HUMAN RIGHTS AND THE ENVIRONMENT: WHAT SPECIFIC ENVIRONMENTAL RIGHTS HAVE BEEN RECOGNIZED?*

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As early as the 1972 Stockholm Conference on the Human Environment, efforts were made to explore and attempt to understand the interrelationship between human rights and environmental protection. Preparations for the Stockholm Conference coincided with the 1968 United Nations Teheran Conference on Human Rights, the first international conference organized by the United Nations, and marking the twentieth anniversary of the adoption of the Universal Declaration of Human Rights. The Teheran Conference, overcoming a long-standing political debate that led to the adoption of two human rights covenants[1] rather than a single instrument, proclaimed that all human rights are interdependent and indivisible, opening the door for consideration of complex issues like environmental rights. The Teheran Conference also addressed concerns about economic development and human rights, proclaiming the interdependence of peace, development and human rights.[2] Resource depletion fit within this agenda and stimulated interest among developing states in the Stockholm Conference, which culminated in the Declaration recognizing environmental protection as a pre-condition for the enjoyment of many human rights.[3] Almost twenty years after the Stockholm Conference, in resolution 45/94, the UN General Assembly recalled the language of the Stockholm Declaration, stating that it:

> Recognizes that all individuals are entitled to live in an environment adequate for their health and well-being; [and] [c]alls upon Member

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1. The two Covenants divide human rights into categories of civil and political rights, on one hand, and economic, social and cultural rights, on the other hand. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESC].

2. International Conference on Human Rights, Apr. 22-May 13, 1968, Teheran, Iran, *Proclamation of Teheran*, pmbl., U.N. Doc. A/CONF. 32/41.

3. United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm, Switz., *Declaration of the United Nations Conference on the Human Environment*, princ. 1, 11 I.L.M. 1416, 1417-18. Principle 1 of the Final Declaration reads: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

> States and intergovernmental and non-governmental organizations... to enhance their efforts towards ensuring a better and healthier environment.[4]

There is a substantial practical reason for emphasizing international human rights law. For those whose well-being suffers due to environmental degradation, human rights law currently provides the only set of international legal procedures that can be invoked to seek redress for harm that is the consequence of an act or omission attributable to a state. The inclusion of inaction is significant because most environmental harm is due to non-state activity. Human rights law makes clear that while its primary objective is to protect individuals from abuse of power by state agents, including legislative representatives of the democratic majority, each state is also obliged to exercise due diligence to ensure that human rights are not violated by non-state actors. Due diligence requires measures to prevent abuses where possible, investigate violations that occur, prosecute the perpetrators as appropriate, and provide redress for victims. Thus, while no international human rights procedure allows a direct action against private enterprises or individuals who cause environmental harm, a state allowing such harm may be held accountable, as the following discussion indicates (litigation can be commenced in certain instances against non-state actors in national courts, for example under the Alien Tort Statute, 28 U.S.C. § 1350 (2006)).

I. INTRODUCTION: INTER-RELATING HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

From Stockholm to the present, most advances in developing environmental rights have occurred first, and almost exclusively, at the regional level. Four principal and complementary approaches have emerged to characterize the relationship between human rights and the environment:

1. International environmental laws incorporate and utilize those human rights guarantees deemed necessary or important to ensuring effective environmental protection.

2. Human rights law re-casts or interprets internationally-guaranteed human rights to include an environmental dimension when environmental degradation prevents full enjoyment of the guaranteed rights.

3. International environmental law and international human rights law elaborate a new substantive right to a safe and healthy environment.

4. International environmental law articulates ethical and legal duties of individuals that include environmental protection and human rights.

The first approach selects from among the catalogue of human rights those rights most relevant to the aims of environmental protection, independent of the utility of environmental protection to the enjoyment of the full human rights catalogue. The approach thus emphasizes procedural rights such as freedom of

4. Need to Ensure a Healthy Environment for the Well-Being of Individuals, G.A. Res. 45/94, at paras. 1-2, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

association, which permits the existence and activities of non-governmental environmental organizations, and the right of access to information concerning potential threats to the environment, which may be used for nature protection not necessarily related to human health and well-being. The potential for improving environmental protection through effective guarantees of procedural rights is solid, but the absence of complaint mechanisms or other recourse in international environmental agreements is a limiting aspect.[5]

In contrast, human rights law seeks to ensure that environmental conditions do not deteriorate to the point where the substantive right to life, the right to health, the right to a family and private life, the right to culture, and other human rights are seriously impaired. As Judge Weeremantry of the International Court of Justice expressed it:

> The protection of the environment is... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments (emphasis added).[6]

With a focus on the consequences of environmental harm to existing human rights, this approach serves to address most serious cases of actual or imminently-threatened pollution. The primary advantage over the first approach is that existing human rights complaint procedures may be employed against those states whose level of environmental protection falls below that necessary to maintain any of the guaranteed human rights. Using existing human rights law has its own limits, however, because it cannot easily resolve threats to other species or to ecological processes if these are not directly and immediately linked to human well-being. The third possibility is to formulate a new human right to an environment that is not defined in purely anthropocentric terms, an environment that is safe not only for humans, but one that is ecologically-balanced and sustainable in the long term. Some international success has attended the various efforts undertaken in this direction, as discussed below.[7] The notion of a right to environment has met resistance from those who claim that the concept cannot be given content and who assert that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental conditions.[8]

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5. Johanna Rinceanu, *Enforcement Mechanisms in International Environmental Law*, 15 J. Envt'l L. & Litig. 147, 149 (2000).

6. Gabçikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92 (Sept. 27) (separate opinion of Judge Weermantry).

7. Far more success has been achieved among national constitutions. As discussed infra, more than 100 constitutions presently proclaim a right to an environment of a specified quality or impose duties on the government to protect the environment. *See infra*, note 171.

8. *See, e.g.* Gunther Handl, *Human Rights and Protection of the Environment: A Mildly 'Revisionist' View,"* in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENTAL PROTECTION 121-22 (Antonio Augusto Cancado Trindade ed. 1992).

Finally, the fourth approach prefers to address environmental protection as a matter of human responsibilities rather than rights. Draft declarations of human responsibilities such as the Earth Charter focus on duties toward the environment.[9] Many proponents of this approach posit ecological rights or rights of nature as a construct to balance human rights, attempting to introduce ecological limitations on human rights. "The objective of these limitations is to implement an eco-centric ethic in a manner which imposes responsibilities and duties upon humankind to take intrinsic values and the interests of the natural community into account when exercising its human rights."[10]

This paper provides a current assessment of environmental rights. It discusses how environmental law has encompassed procedural human rights and how human rights law recognizes the consequences of environmental degradation on the enjoyment of human rights. The merger of the two fields through elaborating a human right to the environment is then considered, as well as the special recognition given the rights of indigenous peoples.

II. PROCEDURAL ENVIRONMENTAL RIGHTS

The lack of state support at the Stockholm Conference for pronouncing a substantive right to environment (proposed by the United States) led scholars[11] and activists during the following decade to consider human rights in a more instrumental fashion, to give content to environmental rights by identifying those rights whose enjoyment could be considered a prerequisite to effective environmental protection. They focused in particular on the procedural rights to environmental information, public participation in decision-making and remedies in the event of environmental harm. Various international instruments, particularly in Europe, built upon this concept to give content to Stockholm Principle I.[12]

The texts adopted in connection with the United Nations Conference on Environment and Development ("UNCED") contain few references to human

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9. *See* The Earth Charter, princs. 4-5, Mar. 2000, *available at* http://www.earthcharter.org/files/charter/charter.pdf (encouraging the protection and restoration of ecological systems and taking action to prevent future environmental harm).

10. Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVT'L. L. REV. 309, 310 (1998). *See also* Catherine Redgwell, *Life, the Universe and Everything: A Critique of Anthropocentric Rights, in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 71 (Alan E. Boyle & M. Anderson eds. 1996) (stating that "there has been an increasing recognition in international environmental law of the intrinsic value of animals and nature which goes beyond merely an incidental spill-over effect.").

11. *See, e.g.*, A.-Ch. Kiss, *Peut-on définir le droit de l'homme □ l'environnement?* 1976 REV. JURIDIQUE DE L'ENVIRONNEMENT 15; Kiss, *Le droit la conservation de l'environnement*, 2 REV. UNIV. DES DROITS DE L'HOMME 445 (1990); Alexandre Kiss, *An introductory note on a human right to environment, in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 199 (Edith Brown Weiss ed. 1992) (arguing that "the right to environment is as concrete in its implications as any other right guaranteed to individuals and groups.").

12. *See* United Nations Conference on Environment and Development, June 3-14, 1992, Rio de Janeiro, Braz., *Rio Declaration on Environment and Development*, princ. 10, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration]; Convention on Biological Diversity, art. 14, June 5, 1992, 31 I.L.M. 818.

rights. Working Group III of the UNCED Preparatory Committee considered numerous proposals to include a right to a healthy environment in the Rio Declaration. In the final meetings prior to Rio, however, the participants failed to reach consensus on including such a right.

The Rio Declaration states that human beings are "entitled to a healthy and productive life in harmony with nature."[13] The Rio Declaration accepts the importance of a role for the public, but – consistent with its avoidance of rights language – calls for including it on the ground of efficiency: "Environmental issues are best handled with the participation of all concerned citizens at the relevant level" (Principle 10). Principle 10 adds that:

> [E]ach individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[14]

Numerous environmental instruments now contain the three procedural rights, which are also guaranteed by human rights instruments. The various international efforts to promote procedural rights in environmental instruments produced a landmark agreement on June 25, 1998, when thirty-five states and the European Community signed a Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.[15] The Convention is the first environmental treaty to incorporate and strengthen the language of Principle 1. The Preamble expressly states that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."[16] The following paragraph adds that to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.[17] These provisions are repeated in Art. 1 where states parties agree to guarantee the rights of access to information, public participation, and access to justice.[18] The Convention acknowledges its broader

13. Rio Declaration, *supra* note 12, at princ. 1.

14. *Id.* at princ. 10.

15. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Convention on Access to Information]. The Convention was sponsored by the United Nations Economic Commission for Europe and is open for signature by the 55 members of the UNECE, which includes all of Europe as well as the United States, Canada, and states of the former Soviet Union. States having consultative status with the UNECE may also participate.

16. *Id.* at pmbl.

17. *Id.* at pmbl.

18. *Id.* at art. 1.

implications, expressing a conviction that its implementation will "contribute to strengthening democracy in the region of the UNECE."[19]

A. The Right to Environmental Information

A "right to information" can mean, narrowly, freedom to seek information, or, more broadly, a right to access to information, or even a right to receive it. Corresponding duties of the state can be limited to abstention from interfering with public efforts to obtain information from the state or from private entities, or expanded to require the state to obtain and disseminate all relevant information concerning both public and private projects that might affect the environment. If the government duty is limited to abstention from interfering with the ability of individuals or associations to seek information from those willing to share it then little may actually be obtained. A governmental obligation to release information about its own projects can increase public knowledge, but fails to provide access to the numerous private-sector activities that can affect the environment. Information about the latter may be obtained by the government through licensing or environmental impact requirements. Imposing upon the state a duty to disseminate this information in addition to details of its own projects provides the public with the broadest basis for informed decision-making.

Informational rights are widely found in environmental treaties, in weak and strong versions.[20] The Framework Convention on Climate Change, Art. 6, provides that its parties "shall... [p]romote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities... public access to information [and]... public participation."[21] The Convention on Biological Diversity similarly does not oblige states parties to provide information, but Article 14 provides that each contracting party, "as far as possible and as

19. *Id.* at pmbl.

20. *See e.g.*, Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 9, Sept. 22, 1992, 32 I.L.M. 1069; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, arts. 13-16, June 21, 1993, 32 I.L.M. 1228; North American Agreement on Environmental Cooperation, art. 2(1)(a), Sept. 14, 1993, 32 I.L.M. 1480; International Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, arts. 10(2)(e), 13(1)(b), 14(2), 19, 25, June 17, 1994, 33 I.L.M. 1328; Convention on Cooperation and Sustainable Use of the Danube River, art. 14, June 29, 1994, *available at* http://www.icpdr.org/icpdr-pages/drpc.htm [hereinafter Danube Convention]; Energy Charter Treaty, arts. 19(1)(1), 20, Dec. 17, 1994; 33 I.L.M. 360; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, art. 19, June 10, 1995, 1999 O.J. (L 322) 3; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15(2), Sept. 10, 1998, *available at* http://www.fco.gov.uk/Files/kfile/CM%206119.pdf; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 5(i), June 17, 1999, *available at* http://www.euro.who.int/Document/Peh-ehp/ProtocolWater.pdf [hereinafter Transboundary Watercourses Convention]; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23, Jan. 29, 2000, 39 I.L.M. 1027; International Treaty on Plant Genetic Resources for Food and Agriculture, art. 17, Nov. 3, 2001, *available at* ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf.

21. Framework Convention on Climate Change, art. 6, May 9, 1992, 31 I.L.M. 849.

appropriate," shall introduce "appropriate" environmental impact assessment procedures and "where appropriate, allow for public participation in such procedures."[22] Broader guarantees of public information are found in regional agreements, including the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Art. 16), the 1992 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Art. 3(8)), and the 1992 Paris Convention on the North-East Atlantic (Art. 9).[23] The last mentioned requires the contracting parties to ensure that their competent authorities are required to make available relevant information to any natural or legal person, in response to any reasonable request, without the person having to prove an interest, without unreasonable charges and within two months of the request.

Other treaties require states parties to inform the public of specific environmental hazards. The International Atomic Energy Agency Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management[24] is based to a large extent on the principles contained in the IAEA document "The Principles of Radioactive Waste Management."[25] The Preamble of the treaty recognizes the importance of informing the public on issues regarding the safety of spent fuel and radioactive waste management.[26] This is reinforced in Arts. 6 and 13, on siting of proposed facilities, which require each state party to take the appropriate steps to ensure that procedures are established and implemented to make information available to members of the public on the safety of any proposed spent fuel management facility or radioactive waste management facility. [27]

Regionally, the European Community generally guarantees the right of the individual to be informed about the environmental compatibility of products, manufacturing processes and their effects on the environment, and industrial installations.[28] Two general directives address rights of information. First, Council Directive 85/337 Concerning the Assessment of the Effects of Certain Public and

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22. Convention on Biological Diversity, *supra* note 12, at art. 14.

23. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 16, Mar. 17, 1992, 31 I.L.M. 1312; Convention on Environmental Impact Assessment in a Transboundary Context, art. 3(8), Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Environmental IA Convention]; Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 9, Sept. 22, 1992, 32 I.L.M. 1069.

24. Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 5, 1997, 36 I.L.M. 1431.

