

Linkages Between Human Rights And Environmental Protection

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Thank you, Commissioner Sandra Paul, for that generous introduction. Please let me also echo the welcome and salutations that the Hon. Dr. Laurent extended to the justices, officials, diplomatic corps, and other distinguished guests who are in attendance. I am honored to be asked to deliver this, the Second Distinguished Lecture organized by the Environment Commission of Trinidad and Tobago, an institution that is not only of vital importance to this country, but one that is a model for other nations in the region in bringing to bear its multidisciplinary expertise to resolve environmental matters and contribute to sustainable development.

Human rights and environmental protection have emerged in the last half century as fundamental values of the global order, reflected in the large number of international agreements states have negotiated and ratified on both topics. The linkages between the two domains of human rights and environmental protection have been increasingly recognized during the nearly 40 years since the Stockholm Conference on the Human Environment.² The present global concern with climate change, however, has propelled consideration of a rights-based approach to environmental protection to the forefront of policy debates. As perhaps the most obvious manifestation of the recognized linkages, individuals and groups are widely utilizing

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² At the Stockholm concluding session, the linkage was reflected in the preamble of the concluding Stockholm Declaration, wherein they proclaimed that

*Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.*²

Principle 1 of the Stockholm Declaration established a foundation for linking human rights and environmental protection, declaring that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” In resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment.

international human rights petition procedures to challenge environmental degradation that limits the enjoyment of their national and internationally guaranteed rights, in the process demanding that governments effectively enforce MEAs and national laws for environmental protection. The result has been a cross-fertilization of the two domains of law to the benefit of both.

To understand the linkages, it is useful to compare a rights-based approach to other disciplines that have been utilized for environmental protection nationally and internationally. If there is value-added in a rights-based approach, which I believe there is, then a review and assessment of the current state of comparative national and international law can illustrate that value. It will then be possible to consider the prospects and hurdles that need to be overcome for environmental protection and the enjoyment of human rights to achieve their full potential.

1. Legal Approaches to Environmental Protection

There are various analytical constructs in law that are used to protect the natural world and ecological processes on which life depends: economic incentives and disincentives, regulatory measures, criminal law, and private liability regimes all form part of the framework of international and national environmental law. In general, these constructs can be grouped into four broad categories: (1) traditional private law remedies based in tort and property law; (2) public regulation of human activities; (3) market mechanisms; and (4) constitutional or human rights law. Each approach has its own advantages and disadvantages.

Chronologically, we start with private law, and it resonates internationally in perhaps the best-known decision concerning environmental harm, the inter-state *Trail Smelter* arbitration that concerned transboundary air pollution from Canada that caused harm in the United States. The arbitral panel found no international precedents on point and thus heavily relied on inter-state cases from within federal systems. Most of the judicial decisions were, in turn, founded on

concepts of nuisance, i.e., tort liability imposed because, after examining and balancing the benefits and burdens accruing to the two parties, one party's use of property or resources was deemed an unreasonable interference with the other party's property or sovereign rights. Private tort actions, and similar ones based on property concepts of trespass, were long the primary avenue for mitigating or halting pollution in domestic legal systems. Today, the international "nuisance" doctrine or notion of abuse of rights has become part of general international law binding on all states. The ICJ expresses this as the principle of prevention, which it explicitly calls a customary rule, having its origins in the due diligence that is required of a State in its territory. The Court holds that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."³ A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State or to areas beyond its national jurisdiction. This obligation "is now part of the corpus of international law relating to the environment."⁴

In addition to private action in tort or property, many countries have relied on the long-established property doctrine of public trust to protect those resources deemed to fall within the public domain.⁵ The doctrine of public trust, traced to Roman law, holds that navigable waters, the sea, and the land along the seashore are common property for use by all.⁶ Common law courts have adopted and applied the public trust doctrine, conferring trusteeship on governments, with an initial focus on fishing rights, access to the shore, and navigable waters and the lands

³ *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22.

⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29.

⁵ One author asserts that "[e]ach of the successful provisions [in state constitutions] invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship." Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169-1210, 1173 (1997). Provisions that refer to "trust," include Haw. Const. art. XI; Pa. Const. art. I, § 27; Va. Const. art. XI, § 3. For provisions outlining public trust principles, see Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59.

⁶ Justinian, Inst. 2.1.1. (T. Sanders Trans. 1st Am. ed. 1876).

beneath them.⁷ After the publication of an influential law review article in 1970,⁸ courts began to expand the doctrine and apply it to other resources, including wildlife and public lands.⁹

The public trust doctrine emphasizes the duties of the trustee rather than the individual rights of the beneficiaries, imposing an obligation – sometimes by constitutional amendment - on the government to conserve the corpus of the trust and ensure common access to and use of it by present and future generations.¹⁰ The major limitation to this approach is that public trust doctrine extends only to those natural resources are viewed as part of the corpus of the trust and not to the environment as a whole.¹¹ Normally public lands are included, but not resources or activities on private property, unless they impact on public lands. A rights-based approach, in contrast, potentially extends to all activities public and private that harmfully impact environmental quality; the focus is on the harm caused not the place where it occurs.

In the 1960s, environmental law shifted from a reliance on property and tort law to one of public regulation. General environmental protection statutes were enacted along with specific

⁷ See, e.g. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927). Fishing rights, free access to the shore, and navigation are traditional rights that are reaffirmed in several state constitutions as well as in jurisprudence. See, e.g., Cal. Const. art. I sec. 25; R.I. Const. art. I sec. 17; Ala. Const. art. 1 sec 24.

⁸ Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L.REV. 471 (1970). See also Bernard Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388.

⁹ See, e.g. *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

¹⁰ Alaska's constitution, for example, guarantees the latter: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Ala. Const. art. VIII, § 3. Rhode Island's Constitutional amendment, added in 1986, also focuses on public rights of access and use, coupled with a legislative mandate:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.¹⁰

¹¹ For various approaches to the reach of the public trust, see: Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?* 1 J. ENVTL L. & LITIG. 107, 107-08, 118 (1986); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 316 (1980); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 398-99 (1991).

acts to ensure clean water, clean air, and the survival of endangered species. As scholar Christopher Schroeder has argued, the shift from private to public law has three advantages in theory – “one procedural, one remedial and one substantive.”¹² On a procedural level, environmental regulation is more democratic: it should determine levels of environmental quality through a public process that involves collective choices, rather than through a series of private actions and reactions (negotiation or litigation). In remedies, the emphasis is on prevention rather than liability (although successful nuisance actions often led to injunctive relief to prevent further harm). Finally, substantively, the regulatory system sets levels of environmental quality that the cost-benefit or balancing approach used in tort actions cannot normally achieve because they tend to rely on corrective justice rather than deterrence and may underestimate the collective losses caused by environmental harm.¹³

Beginning in the 1980s, with deregulation and privatization, market-based approaches to changing human behavior emerged as an alternative to command-and-control and other approaches. The defects in the market, now widely perceived as a result of deregulation and privatization, have led to concerns and a trend towards re-regulation in many countries.

The rights-based approach differs from all the preceding models in several key respects. First, it emphasizes each individual’s entitlement to a certain quality of environment because it is linked to the enjoyment of a host of internationally and domestically guaranteed rights that cannot be exercised otherwise. Former U.N. Secretary-General Kofi Annan in his 1998 Annual Report on the Work of the United Nations Organization spoke in favor of this approach because it “describes situations not simply in terms of human needs, or of development requirements, but in terms of society’s obligations to respond to the inalienable rights of individuals.”

¹² Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002).

¹³ *Id.*

Environmental protection undoubtedly is a pre-condition to the enjoyment of some internationally-guaranteed human rights, especially the rights to life, health, private and home life and cultural rights, but it also directly or indirectly impacts other rights as well.¹⁴ Environmental protection is thus an essential instrument subsumed in or viewed as a prerequisite to the effort to secure the effective enjoyment of human rights.

Conversely, the exercise of certain human rights is also now seen as essential to achieving environmental protection, which is sought not only for its relationship to human well-being, but because nature has intrinsic value. This approach is well-illustrated by the Rio Declaration on Environment and Development, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development. It formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”

These rights-based approaches were initially thought to have the defect of being non-justiciable, however courts are increasingly enforcing constitutional and international rights to environmental quality.¹⁵ Many courts have broadened standing to permit legal redress for violations of environmental rights, eliminating the requirement that individualized injury to

¹⁴ One study has estimated that 40 percent of the world’s deaths can be attributed to environmental factors. Pimental, D., *Ecology of Increasing Diseases: Population Growth and Environmental Degradation*, BIOSCIENCE (October 1998). In addition, some 1.2 billion people in developing countries lack clean and safe drinking water, with the result that waterborne infections account for 80 percent of all infectious diseases worldwide. In many areas industrial and household wastes are dumped directly into rivers and lakes. Air pollution adversely affects the health of 4 billion people. Some 2.5 billion kg of pesticides used worldwide each year – a 50 fold increase over the past 50 years – resulting in about 3 million cases of human pesticide poisonings are reported annually.

