national, regional and international levels,"³⁹¹ and hence, called for the adoption by the United Nations of a set of norms consolidating the right to a satisfactory environment. Annexed to the Ksentini Report is a Draft Declaration of Principles on Human Rights and the Environment recognizing that "all persons have the right to a secure, healthy and ecologically sound environment."³⁹² The "right to a healthy environment" is likewise included in UNEP's 1993

³⁸⁷ U.N. Conference on Population and Development, 1995 World Summit for Social Development, 1996 Second Conference on Human Settlements (Habitat II), OAS-sponsored 1997 Hemispheric Summit on Sustainable Development.

³⁸⁸ "Review of Further Development in Fields with which the Sub Commission has been Concerned, Human Rights and Environment: Final Report Prepared by Mrs. Fatma Ksentini" U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/sub.2/1994/9 (6 July 1994) (hereinafter Ksentini Report). At present Ms. Ksentini is the Thematic Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

³⁸⁹ Environmental Human Rights, *supra* note 375 at 491.

³⁹⁰ *Ibid.*

³⁹¹ Ksentini Report, *supra* note 388 at 58.

³⁹² Draft Principles on Human Rights and the Environment, in Ksentini Final Report, *supra* note 388, Annex 1.

proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development,³⁹³ and the IUCN Draft Covenant on Environment and Development.³⁹⁴

At the regional level, the *African Charter on Human and Peoples' Rights* was the first international human rights instrument to recognize the right of all peoples to a general satisfactory environment favourable to their development.³⁹⁵ In 1988, a protocol was added to the *American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, known as the San Salvador Protocol.³⁹⁶ Article 11 of the protocol, entitled "Right to a healthy environment", provides:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The State Parties shall promote the protection, preservation and improvement of the environment.

This article clearly grants an environmental right, specifies affirmative state obligations and requires both international cooperation and the adoption of domestic legislation for the achievement of rights.³⁹⁷ In 1996, the Hemispheric Summit on Sustainable Development organized by the OAS adopted a legally non-binding document called the Declaration of Santa Cruz. The Summit reaffirmed the commitments set forth in both the Rio Declaration and Agenda 21.³⁹⁸

³⁹³ The draft's Governing Principle provides the "right of present and future generations to enjoy a healthy environment and decent quality of life." (Lynch, *supra* note 381).

³⁹⁴ The draft requires that "parties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity." (Lynch, *supra* note 381).

³⁹⁵ Article 24.

³⁹⁶ *American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* (1988), O.A.S.T.S. 69, OEA/ser. L.V/II.92, doc. 31 rev. 3 [hereinafter San Salvador Protocol].

³⁹⁷ Taylor, *supra* note 360 at 346.

³⁹⁸ J. Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law" (2000) 25 Colum. J. Env'tl. L. 283 at 307.

In international tribunals, such as the European Court of Human Rights (“ECHR”), the Court of Justice of the European Union (“ECJ”), the ICJ, and the Inter-American Commission on Human Rights (“IACHR”), there has yet to be an explicit recognition of a right to a healthy environment.³⁹⁹ However, the trend is moving in that direction. In the *Yanomani Indians v. Brazil* case, the IACHR found that Brazil violated the Yanomani Indian's right to life, liberty and personal security by not taking measures to prevent certain environmental damage which resulted in the loss of life and cultural identity among the Yanomani.⁴⁰⁰ The *Gabcikovo-Nagymaros Project* case arose out of a treaty interpretation between Hungary and Slovakia. In its 1997 decision, the ICJ emphasized the importance of new environmental norms that have been developing, and the necessity for states to take these new norms into consideration. Judge Weeramantry stated in his separate opinion :

*[The] protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a sine quo non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.*⁴⁰¹

More importantly, at the national level, more than sixty countries, including every constitution adopted or revised since 1970 either proclaim that an environment of a specified quality constitutes a human right or impose environmental duties upon the state.⁴⁰² In *Minors Oposa v. Department of Environment and Natural Resources*, a landmark Philippine Supreme

³⁹⁹ Lee, *supra* note 398 at 311.

⁴⁰⁰ *Yanomani Indians v. Brazil* (1985), Inter-Am C.H.P. 7615, OEA/Ser.LV/11/66 doc. 10 rev. 1.

⁴⁰¹ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, I.C.J. Judgment of 25 September 1997, I.C.J. Rep. 7 (Sep. Opinion of Judge Weeramantry), at 4.

⁴⁰² Kiss, *supra* note 257 at 175. See also R.L. Hertz, “Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment (2000) 40 Va. J. Int’l L. 545 at 586, citing The EarthJustice Legal Defense Fund Issue Paper: Human Rights and the Environmental (1999) at 13-15. “Ninety-nine states have enshrined a right to a healthy environment and/or state or private obligation to protect their environment in their constitutions.” (*Ibid.*)

Court decision, the plaintiffs sought the discontinuance of government timber licensing agreements, alleging that deforestation was causing environmental damage.⁴⁰³ The case was based in part on the provision of the Philippine Constitution which provides that "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."⁴⁰⁴ The Court held that the right to a healthful ecology was not only actionable but that the right can be adequately asserted on behalf of future generations.⁴⁰⁵ The Court held that the constitutional right to a balanced and healthful ecology was a "specific, fundamental legal right" that was no less important than other enumerated civil and political rights, and in fact was "assumed to exist from the inception of humankind" and need not even be written in the Constitution."⁴⁰⁶ Similarly, other national tribunals have recognized the right to a healthy environment.⁴⁰⁷

2. The Status of the Right to a Healthy Environment in International Law

Be that as it may, the existence of the right to a healthy environment in international law is not well settled. Admittedly, the right to environment has not been explicitly recognized in any hard law instrument. Even so, one of the most progressive arguments in the context of human rights norms and environmental protection is the view that customary international law

⁴⁰³ Lee, *supra* note 398 at 318.

⁴⁰⁴ 1987 Constitution of the Philippines, Article II Sec. 16.

⁴⁰⁵ *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)* [1994], 33 I.L.M.173.

⁴⁰⁶ M. L. Hughes, "Indigenous Rights in the Philippines: Exploring the Intersection of Cultural Identity, Environment, and Development" (2000) 13 *Geo. Int'l Env'tl. L. Rev.* 3 at 7.

⁴⁰⁷ *Fundepublico v. Mayor Bugalagrande and Others* (1972), Decision of the Constitutional Court of Columbia, June 17, 1992; *Subhash Kumar v. State of Bihar* (1991), A.I.R. 420 (India Sup. Ct.); and *Wildlife Society of Southern Africa and Others v. Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* (1996), Supreme Court of South Africa, Transkei Provincial Division, 27/06/1996, 1996 (9) BCLR 1221 (Tk); 1996 SACLR LEXIS 30, *1.

already recognizes a human right to a decent, healthy or sustainable environment.⁴⁰⁸ Others claim that the right is developing as a rule of customary international law as evidenced by the repeated affirmation of the language in Principle 1 of the Rio Declaration in several U.N. Conferences by almost every nation, without reservation.⁴⁰⁹ Moreover, the development of the connections between the rights of life and health and the environment in judicial decisions supports this claim.

On the other hand, despite the amount of evidence of state practice, the standard view in international environmental law is that no independent right to a healthy environment has yet become part of customary international law. Some commentators opine that it is unlikely that a human right to a healthy environment exists as a norm of general or customary international law. They claim that the right to a healthy environment cannot be considered as being part of international law as states have not treated such right as a "basic or fundamental principle inherent in the nature of their relations."⁴¹⁰ These commentators maintain that it has not been shown that the right to a healthy environment has been uniformly and consistently practiced by states out of a sense of legal obligation. At best, the right to a healthy environment is a mere aspiration, expressing national goals and intents rather than justiciable rights.⁴¹¹

Clearly, the strongest argument against the existence of the right to a healthy environment is its lack of express affirmation in any hard law instrument. Such objection stems from the traditionalist approach to the sources of international norms which rejects as unpersuasive the

⁴⁰⁸ Taylor, *supra* note 360 at 346.