25. *Id.* at intro.

26. *Id.* at pmbl.

27. *Id.* at arts. 6, 13.

28 *See, e.g.* Council Directive 76/160, pmbl, art. 13, 1976 O.J. (L 31) 1 (stating that "public interest in the environment and in the improvement of its quality is increasing...the public should therefore receive objective information on the quality of bathing water.") Article 13 requires Member States to submit regularly to the Commission "a comprehensive report to the Commission on the bathing water and most significant characteristics thereof." The Commission publishes the information "after prior consent has been obtained from the Member State concerned." However, the consent may limit the information provided, undermining its "objective" nature.

Private Projects on the Environment[29] makes explicit the duty to provide information in connection with mandatory environmental assessment projects. Second, the EC adopted in 1990 a Directive on Freedom of Access to Information on the Environment,[30] replaced in January 2003[31] as a consequence of the adoption of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[32] The Community also requires that information be provided to those who may be particularly at risk from certain activities or products. For example, framework directive 89/391[33] on the protection of workers against risks at the workplace, calls for employee information and consultation. Other directives applicable to specific industries, such as mining and fishing or to specific hazards, such as asbestos,[34] require information be given to workers about the risks they face.

Other organizations have issued non-binding declarations proclaiming a right to environmental information. The World Health Organization's European Charter on the Environment and Health specifies that "every individual is entitled to information and consultation on the state of the environment."[35] The states participating in the OSCE have confirmed the right of individuals, groups, and organizations to obtain, publish and distribute information on environmental issues.[36] The Bangkok Declaration, adopted October 16, 1990, affirms similar rights in Asia and the Pacific[37] while the Arab Declaration on Environment and Development and Future Perspectives of September 1991 speaks of the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them.[38]

Human rights texts generally contain a right to freedom of information or a corresponding state duty to inform. The right to information is included in the Universal Declaration of Human Rights (Art. 19), the International Covenant on Civil and Political Rights (Art. 19(2)), the Inter-American Declaration of the Rights and Duties of Man (Art. 10), the American Convention on Human Rights

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[29] Council Directive 85/337, art. 2, 1985 O.J. (L 175) 40 (EC).
[30] Council Directive 90/313, 1990 O.J. (L 158) 56 (EC).
[31] Council Directive 2003/4, 2003 O.J. (L 41) 26.
[32] Convention On Access To Information, *supra* note 15.
[33] Council Directive 89/391, art.1, 1989 O.J. (L 183) 1.
[34] *See* Council Directive 83/477, arts. 3-4, 1983 O.J. (L 263) 25 (EC).
[35] European Charter on Environment and Health, art. 1, Dec 7-8, 1989, *available at* http://www.euro.who.int/AboutWHO/Policy/20010827_3.
[36] Conference on Security and Cooperation in Europe, *On Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe*, Sofia, Bulg., October-November, 1989, *available at* http://www.osce.org/documents/eea/1989/11/13750_en.pdf.
[37] Dinah Shelton & Alexandre Kiss, Judicial Handbook on Environmental Law 28-29 (United Nations Env't Programme 2005) (noting that "para. 27 affirms 'the right of individuals and non-governmental organizations to be informed of environmental problems relevant to them, to have the necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.'").
[38] *Id.* at 29.

(Art. 13), and the African Charter on the Rights and Duties of Peoples (Art. 9).[39] European states are generally bound by Art. 10 of the European Convention on Human Rights, which guarantees the "freedom to... receive... information."[40] In the case of *Leander v. Sweden*, the applicant alleged violation of Art. 10 after he was refused access to a file that was used to deny him employment. The Court unanimously stated:

> [T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.[41]

The Court has applied its restrictive approach to Art. 10 in environmental cases.[42] In *Anna Maria Guerra and 39 Others against Italy*[43] the applicants complained about the chemical factory "ENICHEM Agricoltura," situated near the town of Manfredonia; specifically, pollution and the risk of major accidents at the plant; and the absence of regulation by the public authorities. Invoking Art. 10 of the European Convention on Human Rights, the applicants asserted the government's failure to inform the public of the risks and the measures to be taken in case of a major accident, prescribed by the domestic law transposing the EC "Seveso" directive.[44] The European Commission on Human Rights admitted the complaint insofar as it alleged a violation of the right to information. It did not accept the claim of pollution damage. The Commission found that the government had classified the factory as a "high risk" facility in applying the criteria established by the directive and Italian law and that there had been accidents at the factory. By a large majority, the Commission concluded that Art. 10 imposes on states an obligation not only to disclose to the public available information on the

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[39] Universal Declaration of Human Rights, G.A. Res. 217A, art. 19, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; ICCPR, *supra* note 1, at art. 19; American Declaration of the Rights and Duties of Man, art. XVII, May 2, 1948, AG/RES. 1591 (XXVIII-O/98) [hereinafter American Declaration]; American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]; African Charter on Human and Peoples' Rights, art. 9, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter].

[40] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Sept. 3, 1953, 213 U.N.T.S. 222.