¹⁵ The Montana Supreme Court indicated some of the parameters of its constitutional provision in the case *Cape-France Enterprises v. The Estate of Peed*, 305 Mont. 513, 29 P.3d 1011 (2001), describing the right to a clean and healthful environment as “a fundamental right that may be infringed only by demonstrating a compelling state interest...” one that is, “at a minimum, some interest ‘of the highest order and ... not otherwise served,’ or ‘the gravest abuse endangering [a] paramount [government] interest []’.” *Armstrong v. State* 1999 Mt. 261, 296 Mont. 361, 989 P. 2d 364, at fn. 6.

health or property be demonstrated because the intent of the rights guarantees are to prevent injury from occurring.¹⁶

2. *The Rights Based Approach in International and National Law*

Most human rights treaties were drafted and adopted before the Stockholm Conference and therefore they contain few references to the environment.¹⁷ Later treaties¹⁸ and declarations,¹⁹ especially at the regional level,²⁰ do refer to the right to a safe and healthy or

¹⁶ See, e.g. *Montana Environmental Information Center v. Department of Environmental Quality*, 296 Mont. 207, 988 P. 2d 1236 (1999).

¹⁷ The *International Covenant on Economic, Social and Cultural Rights* (ICESCR)(16 Dec. 1966) speaks primarily to the working environment, guaranteeing the right to safe and healthy working conditions (art. 7 b) and the right of children and young persons to be free from work harmful to their health (art. 10 para. 3). The right to health (ICESCR, art. 12), however, goes further and expressly calls on states parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” and “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.”

¹⁸ The *Convention on the Rights of the Child* (New York, November 20, 1989) refers to aspects of environmental protection in respect to the child’s right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” (Art. 24(2)(c)). States parties also are to provide information and education on hygiene and environmental sanitation to all segments of society. (Art. 24(2)(e)). *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (Geneva, June 27, 1989) contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., arts. 2, 6, 7, 15). The Convention requires states parties to take special measures to safeguard the environment of indigenous peoples (art. 4). In particular, governments must provide for environmental impact studies of planned development activities and take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

¹⁹ The most recent UN human rights text, the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 12, 2007 with only four dissenting votes (U.S., Canada, Australia and New Zealand) contains several provisions related to environmental rights. In addition to protection indigenous lands (arts. 10, 25-27) and resources (arts. 23, 26) the declaration contains procedural rights of participation (art. 18) and prior informed consent (art. 19) as well as a specific article on the environment. Article 29 provides:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

²⁰ The African Charter on Human and Peoples’ Rights, (Banjul June 26, 1981), Article 24 provides that “All peoples shall have the right to a general satisfactory environment favorable to their development.” The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights also contains a right to environment, but did not add it to those rights subject to the individual complaint procedure. Article 11, entitled: “Right to a healthy environment” proclaims:

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

sound environment, while environmental agreements have incorporated procedural human rights deemed necessary or advantageous to achieving environmental protection.²¹ Several dozen international treaties adopted since the Stockholm Conference call upon states to take specific measures to ensure that the public is adequately informed the risks posed to them by specific activities.²² In addition to the right to information, the public is also given broad rights of participation in decision-making and access to remedies for environmental harm. The protections afforded have increased in scope and number since the adoption of Principle 10 of the Rio Declaration on Environment and Development.²³

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

The 2004 Revised Arab Charter on Human Rights, once it comes into force, will also guarantee a right to a safe and healthy environment. Its Article 38 specifies:

Every person has the right to an adequate standard of living for himself and his family, that ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

²¹ See e.g. the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus, June 25, 1998); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes (Geneva, 18 Nov. 1991), art. 2(3)(a)(4); Convention on the Protection and Utilization of Transboundary Rivers and Lakes (Helsinki, 17 Mar. 1992), art. 16; the regional seas agreements; Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993, arts. 13-16; and United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 I.L.M. 849, art. 6. Non-binding texts include the European charter on the Environment and Health, adopted 8 Dec. 1989, First Conference of Ministers of the Environment and Health of the Member States of the European Region of the World Health Organization (“every individual is entitled to information and consultation on the state of the environment.”); Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (Bangkok, 16 Oct. 1990), A/CONF.151/PC/38 (Para. 27 affirms) “the right of individuals and nongovernmental organizations to be informed of environmental problems relevant to them, to have necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.”); Arab Declaration on Environment and Development and Future Perspectives (Cairo, Sept. 1991), A/46/632, cited in U.N. Doc. E/CN.4/Sub.2/1992/7, 20 (affirming the right to information about environmental issues).

²² See, e.g., the Helsinki Convention on the Transboundary Effects of Industrial Accidents, 31 I.L.M. 1330 (1992), which, recognizing “the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment,” requires that states parties provide adequate information to the public and, whenever possible and appropriate, give them the opportunity to participate in relevant procedures and afford them access to justice. (Art. 9). Annex VIII to the Convention details the information to be provided. Agreements requiring environmental impact assessments generally demand assessment of any effect caused by a proposed activity on the environment, specifically including human health and safety. See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 Feb. 1991), 30 I.L.M. 800, art. 1(viii).

²³ See, e.g., Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999); the United Nations Convention to Combat Desertification in Those Countries Experiences Serious Drought and/or Desertification (14 Oct. 1994), which places human beings at the center of concern to combat desertification (PmbI) and requires states parties to ensure that all decisions to combat desertification or to mitigate the effects of drought are taken with the participation of

The former United Nations Human Rights Commission took several initiatives relating to human rights and the environment. It appointed a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,²⁴ whose mandate includes investigating complaints about such trade.²⁵ In its resolutions on this matter, the Commission consistently recognized that such trade “constitute[s] a serious threat to the human rights to life, good health and a sound environment for everyone.”²⁶ The Commission also named a Special Rapporteur on the right to food whose mandate includes the issue of access to water and policies on agriculture and fishing.²⁷ The Commission specifically linked the issue of the right to food with sound environmental policies and noted that problems related to food shortages “can generate additional pressures upon the environment in

populations and local communities. (Art. 3). The Convention places an emphasis throughout on information and participation of local communities. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (September 10, 1998), EMuT, 998:26, Article 15(2), requires each state party to ensure, to the extent practicable that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention. The *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Montreal, January 29, 2000), 39 I.L.M.1027, Art. 23 concerns public awareness and participation, requiring the Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported LMOs should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the Convention.

²⁴ Resolution 2001/35, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, E/CN.4/RES/2001/35.

²⁵ All of the reported cases involved harm to persons as a result of the transboundary movement of hazardous materials, nearly always in violation of national and international environmental law. See the Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Addendum, Commission on Human Rights, E/CN.4/2001/55/Add.1 (21 Dec. 2000), documenting *inter alia* damage to tissues from arsenic poisoning, risks to health from the dumping of heavy metals, illnesses from pesticide use at banana plantations, deaths from petrochemical dumping, and kidney failure in children due to contaminated pharmaceuticals.

²⁶ Commission on Human Rights, Resolutions 199/23 and 2000/72.

²⁷ Resolution 2001/25, The right to food, E/CN.4/RES/2001/25 of 20 April 2001. The Commission’s Sub-Commission on Promotion and Protection of Human Rights also pressed the issue of the right to drinking water and sanitation, conducting a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation. Resolution 2001/2, Promotion of the realization of the right to drinking water and sanitation, E/CN.4/Sub.2/RES/2001/2 of 10 August 2001.

ecologically fragile areas.” Commission and Council resolutions on the topic have affirmed the “right to drinking water supply and sanitation for every woman, man and child.”²⁸

International human rights treaty bodies have received and decided numerous few cases from applicants who allege that environmental conditions affecting them have deteriorated to the point that their internationally-guaranteed human rights have been violated. At the global level, UN human rights treaty bodies have indicated through General Comments,²⁹ observations on state reports, as well as decisions on individual complaints,³⁰ that they view environmental protection as a pre-requisite to the enjoyment of the internationally-guaranteed rights they monitor.

²⁸ The Commission also adopted several resolutions linking human rights, health and the environment, such as Res. 2005/60 (20 April 2005), entitled *Human rights and the environment as part of sustainable development*. The resolution cited relevant UN conferences from Stockholm to Johannesburg and the goals and targets of the United Nations Millennium Declaration.