⁴⁰⁹ Lee, *supra* note 398 at 309.

⁴¹⁰ Eaton, *supra* note 369 at 299.

⁴¹¹ *Ibid.*

accumulation of soft law instruments that directly or indirectly support the expansive right to environment.⁴¹² However, the uncontroverted fact remains:

[T]here are many instruments that serve as unmitigated sources for the recognition of the human right to environment in the international legal order, including: the thousands of international environmental soft law instruments; the many national constitutions and legislative acts; the dozens of international, regional, and national court decisions; the hundreds of non-governmental international organizations; the thousands of local or 'grass-roots level' community organizations, and, more importantly, the overwhelming and sweeping transformation in the valoration of environmental concerns in all levels of society.⁴¹³

The foregoing trend in international environmental law cannot be simply ignored. To overlook this voluminous evidence of the will of the people would be to tantamount to ignoring the evolution of international law during the last half-century.⁴¹⁴

An unequivocal recognition of the right to a healthy environment is imperative inasmuch as it may affect the options for redress of victims of environmental damage. Depending on enforcement provisions and mechanisms, an environmental human right may give individuals access to human rights institutions such as the U.N. Human Rights Committee and a range of rights and remedies before national fora.⁴¹⁵

This Chapter presented some of the emerging principles in international environmental law. Under customary law, states are required to ensure that activities within their jurisdiction or control do not cause significant environmental damage to the territory or property of other states. This obligation of prevention is intrinsically linked to the evolving right to a healthy

⁴¹² Perez-Rodriguez, *supra* note 371 at 44.

⁴¹³ *Ibid.* at 44-45.

⁴¹⁴ *Ibid.* at 45.

⁴¹⁵ Taylor, *supra* note 360 at 346.

environment. The exercise of due diligence to prevent transboundary harm ensures respect for the right to a healthy environment. Accordingly, a breach of the obligation to prevent transboundary pollution violates the right to a healthy environment.

VI. The United State's International Responsibility for the Environmental Damage in Clark Air Force Base and Subic Naval Base

The presence of hazardous waste at Clark and Subic is a given. The U.S. Government does not deny this fact. What the U.S. denies is its responsibility to remediate the contaminated sites at the former Bases. The present overseas DoD cleanup policy provides that DoD shall not fund any environmental remediation in excess of that required by binding international agreement or an approved remediation plan.⁴¹⁶ As with most basing agreements, the Military Bases Agreement between the U.S. and the Philippines did not contemplate responsibility for cleanup after closure of the Bases. Neither was there an approved remediation plan made between the U.S. and the Philippines before the turnover of the Base facilities to the Philippine Government.

The U.S. relies on the provisions of the Military Bases Agreement in claiming that the Philippines waived its right to demand cleanup. Inevitably, it is necessary to examine the provisions of the Agreement to determine if such waiver was in fact made. A valid and effective waiver could preclude an international claim against the U.S. for a breach of an obligation under customary international law.

This Chapter will examine the possible fora for the determination of the international responsibility of the U.S. and the alleged violation of the right to a healthy environment of Filipinos.

⁴¹⁶ Teresa, *supra* note 173.

A. Under the Military Bases Agreement

The responsibility of a State may not be invoked if the injured state has validly waived the claim or if it has, by reason of its conduct, validly acquiesced in the lapse of the claim.⁴¹⁷ Thus, a determination of whether or not the Philippines had validly waived its right to claim that the U.S. accept responsibility for responsibility hazardous waste contamination is imperative.

The U.S. has consistently maintained under the Military Bases Agreement that it has no liability for the environmental damage in the Philippines. It would be recalled that despite the presence of contaminated sites and facilities at the former U.S. Bases, which would not be in compliance with U.S. environmental standards, the '92 GAO Report explicitly declared that the Military Bases Agreement does not impose any well-defined environmental responsibility upon the U.S., either while it operates the Bases or for cleanup upon withdrawal.

The U.S. contends that neither the Military Bases Agreement nor the amendments thereto require the U.S. to conduct any environmental restoration upon the termination of the Agreement. Moreover, the U.S. argues that the Philippine Government expressly agreed to waive any right to demand cleanup in return for the value of the substantial improvements left behind by the U.S.,⁴¹⁸ relying on the following provisions of the 1988 amendments to the Military Bases Agreement:

The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation, nor is the Philippines obliged to make any compensation to the United States for the

⁴¹⁷ Draft Articles, *supra* note 296 at Article 45.

⁴¹⁸ U.S. Deputy Undersecretary of Defense Sherri Goodman's letter to Senator Legarda-Leviste (24 June 1999) (hereinafter Goodman Letter).

*improvements in the bases or for the non-removable buildings or structures left thereon, the right of which shall revert to the Philippines upon the termination of this Agreement or the earlier relinquishment by the United States of the bases where the buildings or structures have been built.*⁴¹⁹

Thus, the U.S. maintains it has no further obligation to undertake restoration activities at its former installations in the Philippines.

In claiming the defense that the Philippines has waived its right to demand for cleanup, the U.S. has repeatedly invoked the above portion of Article VII (Ownership and Disposition of Buildings, Structures and Other Property) of the *Manglapus-Schultz Memorandum of Agreement*.⁴²⁰ The Article in its entirety reads as follows:

Article XVII

Ownership and Disposition of Buildings, Structures and Other Property

1. *It is mutually agreed that the United States shall have the right to remove or dispose of any or all removable improvements, equipment or facilities located at or on any base and paid for with funds of the United States. No export tax shall be charged on any property so removed from the Philippines. The Government of the Philippines shall have the first option to acquire, upon mutually agreed terms, such removable United States Government property within the bases as the United States Government determines to be excess property available for disposition in the Philippines.*

2. *Non-removable buildings and structures within the bases, including essential utility systems such as energy and water production and distribution systems and heating and air conditioning systems that are an integral part of such buildings and structures, are the property of the Government of the Philippines, and shall be so registered. The United States shall, however, have the right of full use, in accordance with this Agreement, of such non-removable buildings and structures within the United States Facilities at the bases, including the right to repair, alter or, when necessary for reasons of safety or new construction, to demolish them. There shall be no obligation on the part of the United States or of the Philippines to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the non-removable buildings or structures used by*

⁴¹⁹ Goodman Letter, *supra* note 418.

⁴²⁰ *Manglapus-Schultz Agreement*, *supra* note 28.

the United States in the bases. The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation, nor is the Philippines obliged to make any compensation to the United States for the improvements made in the bases or for the non-removable buildings or structures left thereon, the right of use of which shall revert to the Philippines upon the termination of this Agreement or the earlier relinquishment by the United States of the bases where the buildings or structures have been built.