[41] Leander v. Sweden, App. No, 9248/81, 9 Eur. H.R. Rep. 433, para. 74 (1987). *See also* Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser.A) at para. 51 (1989) (holding that the government did not breach the Convention in failing to allow access to a personal file of former foster child).

[42] *See* Stefan Weber, *Environmental Information and the European Convention on Human Rights*, 12 HUM. RTS. L.J. 177 (1991). Contrast the views of the former Commission which found that the right to receive information envisages not only access to general sources of information, which may not be restricted by state authorities, but also the right to receive information not generally accessible that is of particular importance to the individual. X v. Federal Republic of Germany, App. No. 8383/78, 17 Dec. & Rep. 227, 228-29 (1980).

[43] Guerra v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357 at para. 61 (1998).

[44] *Id.* at para. 53.

environment, but also the positive duty to collect, collate, and disseminate information which would otherwise not be directly accessible to the public or brought to the public's attention. In arriving at its conclusion, the Commission relied upon "the present state of European law" which it said confirmed that public information represents one of the essential instruments for protecting the well-being and health of the populace in situations of environmental danger. The Commission referred specifically to a resolution of the Parliamentary Assembly of the Council of Europe, relating to the Chernobyl nuclear accident, which the Commission said recognized, at least in Europe, a fundamental right to information concerning activities that are dangerous for the environment or human well-being.[45]

A Grand Chamber of the European Court of Human Rights, in a judgment of February 19, 1998, reversed the Commission on its expanded reading of Art. 10, but unanimously found a violation of Art. 8, the right to family, home and private life. The Court reaffirmed its earlier case law holding that Art. 10 generally only prohibits a government from interfering with the ability of a person to receive information that others wish or may be willing to impart. According to the Court, "[t]hat freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."[46] Although Art. 10 was found to be not applicable to the case, eight of the 20 judges indicated through separate opinions a willingness to consider positive obligations to collect and disseminate information in some circumstances.[47]

The Court has also considered the applicability of Art. 10 to prosecutions for defamation in the dissemination of environmental information. In a 1999 decision, the European Court held that the state may not extend defamation laws to restrict dissemination of environmental information of public interest. In the case of *Bladet TromsØ v. Norway*,[48] a Grand Chamber of the European Court held 13-4 that Norway had violated the rights of a newspaper and its editor by fining them both for defamation after they published extracts of a report by a governmental seal hunting inspector.[49] The report claimed among other things that seals had been flayed alive and that there were other violations of seal hunting regulations. The names of the crew were deleted from the publication but they successfully sued for defamation. The European Court held that the judgment was an unjustified interference with Art. 10 of the Convention. The Court found that the reporting should have been considered in the wider context of the newspaper's coverage of the controversial seal hunting issue, a matter of public interest. Its

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[45] *Id.* at para. 34.

[46] *Id.* at para. 53.

[47] *Id.* (Palm. J., concurring; Bernhardt, J., concurring; Russo, J. concurring; MacDonald, J. concurring; Makarzyck J., concurring; Van Dijk, J. concurring; Jambrek J., concurring; Vilhjalmsson J., concurring & dissenting.)

[48] *Bladet TromsØ v. Norway*, App. No. 21980/93, 29 Eur. Ct. H.R. 125, at paras. 61, 71-73 (1999).

[49] *Id.* at paras. 11, 72-73. (The government decided, based on Norwegian law, to not publish the report because the contents alleged violations of law.).

reporting conveyed an overall picture of balanced reporting. The Court also was influenced by the fact that the report was an official one that the Ministry of Fisheries had not questioned or disavowed. In the view of the Court the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research, otherwise its public-watchdog role could be undermined.[50]

In the subsequent judgment of *Thoma v. Luxembourg* (March 29, 2001), the Court again considered the question of a conviction of defamation for reporting on environmental matters.[51] In this case, a radio journalist presented a weekly program dealing with nature and the environment. During one of his programs he discussed a written article suggesting bribery in reforesting woodlands. He was convicted of defamation in civil actions brought by fifty-four forest wardens and nine forestry engineers. He appealed and then challenged his conviction at the European Court as a violation of freedom of expression. The court noted the fact that the criticisms were of public officials, not of private individuals and that journalistic freedom allows recourse to a degree of exaggerations or even provocation. Thus, while the state can limit speech by law to protect the rights and reputation of others, this particular interference was not "necessary in a democratic society," i.e. meeting a pressing social need, proportionate to the legitimate aim pursued and with relevant and sufficient reasons given. The Court noted in particular that restrictions on freedom of expression are to be strictly construed when they are directed at debate over a problem of general interest.[52]

B. Public Participation in Environmental Decision-making

The major role played by the public in environmental protection is participation in decision-making, especially in environmental impact or other permitting procedures. Public participation is based on the right of those who may be affected, including foreign citizens and residents, to have a say in the determination of their environmental future.