²⁹ The UN Covenants on human rights, as well as other UN human rights treaties, authorize their treaty bodies to issue General Comments, which constitute authoritative legal interpretations of the rights and obligations contained in the treaty. In General Comments on the right to life and on the minority rights provision of the Covenant on Civil and Political Rights, the U.N. Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics. See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 6-7 [hereinafter *Compilation*] and General Comment 23 paras. 7, 9 in *Compilation* at 41. The General Comments of the Committee on Economic, Social and Cultural Rights that refer to environmental include those on the Right to Adequate Food, General Comment 12, E/C.12/1999/5, the Right to Adequate Housing, General Comment 4 of 13 Dec. 1991, *Compilation*, HRI/GEN/1/Rev.3, 63, para. 5, and General Comment 14 “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Article 12).” U.N. CESCR, General Comment 14, U.N. Doc. E/C.12/2000/4 (2000). Most recently and importantly, the Committee adopted its important General Comment No. 15 on the right to water at its November 2002 session. ICESCR, Arts. 11 and 12, E/C.12/2002/11, 20 January 2003. The Committee had previously recognized, in its General Comment No. 6, that Art. 11 implies a right to water.

³⁰ The International Covenant on Civil and Political Rights permits complaints to be filed pursuant to the provisions of its Optional Protocol against States Parties to the Covenant and Protocol, provided domestic remedies have been exhausted and other conditions of admissibility are met. Communications concerning environmental conditions include: *Communication No. 67/1980, EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20; *Communication No. 645/1995, Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, 30 July 1996; *Communication No. 511/1992, Ilmari Lansman et al. v. Finland*, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996); *Kitok v. Sweden*, *Communication No. 197/1985, II Official Records of the Human Rights Committee 1987/88*, U.N. Doc. CCPR/7/Add.1, at 442; *Communication No. 431/1990, O.S. et al. v. Finland*, decision of 23 March 1994, and *Communication No. 671/1995, Jouni E. Lansmann et al. v. Finland*, decision of 30 October 1996.

Most of the individual communications filed with the UN Human Rights Committee by those harmed by environmental conditions have invoked the minority rights guarantees of art. 27. Many of them have been rejected on procedural grounds, without the Committee deciding the merits of the complaint. Those that have been decided have primarily addressed whether or not the affected community was able to participate effectively in the decision-making process.³¹

The three regional human rights systems have examined many more complaints that environmental deterioration has affected guaranteed human rights. The rights invoked most commonly are life,³² health,³³ property, privacy, home and family life,³⁴ and the right to a remedy.³⁵ The European Convention on Human Rights does not mention a right to a safe and

³¹ *Communication No. 547/1992, Apirana Mahuika et al v. New Zealand*, CCPR/C/70/D/547/1993, views issued November 16, 2000.

³² *See Oneryildiz v. Turkey* (GC), Nov. 30, 2004 (holding national authorities responsible for the deaths of the applicants' close relatives and for the destruction of their property due to a methane explosion at a municipal waste dump known to be in danger of such an explosion). The Court determined that Article 2 includes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation extends to any activity, whether public or not, "in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites." *Oneryildiz*, para. 71. The primary duty on the state is to put into place a legislative and administrative framework governing the licensing, setting up, operation, security and supervision of dangerous activities and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.

³³ In the Inter-American case *Yanomami v. Brazil* alleged that the government violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomani territory and authorizing exploitation of the territory's resources. These actions had generated the influx of non-indigenous persons who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI). Case 7615 (Brazil), INTER-AM.CH.R., *1984-1985 Annual Report* 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

³⁴ *Lopez-Ostra v. Spain*, 303-C Eur.Ct.H.R. (1994); *Anna Maria Guerra and 39 others v. Italy*, 1998-I ECHR, judgment of 19 Feb. 1998 and *Fadeyeva v. Russia*, App. NO. 55723/00, judgment of 9 June 2005.

³⁵ In the Inter-American system, the landmark case is that of the *Awasi Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, decided by the Inter-American Court of Human Rights. The complaint, first filed at the Inter-American Commission on Human Rights, protested government-sponsored logging of timber on indigenous forest lands. The Court judgment of August 31, 2001 declared that the State violated the right to judicial protection (art. 25 of the American Convention) and the right to property (Article 21 of the Convention). It unanimously held that the State must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. Pending demarcation of the indigenous lands, the State must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use or enjoyment of those properties located in the Awasi Tingni lands. The Court also awarded monetary reparations.

healthy environment, while the Inter-American system did so, but chose not to make the right justiciable.³⁶ The African system with article 24 of the 1981 African Charter on Human and Peoples Rights, was the first to include and declare justiciable a right to a safe and healthy environment.

Despite the fact that the European Convention contains neither a right to health nor a right to environment, cases have been brought for injury due to pollution, invoking the right to life (Art. 2), the right to information (Art. 10), and the right to privacy and family life (Art. 8). Decisions of the former Commission and the Court have held that environmental harm attributable to state action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Convention Article 8(1). The harm may be excused if it results from an authorized activity of economic benefit to the community in general, as long as there is no disproportionate burden on any particular individual; *i.e.* the measures must have a legitimate aim, be lawfully enacted, and be proportional.³⁷ States enjoy a margin of appreciation in determining the legitimacy of the aim pursued, but the Court will hold the state to the level of environmental protection it has chosen and generally finds a violation if the state fails to enforce its own laws, the treaties to which it is a party, or customary international law.³⁸

³⁶ For the text of the provision, see *supra* note 18.

³⁷ Many of the European environmental cases invoking the protection of privacy and home life involve noise pollution. See *Arrondelle v. United Kingdom*, (1980)19 DR 186; (1982) 26 DR 5; *Powell & Raynor v. United Kingdom*, 172 Eur.Ct. H.R. (1990); and *Hatton and Others v. The United Kingdom* (GC) 2003, 37 EHRR 28, applying a "fair balance" test and finding no violation due to aircraft noise from Heathrow Airport.

³⁸ See, e.g., *Okay and Others v. Turkey*, App. no. 36220/97, judgment of 12 July 2005, in which the applicants complained under Article 6 of the Convention that their right to a fair hearing had been breached on account of the administrative authorities' failure to enforce the judicial orders to halt the operations of the Yatağan, Gökova (Kemerköy) and Yeniköy thermal-power plants in the Muğla province of south-west Turkey. Relying on Article 56 of the Turkish Constitution and section 3 (a) of the Environment Act, the applicants argued that it was their constitutional right to live in a healthy and balanced environment, and their duty to ensure the protection of the environment and to prevent environmental pollution. In examining this case, the European Court not only referred to the domestic law of Turkey, but also to Principle 10 of the 1992 Rio Declaration on Environment and Development and to Parliamentary Assembly Recommendation 1614 (2003) on Environment and Human Rights. Given the applicant's constitutional rights and the international law on point, the Court was satisfied that the applicants could arguably claim that they were entitled under Turkish law to protection against damage to the

In the Western Hemisphere, the Inter-American Commission has devoted considerable attention to environmental quality as it affects human rights.³⁹ In a report on human rights in *Ecuador*, the Commission responded to claims that oil exploitation activities were contaminating the water, air and soil, thereby jeopardizing the lives and health of the people of the region.⁴⁰ Both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts in their drinking and bathing water, in the air, and in the soil, with the result that they suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. The Commission commented that:

[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.⁴¹

Governments may therefore be required to take positive measures, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury.

The Commission of course also recognizes that there is a right to development in international law. While this right implies that each state may exploit its natural resources, the Commission is clear that “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the

environment caused by the power plants' hazardous activities. It followed that there existed a genuine and serious “dispute” concerning a “civil right,” thus Article 6 applied and had been violated.

³⁹ Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997)[hereinafter *Report on Ecuador*]; Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1 (1997); Inter-Am. C.H.R., *Third Report on the Situation in Paraguay*, OEA/Ser.L/V/II.110, Doc. 52, 9 March 2001.

⁴⁰ *Report on Ecuador*, p. v. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report.

⁴¹ *Report on Ecuador*, *id.* at 88.

environment which translate into violations of human rights protected by the American Convention.”⁴² The Commission concluded that

[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ... The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.⁴³

This holding thus sets general standards for environmental rights in the Inter-American system.⁴⁴

In Africa, *SERAC v. Nigeria*,⁴⁵ contains a full exposition of the implications of a rights-based approach to environmental protection. Like the situation the Inter-American Commission reviewed in Ecuador, this communication alleged that development projects produced contamination causing environmental degradation and health problems in violation of applicable international environmental standards. The activities led to poisoning much of the region’s soil and water; the government aided these violations by placing the state’s legal and military powers at the disposal of the companies involved; the government executed opponents and, through its security forces, killed innocent civilians and attacked, burned, and destroyed villages, homes, crops, and farm animals. Further, the government failed to monitor the activities of the companies, provided no information to local communities, conducted no environmental impact studies, and prevented scientists from undertaking independent assessments.