3. Upon final termination of the use by the Government of the United States of the Facilities or earlier relinquishment, the United States and the Republic of the Philippines will take appropriate measures as they shall jointly determine to ensure a smooth transition with respect to custody and control of the Facilities and in order to minimize any disruptive effects of such termination.⁴²¹ [emphasis added]

The phrase “The United States is not obligated to turn over the bases ... in the condition in which they were at the time of their occupation,” must be examined together with the other paragraphs of the Article. As clearly set out in its title, Article VII refers to the ownership and disposition of all buildings, structures and other property found in the Bases. This interpretation is in keeping with the rules of statutory construction that “a specific provision must not be taken in isolation but read in light of the whole instrument, including the title to which it refers.”⁴²² As the title indicates, the article relates to the agreement on ownership and disposition of buildings, structures and other property. The sentence preceding the controversial provision states that the U.S. has no obligation “to rebuild or repair any destruction or damage ... on any of the non-removable buildings or structures used by the United States in the bases.” Clearly, the subject of the “waiver” in the questioned provision is the non-removable buildings and structures within the Bases, and not the cleanup and restoration of the environment. The ‘92 GAO Report supports this interpretation:

In a 1988 amendment to the basing agreement, the United States transferred to the Philippine Government the title for all nonremovable buildings and structures financed by the United States. However, it

⁴²¹ Manglapus-Schultz Agreement, *supra* note 28.

⁴²² Senate Report, *supra* note 146 at 39.

*retained the right to use these facilities and the responsibility for maintaining them. Both the 1947 agreement and the 1988 amendment provide that the United States is not obligated to return the relinquished facilities to their original condition or to repair or rebuild damage or destroyed buildings or structures. The transfer was based on a inventory listing of all nonremovable buildings and structures...*⁴²³ [emphasis added]

The Philippines did not require the U.S. to return non-removable buildings and structures to their original condition or to repair or rebuild the same because the U.S. would be leaving these buildings and structures to the Philippines without requiring the latter to pay any compensation. After turning over the non-removable buildings and structures, the U.S. Government was still obligated to restore and cleanup the environment within the Bases. This is the only logical interpretation that can be given to Article XVII.

As acknowledged by the GAO, the Military Bases Agreement had no provisions on environmental protection. This is understandable as most status of forces agreements (SOFAS) were entered into by the U.S. with host countries at a time when environmental protection was not a priority. It may be well to note that provisions on environmental protection were included in the *Treaty of Friendship, Cooperation and Security* which was rejected by the Philippine Senate in 1991. That treaty contemplated the improvement of the management, control and disposal of hazardous or toxic waste generated by Base operations.⁴²⁴ The U.S.

⁴²³ '92 GAO report, *supra* note 93 at 25.

⁴²⁴ Article VIII of the *Supplementary Agreement Number Two to the 1991 Treaty of Friendship Cooperation and Security Between the Government of the Republic of the Philippine and the Government of the United States of America: Agreement on Installations and Military Operating Procedure* provides:

1. An Overall environmental protection program will be formulated by the Philippines Commander and the United States Commander. The Philippine Commander shall be responsible for the management and control of the disposal of hazardous or toxic waste generated by the operations, activities and training of Philippine forces on the bases under this Agreement. The United States Commander shall be responsible for the management and control of the disposal of hazardous or toxic waste generated by the operations, activities and training of United States forces on the installations under this agreement. The Commander shall coordinate in the development and implementation of their respective programs to provide for environmental protection.

negotiating panel's agreement with these provisions evinces the intent of the U.S. to correct the inadequacy of the Military Bases Agreement.

The lack of any provision on environmental protection in the Military Bases Agreement cannot be readily interpreted to mean that the U.S. is absolved from its obligation of preventing environmental harm to other states. Following the U.S.'s argument, it would seem that the Philippines' alleged waiver of its right to demand for cleanup allows the U.S. to abandon known contaminated sites upon closure of overseas installations. The absence in the Military Bases Agreement of any well-defined provision on environmental responsibility during the operation of the Bases or for cleanup upon withdrawal does not lead to the conclusion that the U.S. may disregard its obligations under customary international law. As succinctly put by the Joint Senate Committee:

Nothing in the 1947 Military Bases Agreement or the amendments thereto authorized the United States to unduly pollute the territorial waters with contaminants, destroy the environment by dumping toxic wastes within the bases and endanger the lives of residents in the vicinity. The tortuous act of inflicting damage, whether to the environment or the lives of the people of the contracting state, could not have been authorized or contemplated under the Military Bases Agreement or any of its amendments, nor could toxic tort injuring Filipino citizens have been sanctioned by the Philippines in exchange for non-removable buildings or structures.⁴²⁵

2. The Philippine Commander and the United States Commander shall promulgate agreed substantive standards, consistent with Philippine laws of general application, governing the disposal of such waste in accordance with their responsibilities under this Agreement.

3. Appropriate arrangements shall be made by the Philippine Commander and United States Commander to enable the Government of the Philippines to monitor and check adherence to the standards as set forth in paragraphs 1 and 2 of this Article.

⁴²⁵ Senate Report, *supra* note 146 at 39.

Suffice it to say, apart from the DoD arguments discussed above, there are no other sections of the Military Bases Agreement that might lend themselves to the argument that the Philippine Government waived its right to demand cleanup and restoration of the environment.

Assuming for the sake of argument that the phrase, "The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation ..."⁴²⁶ pertained to the environment, this does not mean that the U.S. can just abandon contaminated sites inside the Bases. The Military Bases Agreement is akin to a lease under which the Philippines can be regarded as a landlord while the U.S. is the tenant. A tenant's obligation is often described and considered by American courts as an implied covenant in the lease to return the premises at the end of the tenancy in the same condition that it was received.⁴²⁶ "If a tenant fails to fulfill his obligation at common law to maintain the premises which he occupies, he is liable in damages to the landlord."⁴²⁷ By extending the obligation at common law to the Military Bases Agreement, it can be argued that the U.S., as tenant of the Bases, had the obligation to return the premises at the termination of the Agreement in the same environmental condition they were in 1947. In this instance, the liability of the U.S. arises at the time of reversion of the Bases.

The DoD policy of offsetting the residual value of the improvements against the cost of restoring the properties to their previous condition is reflected in Article VII of the Military Bases Agreement. It cannot be denied that the infrastructure left by the Americans at Clark and Subic were valuable in the conversion of the Bases into economic development zones. However,

⁴²⁶ R. Schoshinski, *American Law of Landlord and Tenant* (New York: The Lawyers Co-Operative Publishing Co., 1980) at 270.

⁴²⁷ *Ibid.* at 273.

given that a single hazardous waste site can cost as much as \$100 million to restore, the cleanup of a large Base could easily exceed the value of any residual infrastructure improvements.⁴²⁸ Considering the magnitude of the contamination at Clark and Subic, the cost of environmental cleanup at both Bases will certainly far exceed the residual value of the infrastructure left behind by the Americans.⁴²⁹

B. State Responsibility for Environmental Harm

To determine whether the U.S. is internationally responsible for the hazardous waste contamination at Clark and Subic, it is necessary to examine whether the U.S. complied with its obligations under customary international law.

1. Breach of Customary International Law

To reiterate, a customary rule exists today which requires a state to ensure that activities within its jurisdiction or control do not cause environmental damage to the environment of other states or to areas beyond the limits of its national jurisdiction. This obligation is limited by the due diligence rule which means that a state will be responsible for activities within its jurisdiction or control that cause environmental damage to the environment of another state or to the global commons, unless it exercises all due care or diligence to prevent harm in carrying out those activities, but nevertheless harm occurred.

⁴²⁸ Lindsay-Poland, *supra* note 164.