The right to participate has two components: the right to be heard and the right to affect decisions. Most recent multilateral and many bilateral agreements contain references to or guarantees of public participation.[53] The Climate Change

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[50] *Id.* at paras. 51, 59.

[51] Thoma v. Luxembourg, App. No. 38432/97, at para. 3 (2001).

[52] *Id.* at para. 58.

[53] In addition to the treaties discussed in the text, other agreements referring to public participation are the: Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, art. 2(3)(a)(4), Nov. 18, 1991, 31 I.L.M 568; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 16, Mar. 17, 1992, 31 I.L.M. 1312; Convention on the Transboundary Effects of Industrial Accidents, art. 9, Mar. 17, 1982, 2105 U.N.T.S. 460; Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 9, Sept. 22, 1992, 32 I.L.M. 1072; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, arts. 13-16, June 21, 1993, 32 I.L.M. 1228; North American Agreement on Environmental Cooperation, arts. 2(1)(a), 14, Sept. 14, 1993, 32 I.L.M. 1480; Danube Convention, *supra* note 20, at art. 14; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, art. 19, June 10,

Convention, Art. 4(l)(i) obliges Parties to promote public awareness and to "encourage the widest participation in this process, including that of non-governmental organizations."[54] The Convention on Biological Diversity allows for public participation in environmental impact assessment procedures in Art. 14(1)(a).[28] Regionally, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context requires states parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm.[29]

The right to public participation is widely expressed in human rights instruments as part of democratic governance and the rule of law. Art. 21 of the Universal Declaration of Human Rights affirms the right of everyone to take part in governance of his or her country, as does the American Declaration of the Rights and Duties of Man (Art. 20) and the African Charter (Art. 13).[57] Art. 25 of the International Covenant on Civil and Political Rights provides that citizens have the right, without unreasonable restrictions "to take part in the conduct of public affairs, directly or through freely chosen representatives..."[58] The American Convention contains identical language in Art. 23.[59]

C. The Right to a Remedy for Environmental Harm

Principle 10 of the Rio Declaration provides that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Some instruments make it explicit that the right to a remedy is not limited to nationals of a state, e.g. the OECD Recommendation on Equal Right of Access in Relation to Transfrontier Pollution.[60] International agreements may contain obligations to grant a potential or *de facto* injured person a right of access to any administrative or judicial procedure equal to that of nationals or residents. Equal access to national remedies has been considered one way of implementing the polluter pays principle. Implementing the right of equal access to national remedies requires that states remove jurisdictional barriers to civil proceedings for damages and other remedies in respect of environmental injury. Both the February 25, 1991 Espoo Convention and the March 17, 1992 Helsinki Convention on the

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1995, 1999 O.J. (L 322) 3; Joint Communique and Declaration on the Establishment of the Arctic Council, pmbl, arts. 1(a), 2, 3(c); Sept. 19, 1996, 35 I.L.M. 1382; Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 6(3), Dec. 11, 1997, 37 I.L.M. 22; Stockholm Convention on Persistent Organic Pollutants, art. 10(1)(d), Sept. 22, 2001, 40 I.L.M. 532.

[54] United Nations Framework Convention on Climate Change, art. 4(l)(i), May 9, 1992, 1771 U.N.T.S. 107.

28. Convention on Biological Diversity, art. 14(1)(a), June 5, 1992, 31 I.L.M. 818.

29. Environmental IA Convention, *supra* note 23, at art. 3.

[57] Universal Declaration, *supra* note 39, at art. 21; American Declaration, *supra* note 39 at art. XX. African Charter, *supra* note 39, at art. 13.

[58] ICCPR, *supra* note 1, at art. 25.

[59] *See* American Convention, *supra* note 39.

[60] Org. Econ. Cooperation & Dev., *Council Recommendation: Equal Right of Access to Information, Participation in Hearings and Administrative and Judicial Procedures by Persons Affected by Transfrontier Pollution*, app. 1, May 11, 1976, 15 I.L.M. 1218.

Transboundary Effects of Industrial Accidents call for equality of access.[61] The 1997 U.N. Convention on the Non-Navigational Uses of International Watercourses, Art. 2, formulates the same principle under the title of "non-discrimination."[62]

The right to a remedy when a right is violated is itself a right expressly guaranteed by universal and regional human rights instruments. The Universal Declaration of Human Rights affirms that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[63] The International Covenant on Civil and Political Rights also obliges states to provide remedies.[64] The Human Rights Committee, established pursuant to the Covenant, has identified the kinds of remedies required, depending on the type of violation and the victim's condition. The Committee has indicated that the state which has engaged in human rights violations, in addition to treating and financially compensating the victim, must undertake to investigate the facts, take appropriate action, and bring those found responsible for the violations to justice.[65] The International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries specifically refers to "fair compensation for any damages" (Art. 15(2)), "compensation in money" (Art. 16(4)) and full compensation for "any resulting loss or injury."[66] (Art. 16(5)). Several other treaties refer to the right to legal protection for attacks on privacy, family, home or correspondence, or attacks on honor and reputation.[67]

Declarations, resolutions and other non-treaty texts also proclaim or discuss the right to a remedy. In some instances, the issue is raised by UN human rights treaty bodies as part of the mechanism of issuing General Comments. The third General Comment of the Committee on Economic, Social and Cultural Rights, concerning the nature of state obligations pursuant to Art. 2(1) of the Covenant, states that appropriate measures to implement the Covenant might include the provision of judicial remedies with respect to rights which may be considered justiciable.[68] It specifically points to the non-discrimination requirement of the

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[61] Environmental IA Convention, *supra* note 23, at art. 16 (calls for civil society participation in transboundary Environmental Impact Assessments); Transboundary Watercourses Convention, *supra* note 20, at art. 2 (requiring public access to information).