⁴² *Id.* at 89.

⁴³ *Id.* at 92, 93.

⁴⁴ According to the Commission, information that domestic law requires be submitted as part of environmental impact assessment procedures must be “readily accessible” to potentially affected individuals. Public participation is required by Article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.” Finally, the right of access to judicial remedies is called “the fundamental guarantor of rights at the national level.”

⁴⁵ Decision regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (Afr. Comm’n Hum. & Peoples’ Rts. May 27, 2002), at <<http://www.umn.edu/humanrts/africa/comcases/allcases.html>> [hereinafter Decision].

The Commission held that Nigeria breached its obligations with respect to, *inter alia*, the right of peoples to a “general satisfactory environment favorable to their development” (Article 24).⁴⁶ The obligations were found to contain four separate but overlapping duties: to respect,⁴⁷ protect,⁴⁸ promote,⁴⁹ and fulfill⁵⁰ the guaranteed right entailing “a combination of negative and positive duties.”⁵¹ The Commission concluded its analysis by emphasizing that environmental rights and economic and social rights are essential elements of human rights in Africa, that the Commission intends to apply them, and that “there is no right in the African Charter that cannot be made effective.”⁵²

At the national level, some 130 constitutions in the world, including nearly all amended or written since 1970, specify state obligations to protect the environment or a right to a particular quality of environment. About half the constitutions take the rights-based approach and the other half proclaim state duties. In the United States, While there is no mention of the environment in the federal constitution adopted in 1789,⁵³ some sixty percent of the state

⁴⁶ The Commission also found violations of the right to non-discrimination (Article 2), the right to life (Article 4), the right to property (Article 14), the right to health (Article 16), the right to housing (implied in the duty to protect the family, Article 18(1)), the right to food (implicit in Articles 4, 16, and 22), and the right of peoples to freely dispose of their wealth and natural resources (Article 21).

⁴⁷ Respect for rights entails refraining from interference with the “enjoyment of all fundamental rights.” With regard to socioeconomic rights, in particular, respect means that “[t]he State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.” *Id.*, para. 45.

⁴⁸ Protection of rights requires legislation and provision of effective remedies to ensure that rights-holders are protected “against other subjects” and “political, economic, and social interferences.” *Id.* para. 46.

⁴⁹ Promotion involves such actions as “promoting tolerance, raising awareness, and . . . building infrastructures.” *Id.*

⁵⁰ Fulfillment of rights and freedoms requires the state to move its “machinery” toward the actual realization of rights—for example, by directly providing, as necessary, “basic needs such as food or resources that can be used for food (direct food aid or social security).” *Id.*, para 47.

⁵¹ *Id.*, para. 44 (citing Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 21 (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 1995) [hereinafter ECONOMIC, SOCIAL AND CULTURAL RIGHTS]).

⁵² *Id.*, para. 68.

⁵³ On efforts to imply environmental rights in the federal constitution, see Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, LAW AND THE ENVIRONMENT 134, 165 (M. Baldwin & J. Page, Jr. eds); Roberts, *The Right to a Decent Environment, E=MC²: Environmental Equals Man Times Courts*

constitutions,⁵⁴ all revised or amended since 1959, include environmental protection among their provisions.⁵⁵ Half a dozen states recognize the right of citizens to a safe, clean or healthy environment.⁵⁶

3. Prospects and Problems

The advantages of rights-based approaches to environmental protection are several. First, because human rights are maximum claims on society, elevating a clean environment to a right raises it above a mere policy choice. Rights are inherent attributes that must be respected in any well-ordered society. The moral weight attached to a rights label exercises an important compliance pull on members of society.

Second, all legal systems establish a hierarchy of norms. Constitutional or human rights guarantees usually are at the apex and “trump” conflicting norm of lower value. Thus, to include respect for the environment as a constitutional right, or international human right, ensures that it will be given precedence over other legal norms that are not rights-based. This is important given the short-term costs that may make it politically unpopular to adopt and implement measures of environmental protection. When governments and business entities are concerned

Redoubling Their Efforts, 55 CORNELL L. REV. 674 (1970); Note, *Towards a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

⁵⁴ See Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; Haw. Const. art. XI; Ill. Const. art. XI; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; Ohio Const. art. II, § 36; Pa. Const. art. I, § 27; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59; Utah Const. art. XVIII; Va. Const. art. XI, § 1. For discussions of these provisions, see: A. E. Dick Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 229 (1972); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 Env'tl. L. Rep. 50028-29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, 1984 Ann. Surv. Am. L. 13, 28-29; Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. Haw. L. Rev. 123, 126-27 (1990).

⁵⁵ For a listing of all environmental provisions in state constitutions, see Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002). See also Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 Fordham Env'tl. L.J. 107 (1997).

⁵⁶ The states are: Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Texas. Hawaii's Constitution, Article XI, section 9, reads: “Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings.”

with economic growth and compete for economic activities, they may be reluctant to assume the costs involved in environmental protection, despite the long-term benefits this brings. A “race to the bottom” can be partly countered by elevating environmental protection to a guaranteed right.⁵⁷ The brake or limitation on domestic political processes is potentially an important consequence of a right to environmental quality, particularly given the short-term costs involved in many environmental protection measures and the resulting political disfavor they experience.

Third, the emphasis on rights of information, participation, and access to justice encourages an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Thus, ensuring these rights is not only a means to produce decisions favorable to environmental protection, but can reinforce respect for human rights, the rule of law and democratic values more generally. Experience suggests that repressive regimes also tend to ignore environmental conditions, i.e., “governments that show a disregard for their citizens’ basic rights often protect the environment poorly as well”⁵⁸ and that citizen efforts to counter environmental harm tend to promote democratic governance as well as enhance compliance with environmental norms.

This link should not be surprising: the process by which rules emerge, how proposed rules become norms and norms become law, is highly important to the legitimacy of the law and legitimacy in turn affects compliance. To a large extent, legitimacy is a matter of participation: the governed must have and perceive that they have a voice in governance through representation, deliberation or some other form of action.

⁵⁷ See Kirsten Engel, *State Environmental Standard-Setting: Is there a “Race” and is it “to the Bottom”?* 48 *Hastings L.J.* 271 (1997).

⁵⁸ Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 *Stan. Env’tl L.J.* 71, 88 (2005).

Fourth, a rights-based approach allows utilization of international petition procedures to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threatens human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation. Sometimes the problem is the result of a combination of governmental lack of capacity and lack of political will. Pollution may be caused by powerful enterprises whose business and investment are important to the state or the state may have inadequate monitoring systems to ensure air or water quality. Even in these instances, petition procedures can help to identify problems and encourage their resolution, including by the provision of technical assistance. States may even welcome complaints if the results give them leverage in the domestic political arena to overcome opposition to needed measures. The availability of individual complaints procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.

There are also legitimate concerns with taking a rights-based approach to environmental protection and recognized limits to what can be accomplished. First, relying on existing human rights guarantees is largely anthropocentric, because environmental harm must affect human well-being before human rights guarantees can be invoked. Unless there is a specific right to a healthy or ecologically-balanced environment, international human rights procedures cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes. This anthropocentric approach is reflected in the European Court's decision in the case of *Kyrtatos v. Greece*.⁵⁹ The applicants own real property adjacent to a protected wetland, an important natural habitat for various protected species. The European Court found a violation of the fair hearing provisions article 6 § 1 because a local judgment blocking construction on the

⁵⁹ ECHR (2003), Judgment of 22 May 2003.

site had been ignored by local authorities. With respect to article 8, however, the Court found no violation, affirming that the crucial element for article 8 is the actual harmful effect on a person's private and family life, not deterioration of the environment *per se*. The Court indicated that applicants must demonstrate that the environmental deterioration directly affects their well-being, that is to say, they must clearly delineate the link between environmental degradation and the enjoyment of human rights.

The Court considered that an interference with the conditions of animal life in a wetland did not constitute an attack on the private or family life. A dissent asserted that the Court should recognize the growing awareness about the quality of the environment and the implication of environmental degradation on people's lives, which "would be perfectly in line with the dynamic interpretation and evolutionary updating of the Convention that the Court adopts in many fields." This view did not prevail, however. Nonetheless, if there is a right to environmental quality, not only humans benefit by the improved conditions; humans may be the agent of change, but all components of the environment may be enhanced.