⁴²⁹ This fact is confirmed by the '92 GAO study which stated that "the cost of bringing all contaminated sites into compliance with U.S. environmental standards could approach Superfund proportions." ('92 GAO Report, *supra* note 92 at 5).

a. Unrestricted Use and Control of the Bases

It is well settled that the obligation not to cause transboundary pollution applies not only within the places where states have territorial jurisdiction but everywhere they exercise control. Thus, a state is responsible for the effects of activities under its effective control that causes damage to the environment of other states, even when such activities are physically located or carried out beyond its territory or a place within its jurisdiction.⁴³⁰ For example, a state is responsible for the activities of its troops stationed in foreign territories and in any occupied or dependent territories.⁴³¹

Under the Military Bases Agreement, the U.S. was given unrestricted use and control over U.S. facilities during their fifty-five (55) year occupation. It was mutually agreed between the parties that the U.S.:

*[S]hall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.*⁴³²

In this regard, the U.S. was given certain rights, powers and authority which powers had to be exercised reasonably.⁴³³ A subsequent amendment to the Military Bases Agreement reaffirmed Philippine sovereignty over the Bases by turning over nominal control of much of the Bases to

⁴³⁰ V. Gerochi IV, "Environmental Damage Caused by Activities in the United States Military Facilities: An Application of the Principles of State Responsibility for Transborder Pollution" (D. Jur. Thesis, Ateneo de Manila College of Law 1993) at 43.

⁴³¹ Kiss, *supra* note 257 at 281.

⁴³² Military Bases Agreement, *supra* note 6, Article III para. 1.

⁴³³ *Ibid.* para. 2 (a) to (e).

the Philippines.⁴³⁴ The amendment, however, assured unhampered U.S. military operations for U.S. forces.⁴³⁵ More importantly, it was agreed that “the United States shall have the use of certain facilities and areas within the bases and shall have effective command and control over such facilities and over United States personnel, employees and material.”

The U.S. Bases in the Philippines had a dual character. They were part of Philippine territory but at the same time they were under the effective use and control of the U.S. Under customary law, the U.S. had the obligation to ensure that activities within its control do not cause damage to the environment of the Philippines, regardless of whether the damage is caused to areas within its jurisdiction (inside the Bases) or beyond the Bases. Notably, the areas inside the Bases reserved for the exclusive use of the U.S. Armed Forces and the U.S Navy were subsequently identified as the sources of pollution.⁴³⁶

b. Obligation of Due Diligence

At the time the U.S. “occupied” the Bases it had the obligation to take the necessary measures to ensure that activities within its effective use and control, conform “to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond.”⁴³⁷ In short, the U.S. had to observe its obligation to be duly diligent in carrying out this obligation by formulating and implementing policies designed to prevent significant injury to the environment of the host state or minimize the risk of significant environmental harm. More important than legislation is the actual implementation of the standard that have been adopted in the policies inside the Bases. As

⁴³⁴ Romulo-Murphy Exchange of Notes, *supra* note 27.

⁴³⁵ Nuclear Free Philippines, *supra* note 17 at 24.

⁴³⁶ Gerochi, *supra* note 430 at 47.

⁴³⁷ Restatement (Third) of Foreign Relations Law of the U.S. Sec. 601 (1987).

discussed in Chapter IV, the vacuum in DoD environmental policy led to confusion at overseas facilities as base officials had no clear guidelines as to what environmental standards applied to activities and practices at the bases. DoD oversight was determined to be limited and thus, there was no assurance that the bases were properly managing hazardous waste.⁴³⁸

The DoD breached the United States' duty of due diligence when it failed to effectively implement clear environmental standards at Clark and Subic. Confusion as to the applicable environmental standards led to inadequate hazardous waste management policies inside the Bases. Some U.S. officials put the blame on Philippine authorities for failing to enforce Philippine environmental laws inside the Bases. As previously stated, Philippine officials did not have regulatory jurisdiction over the Bases inasmuch as the U.S. had effective use and control of the Bases. The prudent action for Base officials would have been to apply the more stringent U.S. environmental standards inside the Bases. Instead, it appears that the U.S. did not apply any environmental standards at all. To reiterate, at Subic, untreated sewage and waste water were discharged directly into Subic Bay; lead and other heavy metals were drained directly to the Bay or were buried in a landfill and untreated pollutants were emitted directly into the air. None of these procedures were in compliance with U.S. environmental standards.⁴³⁹

Furthermore, prior to the closure of the Bases, environmental officers at both Clark and Subic had already identified significant environmental damage inside the Bases. These officials even proposed projects to correct environmental hazards and remedy situations that pose serious health and safety threats.⁴⁴⁰ For Subic, environmental officials proposed a new sanitary waste management system, oil/water separator projects, hazardous material storage

⁴³⁸ '92 GAO Report, *supra* note 93 at 12.

⁴³⁹ *Ibid.*

⁴⁴⁰ Please see *Ibid.*

structures and improvement to fuel storage tanks, while officials at Clark proposed PCB removal projects, asbestos abatement and hazardous waste removal.⁴⁴¹ These projects were not undertaken allegedly due to lack of funding. Despite knowledge of severe environmental damage in both Bases, the U.S. failed to take the necessary measures, expected of a good government, to remediate the contaminated sites at Clark and Subic prior to their closure. The '92 GAO Report confirmed that the Air Force and Navy never intended to cleanup the contaminated sites.⁴⁴²

It can be argued that more was expected of the U.S. considering its level of economic development. "The degree of care expected of a state with a well developed economy and human and material resources and with highly evolved system and structure of governance is different from states which are not so well placed."⁴⁴³ The U.S. had the resources and technology to implement at Clark and Subic the highest hazardous waste management system then in effect.

At U.S. domestic military bases, strict laws addressing environmental hazards are applied to toxic wastes, hazardous chemicals, explosive materials and other dangers to human health and the environment that commonly result from military activities.⁴⁴⁴ For domestic bases slated for closure, U.S. laws require the DoD to investigate the environmental quality of the bases, identify the risks to human health and environment, disclose the findings to the public and remedy the problems identified.⁴⁴⁵ These standards were not observed during the closure of both Clark and

⁴⁴¹ '92 GAO Report, *supra* note 93 at 28.

⁴⁴² *Ibid.*

⁴⁴³ ILC Report, *supra* note 299 at 395.

⁴⁴⁴ Wagner, *supra* note 168 at 423.

⁴⁴⁵ *Ibid.* at 424.

Subic. The waste management practices at Clark and Subic was obviously not at par with the standards applied to U.S. domestic bases.

In fairness to all countries in which the U.S. military operates, hazardous waste generated outside the U.S. should be managed with the same degree of care as hazardous waste generated domestically. "The U.S. should not set a higher cleanup standard for its own citizens than for those of other nations affected by contamination produced by U.S. military activities."⁴⁴⁶ The extra-territorial application of U.S. environmental standards to overseas bases can be viewed as an expansion "of Principle 21 of the Stockholm Declaration, extending the concept of 'jurisdiction and control' to citizens and government activities abroad, affirmatively preventing damage to another state or the global commons."⁴⁴⁷

Evidently, the U.S. breached its obligation to take all due care to prevent environmental harm to the territory of another state when it failed to implement clear and uniform environmental standards for overseas installations thereby resulting in poor hazardous waste management at Clark and Subic.

c. Significant Damage to the Environment

Inadequate environmental management policy at the Bases resulted in significant environmental damage at Clark and Subic. The environmental studies presented in Chapter IV illustrate the enormity of damage at and caused by the former Bases. It was the GAO that

⁴⁴⁶ Lindsay-Poland, *supra* note 164.

⁴⁴⁷ Hunter et al., *International Environmental Law and Policy, a Comprehensive Reference Source* (New York: Foundation Press, 1998) at 1418

initially identified contaminated sites and facilities at both Clark and Subic.⁴⁴⁸ The presence of hazardous waste in a number of sites at Clark and Subic was further confirmed in subsequent studies based on a review of DoD documents and past land uses and activities, sampling and analysis of soil and groundwater and interviews of former Base employees. Heavy metals and compounds were found in soil and groundwater samples in some of the identified contaminated sites. While the studies conducted thus far have already identified significant environmental damage at Clark and Subic, a more comprehensive study is needed to determine the full extent of the contamination and strategies for addressing it.