[62] Convention on the Law of the Non-Navigational Uses of International Watercourses, art. 32, May 21, 1997, 36 I.L.M. 700.

[63] Universal Declaration, *supra* note 39, at art. 4.

[64] ICCPR, *supra* note 1, at art. 2(3).

[65] *See* Klint A. Cowen, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 28 (2006).

[66] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, arts. 15-16, June 27, 1989, 28 I.L.M. 1382.

[67] *See* Universal Declaration, *supra* note 39, at art. 12; ICCPR, *supra* note 1, at art. 17; American Convention, *supra* note 39, at art. 11; African Charter, *supra* note 39, at art. 5; United Nations Convention on the Rights of the Child, art. 16, Nov. 20, 1989, 1577 U.N.T.S. 3; American Declaration, *supra* note 39, at art. V; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222.

[68] U.N. Econ. & Soc. Council [ESOSOC], General Comment 3, *The Nature of States Parties*

treaty and cross-references the right to a remedy in the Covenant on Civil and Political Rights.[69] A number of other rights are cited as "capable of immediate application by judicial and other organs."[70]

Regional instruments also contain provisions regarding legal remedies for violations of rights. Art. XVII of the American Declaration of the Rights and Duties of Man guarantees every person the right to resort to the courts to ensure respect for legal rights and protection from acts of authority that violate any fundamental constitutional rights.[71] The American Convention entitles everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution "or laws of the state concerned or by this Convention," even where the act was committed by persons acting in the course of their official duties (Art. 25).[72] The states parties are to ensure that the competent authorities enforce remedies that are granted.

Article 6 of the European Convention on Human Rights[73] guarantees a fair and public hearing before a tribunal for the determination of rights and duties.[74] Applicability of Art. 6 depends upon the existence of a dispute concerning a right recognized in the law of the state concerned, including those created by licenses, authorizations and permits that affect the use of property or commercial activities.[75] In *Oerlemans v. Netherlands*[76] Art. 6 was deemed to apply to a case where a Dutch citizen could not challenge a ministerial order designating his land as a protected site.

In *Zander v. Sweden*,[77] the applicants claimed they had been denied a remedy for threatened environmental harm. The applicants owned property next to a waste treatment and storage area. Local well water showed contamination by cyanide from the dump site. The municipality prohibited use of the water and furnished temporary water supplies. Subsequently, the permissible level of cyanide was raised and the city supply was halted. When the company maintaining the dump site sought a renewed and expanded permit, the applicants argued that the threat to their water supply would be sufficiently high and that the company should be obliged to provide free drinking water if pollution occurred. The licensing board granted the permit, but denied the applicants' request. They sought but could not obtain judicial review of the decision. The European Court held that Art. 6 applied and was violated. The applicability of Art. 6 was based on the Court's finding that the applicants' claim concerned the environmental conditions of the property and

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Obligations, para. 5, U.N. Doc. E/1991/23 (Dec. 14, 1990).

[69] *Id.*. at para. 5.

[70] *Id.* at para. 5.

[71] *See* American Declaration, *supra* note 39, at art. XVII.

[72] American Convention, *supra* note 39, at art. 25..

[73] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

[74] *Id.* at art. 6.

[75] Benthem v. Netherlands, 97 Eur. Ct. H.R. (ser. A) at para. 40 (1985).

[76] Oerlemans v. Netherlands, 219 Eur. Ct. H.R. (ser. A) at paras. 14, 49 (1991).

[77] Zander v. Sweden, 279-B Eur.Ct. H.R. (ser. A) at paras. 6-11 (1993).

the applicants "could arguably maintain that they were entitled under Swedish law to protection against the water in their well being polluted as a result of VAFAB's activities on the dump."[78]

The right to a remedy extends to compensation for pollution. In *Zimmermann v. Switzerland,*[79] the Court found Art. 6 applicable to a complaint about the length of proceedings for compensation for injury caused by noise and air pollution from a nearby airport. Art. 6 does not, however, encompass a right to judicial review of legislative enactments. In *Braunerheilm v. Sweden,*[80] the Commission denied a claim that Art. 6 was violated when the applicant could not challenge in court a new law that granted fishing licenses to the general public in waters where the applicant previously had exclusive rights.