A second limitation to a rights-based approach to environmental protection is found in the limited mandates of human rights bodies in respect to remedies. The European Court can award monetary damages, but has no power to order injunctive relief or mandate specific action. Thus, rights may be vindicated with money for the applicants to move away from the environmental harm, but it is not clear that the environmental conditions themselves are improved. *Fadayeva* is a case in point; the applicant was awarded compensation, but the industrial facility, the steel mill, remained in operation as before. A further limitation is that the decisions of the Inter-American Commission, the African Commission, and the UN bodies are recommendations that lack the binding force of judgments of the European and Inter-American

Courts. While good faith cooperation with international bodies, which have been given monitoring power and the authority to hear complaints, suggests that states should comply, they may take the view that mere recommendations need not be strictly followed.

Third, many states like the United States typically envisage rights as restraints on governmental power, and duties of governmental abstention. Environmental rights, however, not only require state abstention from governmental activities that harm the environment, they require affirmative management of resources and regulations to ensure that private conduct – which is responsible for the large majority of environmental harm – is properly controlled. This means interfering with uses of private property. Indeed, the major difference between constitutional provisions that are based on traditional doctrines of public trust and those that enshrine environmental rights seems to be the extent to which private-source environmental harm will be addressed. Including the right to environment in the constitution places it on an equal footing with rights to property and allows for a balancing of community and individual interests, more than does public interest doctrine.

Fourth, the issue of a right to an environment of a certain quality is complicated by both temporal and geographic elements absent from other human rights protections. While most human rights violations affect only specific and identifiable victims in the present, environmental degradation harms not only those currently living, but future generations of humanity as well. The harm can take various forms. First, an extinct species and whatever benefits it would have brought to the global ecosystem are lost forever. Second, economic, social, and cultural rights cannot be enjoyed in a world where resources are inadequate due to the waste of prior generations. Third, the very survival of future generations may be jeopardized by sufficiently serious environmental problems. A right to environment thus implies significant, constant duties

toward persons not yet born, while it is not clear who represents such future generations and how courts should protect their interests.

On the international level one policy consequence that arises from a rights-based approach to environmental protection could be significant. In climate change negotiations and in issues relating to international watercourses, debate often centers on equitable allocation of rights and responsibilities. Traditional international law is state-based and would divide rights and responsibilities according to sovereign equality, utilizing historic responsibility for harm, wealth, capacity or other factors to determine the “common but differentiated responsibilities” of each party. A rights-based approach on the other hand might suggest a per capita allocation based on the equal rights and responsibilities of each individual, giving populous nations considerably more permissible greenhouse gas emissions and reducing the allowances of those industrialized countries that historically have emitted the largest percentage of global emissions.

The most politically-charged aspect of a right to environment may be the potentially vast expansion of the territorial scope of state obligations. Presently, human rights instruments require each state to respect and ensure guaranteed rights "to all individuals within its territory and subject to its jurisdiction." This geographic limitation reflects the reality that a state normally will have the power to protect or the possibility to violate human rights only of those within its territory and jurisdiction. Nature recognizes no political boundaries, however. A state polluting its coastal waters or the atmosphere may cause significant harm to individuals thousands of miles away. States that permit or encourage GHG emissions or depletion of the tropical rain forest can contribute to global warming that threatens the entire biosphere.

Other objections have less merit. It has been asserted that the right to environment cannot have a content specific enough to be justiciable because environmental conditions and

regulations are inherently variable.⁶⁰ However, in addition to the cases discussed above, constitutional rights to a safe and healthy environment are increasingly being enforced by courts. In India, for example, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi.⁶¹ In some instances, the courts issued orders to cease operations.⁶² The Indian Supreme Court has based the closure orders on the principle that health is of primary importance and that residents are suffering health problems due to pollution. South African courts also have deemed the right to environment to be justiciable. In Argentina, the right is deemed a subjective right entitling any person to initiate an action for environmental protection.⁶³ Colombia also recognizes the enforceability of the right to environment.⁶⁴ In Costa Rica, a court stated that the right to health and to the environment are necessary to ensure that the right to life is fully enjoyed.⁶⁵ Courts have found the necessary laws and means of interpretation to give effect to the guaranteed rights.

4. *Answering the Critiques: International Jurisprudence*

⁶⁰ See, e.g. Gunther Handl, *Human Rights and Protection of the Environment: A Mildly 'Revisionist' View*, in A.A. CACADO-TRINDADE, ed., *HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION* (1992); ALAN BOYLE AND MICHAEL ANDERSON, eds. *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* (1996).

⁶¹ As early as 1991, the Supreme Court interpreted the right to life guaranteed by article 21 of the Constitution to include the right to a wholesome environment. See Charan Lal Sahu v. Union of India, AIR 1990 SC 1480 (1991). In a subsequent case, the Court observed that the "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life." Subhash Kumar v. State of Bihar, AIR 1991 SC 420, 1991 (1) SCC 598.

⁶² See, e.g., M.C. Mehta v. Union of India & Others, JT 1996, reprinted in 1 *The Environmental Activists' Handbook* at 631.

⁶³ Kattan, Alberto and Others v. National Government, Juzgado Nacional de la Instancia en lo Contenciosoadministrativo Federal. No. 2, Ruling of 10 May 1983, La Ley, 1983-D, 576; Irazu Margarita v. Copetro S.A., Camara Civil y Comercial de la Plata, Ruling of 10 May 1993 (available at www.eldial.com) ("The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.")

⁶⁴ Fundepublico v. Mayor of Bugalagrande and Others, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991 ("It should be recognized that a healthy environment is a *sine qua non* condition for life itself and that no right could be exercised in a deeply altered environment.")

⁶⁵ Presidente de la sociedad Marlene S.A. v. Municipalidad de Tibas, Sala Constitucional de la corte Supreme de justicia. Decision No. 6918/94 of 25 Nov. 1994.

Ultimately, a right to environmental quality has to be based on substantive environmental standards that determine acceptable levels of pollution or other harm. In practice, technical requirements are negotiated and regulated through international and national environmental norms and standards, giving content to the right to environmental quality. Human rights courts are increasingly utilizing these norms to determine whether or not the government has complied with its human rights obligations. To take one example, the African Commission,⁶⁶ the Inter-American Commission and the International Court of Justice⁶⁷ have all found that international law today requires a prior environmental impact assessment of projects likely to cause significant harm. Failure to conduct such an assessment can be an international wrong for which state responsibility may ensue.

The use of environmental standards to inform human rights obligations is based on accepted methods of treaty interpretation using the VCLT, which recognizes the primacy of the text and the object and purpose of the agreement. Based on this, tribunals interpret international human rights agreements in a dynamic manner. The Inter-American Court has referred to “evolving American law” and the need to interpret legal instruments in the light of contemporary standards.⁶⁸ The Inter-American Commission and Court have both held that the provisions of regional human rights instruments must be interpreted and applied by taking into account

⁶⁶ SERAC v. Nigeria, *supra*.

⁶⁷ In its judgment in the *Pulp Mills Case (Argentina v. Uruguay)* 2010 ICJ Reports (Apr. 20), the Court stated that the obligation to protect and preserve the environment, contained in a bilateral treaty between the parties, “has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States *that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource*. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.” (emphasis added).

⁶⁸ *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, 10 Inter-Am.Ct.H.R. (Ser. A) (1989), citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion I.C.J. Rep. 1971, pp. 16 and 31.

“developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged.”⁶⁹ The jurisprudence of the Inter-American system reveals that relevant developments in the corpus of international human rights law may be drawn from the provisions of other international and regional instruments, including those in the field of environmental protection.⁷⁰

The European Court of Human Rights has also determined that it must have regard to the changing conditions within its Contracting States generally and must respond to evolving convergence as to the standards to be achieved. The European Court maintains this dynamic and evolutive approach because it finds it is “of critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”⁷¹ Applying its evolutive approach, the European Court has indicated that the scope of guaranteed rights is affected by the “growing and legitimate concern both in Europe and internationally about offenses against the environment.”⁷² It thus concluded that governments

⁶⁹ See Advisory Opinion OC-10/89, *supra* n. 46, para. 37; I/A Court H.R., Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 16 Inter-Am.Ct.H.R. (Ser. A)(1999) [hereinafter “Advisory Opinion OC-16/99”], para. 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions); Report N° 52/02, Case N° 11.753, *Ramón Martínez Villareal* (United States), Annual Report of the IACHR 2002, para. 60.

⁷⁰ See Advisory Opinion OC-10/89, *supra* n. 25, para. 37; Advisory Opinion OC-16/99, *supra* n. 26, para. 115; Report N° 52/01, Case 12.243, *Juan Raul Garza* (United States), I/A Comm, Annual Report 2000, paras. 88, 89 (confirming that while the Commission does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

⁷¹ *Christine Goodwin v. The United Kingdom* [GC], App. No. 28957/95, judgment of 11 July 2002, 35 EHRR 18 (2002), para. 74.