2. Invoking State Responsibility

State responsibility refers to the liability of one state to another for the non-observance of the obligations imposed by general principles of international law. A state is responsible for internationally wrongful acts directly carried out by State organs or indirectly by dependent entities of the State which result in a breach of obligations of diligent conduct. There exists today a general rule of international law that binds the U.S. to ensure that activities within its jurisdiction or control do not cause significant environmental harm to other states. Accordingly, the U.S. military services were required to actively undertake measures to ensure that its domestic and overseas bases do not cause significant environmental harm to other states.

As discussed above, the United States' failure to act in a manner that was duly diligent with respect to preventing harm to the Philippine environment caused significant environmental degradation at Clark and Subic and to the surrounding communities. The U.S. thus breached its obligation to refrain from causing environmental harm to the territory of another state, in this

⁴⁴⁸ '92 GAO Report, *supra* note 93 at 27.

case the Philippines, when it failed to comply with customary environmental standards in carrying out its military activities at Subic and Clark. Clearly, the United States' breach of the customary international law prohibiting damage to the environment of other states is a wrongful act giving rise to international responsibility. To reiterate, the breach of an international obligation creates liability to make reparation for the wrongful act or omission. Hence, the U.S. has the obligation to make reparations for the consequences of the wrongful act harming the Philippines and individual Filipinos. Comprehensive remediation of the Philippine environment and compensation for the individuals suffering human health effects of the contamination should be demanded from the U.S.

C. Violation of the Right to a Healthy Environment

The obligation of states to ensure that activities within their jurisdiction or control do not cause significant environmental damage to the territory or property of other states is intrinsically linked to the evolving right to a healthy environment. The breach of the obligation to prevent transboundary environmental harm results in the violation of the right to a healthy environment. At present there are no existing hard law instruments recognizing the right to a healthy environment. The right to a healthy environment does not exist as a norm of customary international law. Neither is it considered a general principle of international law. The right to a healthy environment does not yet form part of international law and thus, international tribunals do not have the jurisdiction to hear claims based on the violation such right. Until it can be shown that the right to a healthy environment has been uniformly and consistently practiced by states out of a sense of legal obligation, it would seem that the right to a healthy environment cannot be invoked independently of established human rights. In the meantime, the environmental dimension of existing human rights may be considered. In determining

whether or not the right to a healthy environment of the Filipino people has been violated, some relevant rights recognized in international human rights instruments will be applied from an environmental perspective.⁴⁴⁹

The protection of the right to a healthy environment is an essential pre-requisite to the fulfilment of many other human rights.⁴⁵⁰ Environmental damage threatens human rights. Threats to recognized human rights from environmental damage are clearly illustrated by the following:

*Carcinogens and other toxins carried in the air and water contaminate drinking water; cause cancer, birth defects, and other diseases; poison arable land, sea life, and other food sources; and, as a result, threaten the rights to life, health, and general welfare. Cross-frontier and internal pollution decimate forest resources, create toxic workplaces, poison meat and dairy products, and make property worthless, all of which cause economic catastrophe to individuals who can no longer subsist on what they grow and sell, and thereby violate the rights to a safe workplace, work, and property ownership.*⁴⁵¹

As a result of the environmental devastation and unhealthy environment at Clark and Subic, the Filipino victims have been deprived of some of their basic human rights, such as the rights to life, health, food and water, safe and healthy working environment and information.

1. Right to Life and Health

⁴⁴⁹ See Annex I for a List of Human Rights Treaty Provisions Which Pertain to Environmental Degradation.

⁴⁵⁰ Eaton, *supra* note 369 at 300.

⁴⁵¹ J. Downs, "A Healthy and Ecologically Balanced Environment: An Argument For a Third Generation Right" (1993) 3 Duke J. Comp. & Int'l. L. 351 at 367-368.

The right to life is generally considered a fundamental human right from which no derogation is permitted.⁴⁵² As succinctly put by Professor Galicki:

*The right to life is the most important among all human rights legally guaranteed and protected by contemporary international law. On the other hand, the right to life is the one which is, most of all, connected to and dependent on proper protection of the human environment. It is because this right, like no other, may be directly and dangerously threatened by detrimental environmental measures. The right to life and the quality of life depend directly on positive or negative environmental conditions. Simultaneously, we cannot forget that this is an original right from which all other human rights derive.*⁴⁵³ [emphasis added]

The right to a healthy environment includes the right to be free from life-threatening environmental hazards. Considering that environmental hazards at U.S. military bases may endanger human health, these hazards may also violate the human right to health.⁴⁵⁴ As recognized in international human rights instruments, everyone has a right to the highest attainable standard of health.⁴⁵⁵ *The International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) explicitly links the right to health with environmental considerations by recognizing that “the improvement of all aspects of environmental and industrial hygiene” is one of the elements necessary for realization of the right to health.⁴⁵⁶

Scientific evidence exists directly linking adverse environmental conditions and violations to the right to health. Environmental studies undertaken at Clark and Subic reveal the presence of chemicals and compounds in soil and groundwater samples taken at the

⁴⁵² Ksentini Report, *supra* note 388 at 44. See also the International Covenant on Civil and Political Rights of 1966 (Article 4), the European Convention on Human Rights of 1950 and the American Convention on Human Rights (Pact of San Jose of 1969).

⁴⁵³ Ksentini Report, *supra* note 388 at 45 citing the comments of Mr. Galicki (Poland) to the Special Rapporteur.

⁴⁵⁴ Wagner, *supra* note 168 at 484.

⁴⁵⁵ Please see the ICESCR, *supra* note 377 at Article 12.

⁴⁵⁶ Wagner, *supra* note 168 at 484.

contaminated sites. These chemicals and substances are medically known to have adverse effects to life and health.⁴⁵⁷ Health studies conducted in communities located nearest to the landfill sites or located next to known contaminated areas at Clark reported high incidence of reproductive disorders, kidney and lung problems, nervous system problems and growth retardation and respiratory problems in children.⁴⁵⁸ The presence of these health problems indicate that sources of exposure are present in the communities located near the contaminated sites.

Admittedly, no study has yet been conducted which conclusively shows that exposure to hazardous chemicals and compounds is the primary cause of the illnesses reported at Clark. The absence of a causal link, however, does not derogate from the fact that Filipinos continue to be exposed to toxic substances scientifically known to be life and health threatening. Due to the presence of hazardous contaminants in the environment, Filipinos residing in communities near the former U.S. Bases are deprived of their right to the highest attainable standard of physical and mental health. As pointed out by the World Health Organization: "... health status is nearly always the best as well as first indicator of environmental degradation."⁴⁵⁹ The magnitude of environmental damage at Clark and Subic is clearly manifested in the health profile of the people living in the communities surrounding the former U.S. Bases.⁴⁶⁰

2. Right to Food and Water

⁴⁵⁷ For the effects of hazardous substances on the health of human population see Agency for Toxic Substances & Disease Registry, *ATSDR's Hazardous Substance Release and Health Effects Database*, online: ATSDR <http://www.atsdr.cdc.gov/hazdat.html> (last modified: 8 December 2001).

⁴⁵⁸ Please see Bertell Study, *supra* note 123 and DOH Study, *supra* note 128.

⁴⁵⁹ Ksentini Report, *supra* note 388 at 47, citing the background paper on "Health, the Environment and Sustainable Development," prepared for the Commission on Sustainable Development by the World Health Organization, Task Manager on Health, March 1994 at 1.

⁴⁶⁰ Please see Chapter 4, Bertell Study, above.