⁷² See *Mangouras v. Spain*, no. 12050/04, 8 Jan. 2009, para. 41 (referred to a Grand Chamber 5 June 2009). Increased concern with the environment has also proved important in cases where states have taken measures to protect the environment and the actions are resisted on the grounds that they interfere with the right to property. In *Fredin v. Sweden* the applicant argued that nature protection was an inadequate reason to revoke a license to extract gravel on his property and therefore was a violation of Article I, Protocol 1. The Court found no violation, noting that the protection of the environment is an increasingly important consideration. *Fredin v. Sweden*, No. 12033/86, 13 EHRR. 784 (1991). The Court similarly found no violation of the same provision in *Pine Valley Developments Ltd v. Ireland*, where permission to carry out construction in a green belt area was revoked on grounds of

may adjust the amount of permissible bail that can be demanded and the length of pre-trial detention according to the particular circumstances of an environmental disaster.⁷³ In reaching this conclusion, the Court took into account the 1982 Convention on the Law of the Sea and its provisions on offenses against the marine environment, MARPOL,⁷⁴ and European law on environmental crimes and liability.⁷⁵

It is increasingly common for tribunals to interpret human rights instruments by reference to international and domestic law concerned with environmental protection, giving emphasis to the importance of enforcing national environmental rights provisions. In its *Öneryıldız v. Turkey*⁷⁶ judgment, the European Court referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment⁷⁷ and the Convention on the Protection of the Environment through Criminal Law⁷⁸ while in the *Taşkın and Others v. Turkey*⁷⁹ case, the Court utilized principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁸⁰

Using environmental standards, the European Court has given some indications of the quality of environment required to comply with the Convention's substantive guarantees. In its

environmental protection. *Pine Valley Devs. Ltd. v Ireland*, App. No. 12742/87, 14 EHRR. 319 (1992). The most difficult and contentious cases in this respect have concerned travellers or gypsies, whose lifestyle may bring them into contact with modern land use planning. The European Court has repeatedly refused to override local zoning restrictions, especially the creation of green belts, in order to ensure a permanent home for this minority group. See *Buckley v. United Kingdom*, 1996-IV Eur. Ct. H.R. 1271 (1996) and the four recent cases: *Smith v. United Kingdom*, App. No. 25154/94, 33 EHRR 712 (2001); *Lee v. United Kingdom*, App. No. 25289/94, 33 EHRR 677 (2001); *Chapman v. United Kingdom*, App. No. 27238/94, 33 EHRR 399 (2001); *Beard v. United Kingdom*, App. No. 24882/94, 33 EHRR (2001).

⁷³ *Mangouros v. Spain*, *id.*

⁷⁴ International Convention for the Prevention of Pollution from Ships, 2 Nov. 1973 (MARPOL 73/78) and the Protocol thereto adopted 17 Feb. 1978.

⁷⁵ The Court cited two European Community directives, Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage; and Directive 2005/35/EC of 7 Sept. 2005 on ship-source pollution and on the introduction of penalties for infringements.

⁷⁶ *Oneryıldız v. Turkey* (GC), Reports 2004-VI (30 Nov.)

⁷⁷ ETS no. 150 – Lugano, 21 June 1993.

⁷⁸ ETS no. 172 – Strasbourg, 4 November 1998.

⁷⁹ *Taşkın and Others v. Turkey*, no. 49517/99, §§ 99 and 119, 2004-X Eur. Ct. H.R. 145 (2005).

⁸⁰ Aarhus Convention, *supra*, note 4.

first major decision⁸¹ involving environmental harm as a breach of the right to private life and the home, guaranteed by Article 8 of the European Convention, the European Court held that severe environmental pollution may affect individuals' "well-being" to the extent that it constitutes a violation of Article 8. The pollution need not reach the point of affecting health, if the enjoyment of home, private and family life are reduced and there is no fair balance struck between the community's economic well-being and the individuals effective enjoyment of guaranteed rights.⁸² The Court further explained in *Fadayeva v. Russia*,⁸³ that because "no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention," the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The requisite effects or interference need not reach the level of proven injury to health; it is enough if there are serious risks posed.⁸⁴

In the Western Hemisphere, the Inter-American Commission and Court have articulated the right to an environment at a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all inter-American normative instruments. The Commission's general approach to environmental protection has been to recognize that a basic level of environmental health is not linked to a single human right, but is required by the very nature and purpose of human rights law:

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being.

⁸¹ *Lopez Ostra v. Spain*, Eur. Ct. Hum. Rts [1994] Ser. A, No. 303C.

⁸² In *Powell & Raynor v. United Kingdom*, Eur. Ct.Hum.Rts [1990] Ser. A No. 172, the European Court found that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified as "necessary in a democratic society" for the economic well-being of the country and was acceptable under the principle of proportionality because it did not "create an unreasonable burden for the person concerned." The latter text could be met by the State if the individual had "the possibility of moving elsewhere without substantial difficulties and losses."

⁸³ *Fadayeva v. Russia*, no. 55723/00, judgment of 9 June 2005, 2005/IV Eur. Ct.H.R. 255 (2005).

⁸⁴ The evidentiary issues in this case are discussed *infra* at section 3 C.

Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.⁸⁵

National courts also enforce environmental rights provisions by reference to international environmental and developmental standards. The South African Constitutional Court explicitly relied on international environmental principles in giving substantive content to its Constitutional guarantee of a safe and healthy environment. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*⁸⁶ addressed the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. The Court characterized the case as one that required the integration of the need to protect the environment with the need for social and economic development. In the Court's view, the international principle of sustainable development provided the applicable framework for reconciling these two needs.⁸⁷

Sustainable development “recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources” but it envisages that decision-makers “will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.”⁸⁸ The concept of sustainable development means “the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations.” In turn, this broad definition

⁸⁵ Inter-Am.Comm.H.R., *Report on the Situation of Human Rights in Ecuador*, OAS doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, at 92 [hereinafter Report on Ecuador].

⁸⁶ Case no CCT 67/06; ILDC 783 (ZA 2007). The case arose out of a decision by a provincial Department of Agriculture, Conservation and Environment to grant private parties permission to construct a filling station.

⁸⁷ *Id.* paras. 56-57.

⁸⁸ *Id.* paras. 58.

of sustainable development integrates environmental protection and socio-economic development, and incorporates the internationally-recognized principle of inter-generational and intra-generational equity.⁸⁹

The Constitutional and legislative guarantees were seen to have a second objective: to identify and predict the actual or potential impact of development and to consider ways of minimising negative impact while maximising benefit. Finally, the Court pointed out the need to apply the precautionary approach, “a risk averse and cautious approach,” that takes into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach was seen to be especially important because NEMA requires that the cumulative impact of a development on the environmental and socio-economic conditions be investigated and addressed.⁹⁰ The precautionary principle required the authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water.

⁸⁹ *Id.*, paras. 59. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive. The Court quoted the factors set forth in the domestic National Environmental Management Act, Section 2(4)(a):

“Sustainable development requires the consideration of all relevant factors including the following:

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
- (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;
- (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- (vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
- (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.”

⁹⁰ Section 24(7)(b) of NEMA provides:

“Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure ... investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact”.

“This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.”⁹¹ The Court thus set aside the decision of the environmental authorities and required reconsideration consistent with the judgment.

As to the role of the courts in giving effect to environmental rights, the Court was clear:

The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.⁹²

Enforcement of environmental rights involves courts in not only determining the mandated environmental quality, but also in assessing whether or not the government has taken the requisite actions to achieve that quality. Human rights tribunals have made clear that the state may be responsible whether pollution or other environmental harm is directly caused by the State or whether the State’s responsibility arises from its failure to exercise due diligence to regulate properly private-sector activities.⁹³ Human rights instruments require States not only to respect the observance of rights and freedoms but also to guarantee their existence and the free

⁹¹ *Id.* para. 98.

⁹² *Id.*, para. 102.

⁹³ *See: Mareno Gomez v. Spain*, no. 4143/02, 16 Nov. 2004, para. 55; *Giacomelli v. Italy*, paras. 78-79; *Surugiu v. Romania*, no. 48995/99, 20 April 2004.

exercise of all of them against private as well as State actors. Thus any act or omission by a public authority which impairs guaranteed rights may violate a state's obligations.⁹⁴ This is particularly important in respect to the environment, where most activities causing harm are undertaken by the private sector.

In the Inter-American system, positive obligations for the state to act derive not only from the generic obligations of Convention Article 1,⁹⁵ but also from specific rights, including Convention Article 4, which guarantees an individual's right to have his or her life respected and protected by law.⁹⁶ In the case of *Yanomami v. Brazil*⁹⁷ the Inter-American Commission found that the government had violated the Yanomami rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI)⁹⁸ because the government failed to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians."⁹⁹

Other cases and country studies have helped to clarify the requisite standard of care, specifying that governments must enact appropriate laws and regulations, and then fully enforce them. The Commission has referred to the obligation of the state to respect and ensure the rights of those within its territory and the responsibility of the government to implement the measures necessary to remedy existing pollution and to prevent future contamination which would threaten

⁹⁴ *Velasquez Rodriguez Case*, 4 Inter-Am. Ct. H.R. (ser. C) at 155 (Judgment of July 29, 1988) (concerning disappearance of civilians perpetrated by the Honduran army); *Godinez Cruz Case*, 5 Inter-Am. Ct. H.R. (ser. C) at 152-53 (Judgment of Jan. 20, 1989).

⁹⁵ Article 1 provides: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...." American Convention, *supra* note 15, art. 1.

⁹⁶ Art 4(1) reads: Every person has the right to have his life respected. This right shall be protected by law....No one shall be arbitrarily deprived of his life.

⁹⁷ *Yanomami Case*, Res. No. 12/85, Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985*, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), 24.

⁹⁸ *Id.* at 33

⁹⁹ *Id.* at 32.

the lives and health of its people, including through addressing risks associated with hazardous development activities.¹⁰⁰ Governments must regulate industrial and other activities that potentially could result in environmental conditions so detrimental that they create risks to health or life.¹⁰¹ Furthermore, the government must enforce the laws that it enacts as well as any constitutional guarantee of a particular quality of environment.¹⁰² The Commission was clear: “Where the right to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced.”¹⁰³

The State must also comply with and enforce the international agreements to which it is a signatory, whether these are human rights instruments or ones related to environmental protection.¹⁰⁴ Through the standard-setting and enforcement process, the State must “take the measures necessary to ensure that the acts of its agents . . . conform to its domestic and inter-American legal obligations.”¹⁰⁵

¹⁰⁰ Report on Ecuador *supra* note 89 at 94.

¹⁰¹ *Id.*, p. v.

¹⁰² In the Ecuador report, the Commission heard allegations that the Government had failed to ensure that oil exploitation activities were conducted in compliance with existing legal and policy requirements. The Commission’s on site delegation also heard that the Government of Ecuador had failed to enforce the inhabitants’ constitutionally protected rights to life and to live in an environment free from contamination. The domestic law of Ecuador recognizes the relationship between the rights to life, physical security and integrity and the physical environment in which the individual lives. The first protection accorded under Article 19 of the Constitution of Ecuador, the section which establishes the rights of persons, is of the right to life and personal integrity. The second protection establishes “the right to live in an environment free from contamination.” Accordingly, the Constitution invests the State with responsibility for ensuring the enjoyment of this right, and for establishing by law such restrictions on other rights and freedoms as are necessary to protect the environment. Thus, the Constitution establishes a hierarchy according to which protections which safeguard the right to a safe environment may have priority over other entitlements. *Id.* pp. 78-86.

¹⁰³ *Id.*

¹⁰⁴ In the Ecuador report, the Commission noted that the state is party to or has supported a number of instruments “which recognize the critical connection between the sustenance of human life and the environment”, including: the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, the ICCPR and the ICESCR, the Stockholm Declaration, the Treaty for Amazonian Cooperation, 17 I.L.M. 1045 (1978), Amazon Declaration, 28 I.L.M. 1303 (1989), World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/37/51 (1982), Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 161 U.N.T.S. 229 (1940), Rio Declaration on Environment and Development and the Convention on Biological Diversity, 31 I.L.M. 818 (1992).

¹⁰⁵ Report on Ecuador, *supra* n. 89 at 92.

States thus are not exempt from human rights and environmental obligations in their development projects: “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”¹⁰⁶ In the case of the *Saramaka People v. Suriname*,¹⁰⁷ the Inter-American Court set forth three safeguards it deemed essential to ensure that development is consistent with human rights and environmental protection: (1) the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; (2) the state must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; and (3) the state must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state’s supervision, perform a prior environmental and social impact assessment.¹⁰⁸ The Court referred in this respect to views of the UN Human Rights Committee,¹⁰⁹ ILO Convention No. 169, World Bank policies,¹¹⁰ and the 2007 UN Declaration on the Rights of Indigenous Peoples.¹¹¹ The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21(2) of the Inter-American Convention.¹¹²

¹⁰⁶ *Id.* at 89.

¹⁰⁷ *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. Hum. Rts, Ser. C No. 172 (28 Nov. 2007).

¹⁰⁸ *Id.* at para. 129.

¹⁰⁹ See ICCPR, General Comment No. 23, *The Rights of Minorities* (Art. 27), U.N. Doc. CCPR/C/21 Rev 1/Add.5, Aug. 4, 1994 and *Apirana Mahuika et al. v. New Zealand*, U.N. doc CCPR/C/70/D/47/1993, Nov. 15, 2000.

¹¹⁰ See World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples, OP/BP 4.10.

¹¹¹ UN Declaration on the Rights of Indigenous Peoples, approved by the General Assembly Sept. 14, 2007.

¹¹² Article 21(2) provides that [n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

The European Court's jurisprudence is similar. The Court requires at a minimum that the State should have complied with its domestic environmental standards.¹¹³ The issue of compliance with domestic law is particularly important when there is a domestic constitutional right to environmental protection. The European Court will review governmental actions in the light of the domestic law. *Okyay and Others v. Turkey*¹¹⁴ concerned the failure of Turkish authorities to enforce constitutional rights and statutory environmental laws. The applicants had successfully challenged in domestic courts the operations of thermal-power plants in Southwest Turkey, which they claimed would damage the environment and pose risks for the life and health of the Aegean region's population. They explicitly argued that Article 56 of the Turkish Constitution guaranteed them the right to life in a healthy and balanced environment. They did not argue that they had suffered any economic or other loss. The European Court agreed that they had a right under Turkish law to protection against damage to the environment and that their rights under Article 6(1) had been violated due to the failure of Turkish authorities to comply in practice and within a reasonable time with the domestic court's judgments.

Domestic Constitutional laws and provisions are also important in cases where the applicants have no independent claim under the European Convention for severe pollution, but instead are seeking nature protection or protection of the environment more generally. In *Kyrtatos v. Greece*,¹¹⁵ as in the *Okyay* case, the applicants' claim involved a constitutional provision protecting the environment. In domestic courts, the applicants and the Greek Society for the Protection of the Environment and Cultural Heritage asserted that the local prefect's decisions to allow development projects, and consequently the building permits, were illegal

¹¹³ See, e.g. *Ashworth and Others v. the United Kingdom*, App. No. 39561/98, 20 Jan. 2004; , *Moreno Gomes v. Spain*, 2004-X Eur. Ct. H.R. 327 (2005).

¹¹⁴ *Okyay and Others v. Turkey*, *supra* note 16 at 57.

¹¹⁵ *Kyrtatos v. Greece*, *supra* note 94.

because the area concerned was a swamp safeguarded by Article 24 of the Greek Constitution, which protects the environment. The domestic court held that the prefect had violated Article 24 of the Constitution, because the decision put in jeopardy an important natural habitat for various protected species, including birds, fishes and sea-turtles. It followed that the building permits were also unlawful and had to be quashed. The decision was not enforced by the local authorities, who instead issued further building permits. Given the constitutional provision, the European Court found a violation of Article 6(1), because the domestic law gave environmental rights to the applicants and the government had failed to enforce them.

The African Commission also has identified governmental obligations in this field by reference to environmental norms. In *SERAC v. Nigeria*, the African Commission held that Article 24 “imposes clear obligations upon a government to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”¹¹⁶ Compliance with these obligations includes ordering or permitting independent scientific monitoring of threatened environments, requiring environmental and social impact studies, monitoring hazardous materials and activities, as well as the providing information and an opportunity for the public to participate in decision-making.¹¹⁷ While the Commission did not cite to specific environmental agreements, the obligations it mentions are part of international environmental law.

Beyond ensuring that any domestic environmental rights are enforced, the European Court scrutinizes the adequacy of the domestic law, to see if the State has ensured a fair balance between the interests of the community and the rights of those affected. The Court accords each state a wide margin of appreciation in this respect, because national authorities “are in principle

¹¹⁶ *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Comm. 155/96, Case No. ACHPR/COMM/A044/1, May 27, 2002.