Inherently linked to the right to life and health is the right to food and water. The right to food and water entails protection against environmental hazards that may interfere with the provision and/or safety of food and water.⁴⁶¹ “The right to safe and healthy food and water adequate to health and well-being addresses basic needs for survival and it exemplifies the connection between environmental conditions and the satisfaction of those basic needs.”⁴⁶² Environmental degradation that disrupts the quality or quantity of water resources can have far-reaching and devastating implications, especially for children and other vulnerable groups.⁴⁶³ Aside from the right to drinking water, the right to water includes water for sanitation purposes and for agriculture.⁴⁶⁴ An analysis of the water samples collected from different deep well sites at the evacuation center at Clark revealed the presence of mercury and nitrates. Most of the illnesses reported at Clark are attributable to the chemical substances found in the water at CABCOM. The Bertell Study identified the following relationship:⁴⁶⁵

1. *Poor water quality was associated with all kidney and urinary tract infections;*
2. *Corrosive drinking water was significantly related to respiratory problems;*
3. *Water with an unusual taste or smell was related to problems with the nervous system;*⁴⁶⁶

The right to food is an essential component of the right to health.⁴⁶⁷ The right to food is adversely affected by environmental degradation as contaminating substances enter the food

⁴⁶¹ Wagner, *supra* note 168 at 487.

⁴⁶² Environmental Human Rights, *supra* note 375 at 529.

⁴⁶³ Wagner, *supra* note 168 at 487.

⁴⁶⁴ Environmental Human Rights, *supra* note 375 at 528 citing S. McCaffrey, “A Human Right to Water: Domestic and International Implications” (1992) 5 Geo. Int’l Env’tl. L. Rev. 1.

⁴⁶⁵ See Chapter III.

⁴⁶⁶ O’lola, *supra* note 124 at 48.

⁴⁶⁷ Please see the ICESCR, *supra* note 377.

chain as well.⁴⁶⁸ Contaminated water at the former U.S. Bases may also affect the right to food as polluted water cannot be safely used to grow crops and to cook food.

3. Right to a Safe and Healthy Working Environment

The right to “just and favorable conditions of work which ensure in particular... safe and healthy working conditions” is guaranteed in the ICESCR.⁴⁶⁹ The right to safe and healthy working conditions is inextricably linked to the right to health. Thus, the working environment must be free from pollution and other health hazards such as exposure to asbestos and inhalation of and contact with toxic substances. The hazardous waste management practices at Clark and Subic infringed the right of Filipino Base workers to a safe and healthy working environment. Evidence indicates that former Base workers handled hazardous chemicals, without proper safety protection.⁴⁷⁰ Worse, these workers were not informed of the health risks involved in handling these chemicals. Clearly, the occupational health and safety standards implemented at Clark and Subic were far below U.S. standards

4. Right to Information

The right to information is a vital component of the right to a healthy environment. The right to information is recognized in Article 19 of the *Universal Declaration of Human Rights* and Article 19 of the *International Covenant on Civil and Political Rights*.⁴⁷¹ Essentially, this

⁴⁶⁸ Ksentini Report, *supra* note 388 at 46.

⁴⁶⁹ Article 7. See Environmental Human Rights, *supra* note 375 at 530 note 190.

⁴⁷⁰ Please see Chapter V.

⁴⁷¹ See also Stockholm Declaration (Principle 19), the 1972 United Nations, Education, Scientific and Cultural Organization Convention, World Charter For Nature (paragraph 21 (a)) and Rio Declaration (Principle 10).

right imposes a duty on the state to collect and disseminate information and to provide due notice of significant environmental hazards.⁴⁷²

The right to information is particularly important in the closure of Clark and Subic considering that military bases are known to be significant generators of hazardous waste. At the time of the closure of the Bases, it was incumbent upon the U.S. to inform the Filipino people and their Government of the environmental condition of the Bases. Moreover, full disclosure of the environmental damage at the former Bases was necessary inasmuch as the Bases were to be converted to special economic zones. Despite knowledge of the presence of contamination,⁴⁷³ the U.S. Government failed to warn all those likely to be affected of the environmental threats to life and health inside the Bases. And even after the presence of contamination was uncovered, the U.S. was still reluctant to release all the relevant documents, records and plans to the Philippine Government.

As discussed above, the environmental policy for domestic bases is different from those applied to overseas installations. When the DoD closes a domestic military base, U.S. laws require the DoD to disclose all known information concerning hazards to human health or the environment. Members of the public who might be affected by the presence of hazardous substances are provided meaningful opportunities to participate in making decisions as to the proper remedial action to be taken.⁴⁷⁴ Sadly, the U.S. Government did not apply the same standards in the closure of Clark and Subic. The U.S. kept the nature and full extent of environmental damage at Clark and Subic from the Filipino people and their Government. The United States' failure to inform the Philippine Government of the environmental condition of

⁴⁷² Ksentini Report, *supra* note 388 at 50.

⁴⁷³ Please see '92 GAO Report, *supra* note 93.

⁴⁷⁴ Wagner, *supra* note 168 at 430.

the Bases upon turnover significantly affected the Philippine Government's ability to make informed decisions relating to the contamination. This is best exemplified by the Philippine Government's decision to relocate Mt. Pinatubo victims in CABCOM, which turned out to be a former motor pool.⁴⁷⁵

D. Proper Fora for Redress

The foregoing discussion clearly shows that the Philippines has a legal basis for bringing a claim against the U.S. for the environmental damage at Clark and Subic. The Philippine Government has been negotiating with the U.S. Government through diplomatic means for the cleanup of the contaminated sites at Clark and Subic. As pointed out in Chapter IV, so far, diplomatic efforts have proved to be ineffective. On the other hand, local remedies have not been successful due to the Philippine Court's lack of jurisdiction over the U.S. Government. To reiterate a Philippine Regional Trial Court (Branch 56, Angeles City, Pampanga) recently dismissed the civil case filed by toxic waste contamination victims and their families against the U.S. and Philippine Governments due to lack of jurisdiction.⁴⁷⁶ Therefore, resort to international tribunals may be considered by the Philippine Government in order to resolve the question of the international responsibility of the U.S. and the alleged violation of the right to a healthy environment of Filipinos.

1. Interpretation of the Military Bases Agreement and Determination of State Responsibility

⁴⁷⁵ A "motor pool" is defined as a centrally managed group of motor vehicles intended for the use of personnel, as of a military installation. [American Heritage Dictionary of the English Language, 4 ed. (2000) online: <http://www.dictionary.com/cgi-bin/dict.pl?term+motor%20pool> (date accessed: 13 December 2001)]. See *supra* note 86 for the hazardous wastes generated at motor pools.

⁴⁷⁶ A. Malig, Jr., "The State's Immunity From Suit" *Sun Star Pampanga*, (20 August 2001) online: <<http://www.sunstar.com.ph/pampanga/08-20-2001/opinion3.html>> (date accessed: 27 November 2001).

The Philippines may opt to file an international claim against the U.S. before the ICJ to determine whether under the provisions of the Military Bases Agreement the Philippines waived its right to demand cleanup of the former Bases. Assuming that the ICJ finds that the Philippines has not waived its right, the issue of state responsibility for breach of a customary rule of law can be adjudicated.

The inherent limitations of the ICJ, however, may hinder the filing of a claim. The jurisdiction of the ICJ is based on consent. Generally, the Court has no jurisdiction to hear applications submitted unilaterally save to the extent provided by Art. 36 (2)⁴⁷⁷ of the Statute of the Court, or in other treaties.⁴⁷⁸ It is highly doubtful if the Philippines can bring the U.S. to the ICJ without its consent. In October 1985, the U.S. withdrew its declaration of acceptance of the compulsory jurisdiction of the ICJ.⁴⁷⁹ As a result of the U.S.'s withdrawal of its acceptance, the ICJ is prevented from trying future cases against the U.S., unless it involves adjudication of treaties containing compromissory clauses or in cases referred by both parties to the Court.⁴⁸⁰ In any case, there are recent precedents in which the U.S. had agreed to submit to an ad hoc committee.

⁴⁷⁷

Article 36

"2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning"

- a. the interpretation of a treaty;
- b. any question of international law
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation"

⁴⁷⁸ Birnie, *supra* note 254 at 184.

⁴⁷⁹ Department of State File No. P85 0189-0461.

⁴⁸⁰ A. D'Amato, "The United States Should Accept By a New Declaration The General Compulsory Jurisdiction of the World Court" (1985) 80 A.J.I.L. 331.

In the alternative, the Philippine Government may consider bringing a claim before the ICEAC.⁴⁸¹ However, like the ICJ, the ICEAC has jurisdiction to settle disputes between any State, natural or legal person as long as both parties of the dispute agree to its jurisdiction. It is also unlikely that the U.S. would submit itself to the jurisdiction of the ICEAC.

2. Invoking the Human Right to a Healthy Environment

Individual victims of the environmental devastation at Clark and Subic or their representatives may look into the possibility of using the human rights approach contemplated above. The human rights approach allows existing human rights complaint machinery to be invoked against states “whose level of environmental protection fall below that necessary to maintain any of the guaranteed human rights.”⁴⁸² “International human rights committees and tribunals have increasingly extended the application of the fundamental right to a healthy environment to situations concerning life-threatening environmental risks.”⁴⁸³ However, human rights tribunals do not provide enforceable remedies to the victim.⁴⁸⁴ More importantly, complaints may only be brought against States that are parties to the relevant international or regional convention.⁴⁸⁵

The Human Rights Committee may hear individual complaints (“communications”) against a state party to the *International Convention on Civil and Political Rights* (“ICCPR”)

⁴⁸¹ For an assessment of the effectiveness of the ICEAC see B. Reh binder & D. Loperena, “Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation” Eur Env'tl. L & Pol'y (forthcoming). See also *International Court of Environmental Arbitration* online: International Court of Environmental Arbitration and Conciliation <http://iceac.sarenet.es> (date accessed: 11 November 2001).

⁴⁸² Kiss, *supra* note 257 at 161.

⁴⁸³ Kalas, *supra* note 358 at 216.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

alleging violations of the covenant if the state has also accepted the *Optional Protocol to the International Covenant on Civil and Political Rights*.⁴⁸⁶ The Optional Protocol is subject to separate ratification and it is by no means compulsory for ICCPR parties to ratify the said Protocol.⁴⁸⁷ Thus, ratification of the ICCPR alone does not empower the Human Rights Committee to receive complaints. A state party to the ICCPR that becomes a party to the Optional Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by that state party of any of the rights set forth in the covenant.⁴⁸⁸ The Committee has clarified that the words "subject to its jurisdiction" in Article 1 of the Protocol, refer to the relationship between the individual and the state concerned, and not the place where the violation occurred.⁴⁸⁹ In other words, the Optional Protocol does not contemplate the filing of a communication against a state party by an individual who was not under the jurisdiction of that state. Thus, Filipino victims are precluded from submitting a communication against the U.S since they were not subject to the jurisdiction of the U.S. at the time the violation occurred. Under the optional protocol, only individuals within the jurisdiction of the U.S. can file a communication against the U.S. In any case, while the U.S. has ratified the ICCPR on 8 June 1992, it has not accepted the Optional Protocol.

The Philippines ratified the ICCPR on 23 October 1986 and accepted the Optional Protocol on 22 August 1989. This means that Filipino victims, after exhausting all available domestic remedies, may submit a communication to the Committee alleging violation by the

⁴⁸⁶ Kiss, *supra* note 257 at 169.

⁴⁸⁷ H. Hannum, "Guide to International Human Rights Practice" 3rd ed. (New York: Transnational Publishers, Inc, 1999) at 40.

⁴⁸⁸ Article 1, Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1).

⁴⁸⁹ Hannum, *supra* note 487, citing Lopez Burgos v. Uruguay, Communication No. 52/1079.

Philippine Government of their rights as provided for in the ICCPR.⁴⁹⁰ However, filing a claim against the Philippine Government may be a futile exercise considering that the Human Rights Committee is not an adjudicatory body. "Upon receiving all relevant information on the merits of a case, the Committee adopts what are known as its "views," which it forwards to both the author and state concerned."⁴⁹¹ The Committee's findings are not legally binding unlike other international judicial bodies like the ICJ⁴⁹² and, until recently, no sanction was available for non-compliance by states found to have violated the Covenant.⁴⁹³ And even if the Committee's finding is legally binding and enforceable, a finding against the Philippines is useless considering that it has no resources to undertake any cleanup and remediation. Perhaps the only benefit of filing a complaint against the Philippine Government is to compel it to file a claim against the U.S. before an international forum.

Another recourse is the inter-state complaint procedure. The U.S. recognizes "the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State party claims that another state party is not fulfilling its obligations under the Covenant."⁴⁹⁴ This means that the Philippine Government may send a communication to the U.S. alleging that the latter is not giving effect to the provisions of the Covenant, i.e. right to life.⁴⁹⁵ If the matter is not resolved to the satisfaction of both States within six months from

⁴⁹⁰ It may be argued that the Philippine Government contributed to the environmental damage in Clark when it failed to enforce Philippine laws and regulations for the protection of the environment and human health at the time Clark Air Base was "occupied" by U.S. forces. More importantly, the Philippine Government failed to ensure that Mt. Pinatubo evacuees were being relocated to a habitable environment. To recall, Philippine officials designated the Clark Air Base Communications Center (CABCOM) as the temporary evacuation center for thousands of families displaced by the Mt. Pinatubo explosion. Environmental and health studies have identified CABCOM as one of the areas contaminated by hazardous wastes.

⁴⁹¹ Hannum, *supra* note 487 at 48.

⁴⁹² S. Joseph, "A Right Analysis of the Covenant of Civil and Political Rights" (1999) 5 J. Int'l. Legal Stud. 57 at 66.

⁴⁹³ Hannum, *supra* note 487 at 48.

⁴⁹⁴ United Nations Treaty Collections, Declarations Recognizing the Competence of the Human Rights Committee under Article 41, online: United Nations Human Rights Website http://www.unhcr.ch/html/menu3/b/treaty5_asp.htm (date accessed: 11 November 2001).

⁴⁹⁵ ICCPR, *supra* note 378, Article 41 (1)(a).

receipt of the communication, the Philippines may bring the matter to the attention of the Human Rights Committee.⁴⁹⁶ Basically, the Committee will “make available its good offices to the States Parties concerned with a view of finding a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized” in the covenant.⁴⁹⁷ However, the inter-state complaint procedure has not proven itself to be an effective means of ensuring compliance with the ICCPR.⁴⁹⁸ In fact, the effectivity of the process remains doubtful as state parties have yet to invoke this complaint mechanism.⁴⁹⁹ “Political factors counsel against parties making complaints against each other.”⁵⁰⁰

As for the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) monitored by the Committee on Economic, Social and Cultural Rights, the ICESCR does not establish any interstate or individual complaints system.⁵⁰¹ It only requires state parties to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the Covenant.⁵⁰² It may be well to note that the U.S. signed the ICESCR on 5 October 1977.

3. Inadequacy of International Mechanisms for the Adjudication and Settlement of Environmental Claims

It is apparent that the current international mechanisms for the adjudication and settlement of environmental claims are inadequate to address the Philippines’ claim against the

⁴⁹⁶ ICCPR, *supra* note 378, Article 41 (1) (b).