¹¹⁷ *Id.* para. 53.

better placed than an international court to assess the requirements” in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community,¹¹⁸ especially in a technical sphere like environmental protection.¹¹⁹ The wide margin of appreciation afforded governments means that the Court will only find a violation if there is a “manifest error of appreciation” by the national authorities in striking a fair balance between the competing interests of the different private actors.¹²⁰ The final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court¹²¹ but “only in exceptional circumstances” will the court look beyond the procedures followed to disallow the conclusions reached by domestic authorities on the environmental protection measures to be taken on the projects and activities allowed to proceed.¹²² Even if it finds that the State decided wrongly, the Court will not determine exactly what should have been done to reduce the pollution in a more efficient way.¹²³

Another human rights supervisory body has also found violations of substantive guarantees due to the failure of the government to legislate to protect the environment. The first and, to date, only European Social Charter complaint to concern environmental conditions, lodged April 4, 2005, claimed violations of the Charter’s right to health provisions¹²⁴ because the State had not adequately prevented negative environmental impacts nor had it developed an appropriate strategy to prevent and respond to the health hazards stemming from lignite mining. The complaint also alleged that there was no legal framework guaranteeing security and safety of

¹¹⁸ *Giacomelli*, para. 80.

¹¹⁹ *Fadayeva v. Russia*, supra note 92 at para 104, citing *Hatton*, para. 122.

¹²⁰ *Id.*

¹²¹ *Id.*, paras. 102-103.

¹²² *Id.* para. 105, citing *Taskin*.

¹²³ In particular, the Court says it would be going too far to assert that the State or the polluting undertaking were under an obligation to provide the applicant with free housing. Para. 133. It is enough to say that the situation called for a special treatment of those living near the plant.

¹²⁴ Complaint No. 30/2005 *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*.

persons working in lignite mines. The European Committee of Social Rights concluded that the government had violated the Charter.¹²⁵ On the issue of the right to health (Article 11), the Committee examined the Greek National Action Plan for greenhouse gas emissions and found it inadequate in the light of the State's obligations under the Kyoto Protocol and the principle requiring use of the "best available techniques."¹²⁶ While the Committee found that Greek regulations on information and public participation were satisfactory, the evidence showed "that in practice the Greek authorities do not apply the relevant legislation satisfactorily" and very little had been done to organize systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out.

In the *Oneryildiz* case referred to earlier, the Court explained that the right to life provision, Article 2 of the European Convention "must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites." According to European standards, waste disposal is a hazardous activity, therefore Article 2 applies. The resulting duty of care depends on several factors: the harmfulness of the phenomena inherent in the activity; the contingency of the risk to the applicant; the status of those involved in creating the risk, and whether or not the conduct was deliberate. The court merged procedural rights into the substantive evaluation, finding that "particular emphasis" should be placed on the public's right to information concerning the risks

¹²⁵ The Committee transmitted its decision on the merits to the Committee of Ministers and to the Parties on 6 December 2006. The Committee of Ministers adopted its resolution on the matter on January 15, 2008.

¹²⁶ According to the Committee, "[t]he Greek National Action Plan for 2005-2007 (NAPI) provides for greenhouse gas emissions for the whole country and all sectors combined to rise by no more than 39.2% until 2010, whereas Greece was committed, in the framework of the Kyoto Protocol, to an increase in these gases of no more than 25% in 2010. When air quality measurements reveal that emission limit values have been exceeded, the penalties imposed are limited and have little dissuasive effect. Moreover, the initiatives taken by DEH (the public power corporation operating the Greek lignite mines) to adapt plant and mining equipment to the "best available techniques" have been slow. "

to life and the duty to investigate when loss of life occurs.¹²⁷ Assessing the evidence, the Court found that the authorities must have known of the risk and of the need to take preventive measures “particularly as there were specific regulations on the matter.”¹²⁸ As such they had an obligation as well under Convention Article 2, “to take such preventive measures as were necessary and sufficient to protect those individuals...”¹²⁹ The government failed in its duty.

Like *Oneryildiz*, the case of *Budayeva and Others v. Russia*,¹³⁰ concerned governmental knowledge of hazards and the failure to act upon that knowledge. The difference was that the latter case involved repeated natural disasters rather than hazards originating in human activities. The standard of care did not differ appreciably, however. Governmental authorities aware of mudslide hazards in a mining district failed to take reasonable precautions, with resulting deaths in a village and loss of property. They pleaded violations of Article 2 (right to life) and Protocol 1, Article 1 (right to property). The Court held the government responsible for the loss of life, but found that the causal link was not established in respect of the latter claims. The applicants could not demonstrate that “but for” the official failures to act, their property would have been safe. The July 2000 mudslide was of unprecedented severity.

Looking at the substantive aspect of the government’s obligations respecting dangerous activities, the Court placed special emphasis on the adoption of regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human life.¹³¹ Such regulations must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the

¹²⁷ *Id.* para. 90.

¹²⁸ *Id.* para. 101.

¹²⁹ *Id.*

¹³⁰ *Budayeva and Others v. Russia*, App. No. 15339/02 & Ors (20 March 2008).

¹³¹ *Id.* para. 132.

inherent risks.¹³² Supervision and monitoring are also required. The choice of particular practical measures is in principle a matter within the State's margin of appreciation and the Court will seek to avoid placing an impossible or disproportionate burden on authorities.¹³³

After the Court requested the government to provide information on its regulatory framework, land-planning policies and specific safety measures implemented at the relevant time to respond to natural hazards, the Court found that the measures were limited to a mud-retention dam and collector that were not adequately maintained. The Court held that there was no justification for the failure to act regarding foreseeable mortal risks to the residents of the town and there was a causal link between that failure and the death and injuries suffered in the mudslide. Accordingly there was a violation of Article 2.

The wide margin of appreciation afforded in environmental matters, due to their technical complexity and the variations in State priorities and resources, is given even greater weight in the sphere of emergency relief after the fact, in responding to weather events. The Court held that the State's positive obligation is less in the context of natural disasters, "which are as such beyond human control," than in the sphere of dangerous activities of a man-made nature. The right to peaceful enjoyment of possessions, which is not absolute, requires only that the state do what is reasonable in the circumstances.¹³⁴ The standard of care is different and higher when the risk involves potential loss of life. The State in this situation has a positive obligation to do everything within the authorities' power in the sphere of disaster relief for the protection of the right to life. The origin of the threat and the extent to which one or another risk is susceptible to

¹³² *Id.*

¹³³ *Id.*, para. 135.

¹³⁴ *Id.*, at para. 174. While the Court found that the measures taken by the state were negligent, it found the causal link was not well-established. The mudslide of 2000 being exceptionally strong, the Court said it was unclear whether a functioning warning system or proper maintenance of the defence infrastructure would have mitigated the damage.

mitigation are factors to be evaluated in determining the scope of the state's positive obligations.¹³⁵ The Court found that the authorities had been given warnings about the risks, including the state of disrepair of the dam, and had failed to provide resources for strengthening the defense infrastructure – resources that became available immediately after the mudslide. The government provided no explanation and the Court concluded that the restoration of the defense infrastructure between 1999 and 2000 was “not given proper consideration by the decision-making and budgetary bodies prior to the hazardous season of 2000.”¹³⁶ Nor were any alternative land-planning policies being implemented or monitoring stations set up. The Court noted that the public's procedural right of information can only be implemented if the government obtains the relevant information, which in this case was indispensable for ensuring the residents' safety. The authorities' failure to ensure the functioning of an early warning system was thus also unjustified.

At present, human health is the bridge between human rights and environmental protection, being a primary objective of both areas of regulation. Human rights exist to promote and protect human well-being, to allow the full development of each person and the maximization of the person's goals and interests, individually and in community with others. This cannot occur without basic conditions of health, which the state is to promote and protect. Among the pre-requisites for health are safe environmental milieu, i.e. air, water, and soil. Pollution destroys life and health and thus not only destroys the environment, but infringes human rights as well. From the perspective of the law of state responsibility, there may be little difference between a state that arbitrarily executes persons and a state that knowingly allows drinking water to be poisoned by contaminants. In both instances, the state can be responsible

¹³⁵ *Id.*, at para. 137.

¹³⁶ *Id.*, at para. 149.

for depriving individuals of their life in violation of human rights law; in the second case, international environmental law is also implicated. Implementing and enforcing the latter will also help protect the former. Thus, the goal of human health provides the basis for reinforcing both areas of law.

Human rights and environmental protection both ultimately seek to achieve the highest quality of sustainable life for humanity within the existing global ecosystem. Potentially conflicting differences of emphasis still exist, however: the essential concern of human rights law is to protect individuals and groups alive today within a given society, while the purpose of environmental law is to sustain all life and ecological processes by balancing the needs and capacities of present generations with those of the future. Each body of law should reinforce the other in fulfilling the overarching concept of sustainable development.

Distinguished guests, I have taken too much of your time. I look forward to your questions. I learn from them and receive valuable comments and reminders. Even driving over here I saw embedded in an entry pillar an inscription that is important to remember. It said: “We construct for our descendants; We are all trustees for those who follow.”

Thank you.