⁴⁹⁷ *Ibid.* at Article 41 (1)(e).

⁴⁹⁸ T. Buergental, *International Human Rights in a Nutshell* (St. Paul: West Publishing Company, 1995) at 46.

⁴⁹⁹ E. H. Sadtler, “A Right to Same-Sex Marriage Under International Law: Can it Be Vindicated in the U.S.?” (1999) 40 Va. J. Int’l L. 405 at 434.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Buergental, *supra* note 498 at 48.

⁵⁰² ICESCR, *supra* note 377 at Article 16 (1).

U.S. for the cleanup and remediation of the contaminated sites at the former U.S. Bases.⁵⁰³ Among the problematic issues to be settled in any international judicial forum is whether there is any dispute, as defined in international law. And even if there is a justiciable issue, most of these adjudicatory bodies have consent based jurisdiction which renders them powerless to hear international claims filed unilaterally by one state. The unwillingness of states to submit to the jurisdiction of existing international tribunal has been the greatest obstacle to the resolution of most environmental disputes. Moreover, the fact that most international tribunals, like the ICJ, do not allow non-state entities to appear before them poses a problem for victims of environmental damage. Individual victims of the toxic waste contamination at Clark and Subic must prevail upon the Philippine Government to espouse their claims.

Due to the inherent limitation the present system, some commentators have proposed the creation of an international environmental court.⁵⁰⁴ Most of the proposals would allow individuals and non-governmental organizations to bring claims not only against states but also against transnational corporations and international organizations. However, it is unlikely that states, like the U.S., would be willing to submit to the jurisdiction of this court and face the possibility of going against non-state entities. States are inherently unwilling to give up their

⁵⁰³ A detailed discussion of the possible remedies under U.S. courts is not within the scope of this thesis. Suffice it to say, the filing of a toxic tort suit before U.S. courts can be pursued by the individual victims. The feasibility of applying CERCLA extra-territorially, particularly Sections 107 and 111, should be further explored. (See P. Obstler, "Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste" (1991) 16 Yale J. Int'l. L. 73).

⁵⁰⁴ Please see Murphy, *supra* note 357; Kalas, *supra* note 358; J. Riceanu "Enforcement Mechanism in International Law: Quo Vadant?" (2000) 15 J. Env'tl. L & Litig. 147; K. McCallan & H.R. Sharma, "The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" (2000) 32 GW J. Int'l. L. & Econ. 351; P. Sands "International Environmental Litigation and Its Future" (1999) 3 U. Rich. L. Rev. 1619; A. Rest "Need for an International Court for the Environment- Underdeveloped Legal Protection for the Individual in Transnational Litigation" (1994) 24 Env'tl. Pol'y. & L. 173; A. Dehan, "An International Environmental Court: Should There be One?" (1992) 3 Touro J. Transnat'l L. 31.

sovereignty by exposing themselves to legal proceedings.⁵⁰⁵ Thus, it would seem that establishing a new international tribunal is not the solution.

The ICJ's Chamber for Environmental Matters appears to be best suited in resolving disputes concerning breaches of international obligations and the reparation to be made for such breach. Nevertheless, environmental disputes can only be resolved if states commit to submit themselves to the jurisdiction of competent international tribunals.

⁵⁰⁵Rest, *supra* note 504 at 183.

VII. Conclusion

The Philippines achieved formal independence in 1946, without eliminating foreign domination. For almost half a century, the Philippines accommodated the U.S. military presence in the name of regional security. The rejection of the *Treaty of Friendship, Cooperation and Security* by the Philippine Senate in 1991 was a definitive moment in Philippine history for it symbolically marked the end of U.S. domination. However, as revealed by the subsequent discovery of contaminated sites at Clark and Subic, previous activities and policies of the U.S. continue to have an effect on Philippine affairs.

In spite of overwhelming findings of environmental contamination at Clark and Subic brought about by the inadequate environmental policy of the DoD for overseas installations, it appears that individual victims are left with no viable remedy. The international dispute settlement procedures currently in place are ineffective given that their jurisdiction is based on consent. An injured state cannot unilaterally bring a polluting state, such as the U.S., before an international court without the latter's consent. Moreover, non-state actors are not granted direct access to most of these fora. Thus, individual victims are at the mercy of their governments to take up their claims. The inherent weakness of the current system precludes the adjudication of even the most meritorious of claims.

Creating an international court for the environment is not the answer. What is needed is commitment from states to recognize and support existing dispute settlement mechanisms geared towards the protection of the environment. In this regard, the U.S. is in a unique position to assert its leadership role in the protection of the environment by voluntarily submitting to the jurisdiction of the ICJ's Chamber for Environmental Matters, without any reservation.

And even if the U.S. accepts the jurisdiction of the ICJ, individual claims against the U.S. may be adjudicated before the ICJ only if the Philippines is willing to espouse the claims on these individuals' behalf. The so-called "special relationship" between the U.S. and the Philippines poses a serious obstacle to the submission of a claim before an international tribunal. Admittedly, the Philippines remains economically dependent on the U.S. and demanding a cleanup of Superfund⁵⁰⁶ proportions may jeopardize negotiations for more loans and military aid.⁵⁰⁷ The Philippines already missed an opportunity to demand the cleanup and restoration of Clark and Subic when the Philippines was negotiating for a Visiting Forces Agreement ("VFA") with the U.S in 1999.⁵⁰⁸ Even then, the Philippine Senate should have rejected the VFA, in light of the findings of contamination in the former Bases. It is evident that the Philippines does not have the political will to go up against the U.S.

As the hope for justice fades, the threat of exposure to hazardous contamination pervades in the communities surrounding the former Bases. The full extent of environmental damage at Clark and Subic remains to be uncovered. The long term effects of exposure to hazardous wastes have yet to be determined. The fact that the environmental devastation at Clark and Subic affects not only the present generation of Filipinos but also future generations should be enough reason for the Philippines to pursue a workable solution to this tragedy.

⁵⁰⁶ See '92 GAO Report, *supra* note 93 at 27.

⁵⁰⁷ Grassroots Summit, *supra* note 34 at 45.

⁵⁰⁸ The VFA allows U.S. troops access to the Philippines for the purpose of joint military exercises. For a comprehensive discussion of the provisions of the VFA, please see F. Nemenzo, *What's Wrong with the Visiting Forces Agreement*, online: <http://www.philsol.n1/A99a/VFA-Nemenzo-1.htm> and R. Simbulan, *Why the Senate Should Reject the VFA*, online: BoondocksNet.com <http://www.boondocksnet.com/sctexts/simbulan99a.html> (date accessed: 20 August 2001).

While a legal case can be made for remediation and compensation for damages of the victims, there are many political obstacles to a satisfactory conclusion. Therefore, the most promising approach may well be through political and diplomatic means.

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ANNEX I

LIST OF HUMAN RIGHTS TREATY PROVISIONS WHICH PERTAIN TO ENVIRONMENTAL DEGRADATION¹

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

Right to be free from racial discrimination (Article 2)

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Right to life (Article 6)

Right to be free from interference with one's private or family life (Article 17)

Right of members of minorities (Article 27)

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

Right to safe and healthy working conditions (Article 6)

Right to an adequate standard of living (Article 11)

Right to health (Article 12)

Right to enjoy the benefits of scientific progress (Article 15)

CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Right to free from discrimination (Article 2)

Right to life (Article 6)

Right to health (Article 24)

Right of children of minorities and indigenous populations to enjoy their own culture (Article 30)

¹ (Source: C. Dommen, "Claiming Environmental Rights: Some Possibilities Offered by U.N. Human Rights Mechanism" (1998) 11 Geo Int'l Env't'l L. Rev. 1 at 11).