The African Charter contains a broad right to a remedy in Art. 7, supplemented by the right to adequate compensation for the spoliation of resources of a dispossessed people.[81] Article 26 also imposes a duty on states parties to the Charter to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the Charter.[82]

D. Right to Life and Right to Health

The eighteen independent experts on the U.N. Human Rights Committee supervise state implementation of and compliance with the International Covenant on Civil and Political Rights, primarily through a system of state reporting. Each state party submits periodic reports on the measures taken to give effect to the rights in the Covenant, then sends a representative to answer questions of the Committee members.[83] The Committee may make comments and recommendations to the state individually or issue General Comments to all states parties. In the latter context, the Committee has indicated that state obligations to protect the right to life can require positive measures designed to reduce infant mortality and protect against malnutrition and epidemics, implicating environmental protection.[84]

The Human Rights Committee also may hear individual complaints against a state party to the International Covenant on Civil and Political Rights if the state has also accepted the first Optional Protocol to the Covenant that creates the

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[78] *Id.*, at para. 24.

[79] Zimmermann v. Switzerland, 66 Eur. Ct. H.R. (ser.A) para. 32 (1983).

[80] Braunerheilm v. Sweden, App. No. 11764/85 (Mar. 9, 1989, unpublished). *See* Maguelonne Déjeant-Pons, *Le Droit de l'homme a l'environnement, droit fondamental au niveau europeen dans le cadre du Conseil de l'Europe, et la Convention europeenne de sauvegarde des droit de l'homme et des libertes fondamentales*, 4 REV. JUR. DE L'ENVIRONNEMENT (1994).

[81] African Charter, *supra* note 39, at art. 21(2).

[82] *Id.* at art. 26.

[83] Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUM. RTS. Q. 295, 296 (1991).

[84] U.N. Econ. & Soc. Council [ECOSOC], General Comment 14, *The Right to the Highest Attainable Standard of Health*, para. 36, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment 14].

procedure. The Committee has received several complaints alleging that environmental damage caused a violation of one or more civil and political rights. First, a group of Canadian citizens asserted that the storage of radioactive waste near their homes threatened the right to life of present and future generations. The Committee found that the case raised "serious issues with regard to the obligation of States parties to protect human life," but declared the case inadmissible due to failure to exhaust local remedies.[85]

The Committee on Economic, Social and Cultural Rights supervises implementation of the Covenant guaranteeing these rights, also by means of periodic reporting. In this context, states often report on environmental issues as they affect guaranteed rights. The Ukraine reported in 1995 on the environmental situation consequent to the explosion at Chernobyl, in regard to the right to life. Committee members sometimes request specific information about environmental harm that threatens human rights. Poland, for example, was asked to provide information in 1989 about measures to combat pollution, especially in upper Silesia.[86] The Committee may pose questions and make recommendations in response to the state report. In respect to this as well as other UN treaty bodies, NGOs and activists have often overlooked the importance of participating in reporting procedures; they offer a public forum for challenging state action or inaction on environmental protection as it affects the enjoyment of human rights. The procedure has been strengthened through the recent addition of follow-up procedures to monitor compliance.

On November 8, 2000, the Committee on Economic, Social and Cultural Rights issued General Comment No. 14 on "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights" (Art. 12).[87] The Comment states in paragraph 4 that "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as... a healthy environment."[88] General Comment 14 adds that "[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels [and]... should be entitled to adequate reparation."[89]

Among UN Charter-based organs, the U.N. Commission on Human Rights decided in 1995 to appoint a special rapporteur to study the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.[90] In addition to investigating the human rights effects

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[85] Communication No. 67/1980, *EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20.

[86] E/1989/4/Add.12.

[87] General Comment 14, *supra* note 84, at para. 36.

[88] *Id.* at para. 4.

[89] *Id* at para. 59.

[90] U.N. Comm'n on Human Rights, *Report on the Fifty-first Session*, para. 632, U.N. Doc E/CN.4/1995/176, E/1995/23 (July 7, 1995) (The vote was 31 to 15, with six abstentions. The division was geographic, with all developing countries of the South voting in favor of the proposal and all

of illegal dumping of toxic and dangerous products and wastes in developing countries, the Special Rapporteur was given authority to receive and examine communications and undertake fact-finding concerning illicit traffic and dumping, in effect creating an individual complaints procedure. The rapporteur may make recommendations to states on measures to be taken and must produce an annual list of the countries and transnational corporations engaged in illicit dumping, as well as a census of persons killed, maimed or otherwise injured in the developing countries due to the practice.[91]

The 1998 report[92] of the Special Rapporteur contained information on specific cases and incidents. Most of them involved chemical companies in Europe exporting contaminated wastes to Asia and the Middle East. In many cases, the government replies indicated that prosecutions were initiated and the waste returned to the place of origin. The Special Rapporteur found that the communications showed the right to life and security of person, health, an adequate standard of living, adequate food and housing, work and non-discrimination, were implicated by the acts denounced. In certain cases the reported incidents had led to sickness, disorders, physical or mental disability and death. In other instances, the rights of association and access to information were ignored or curtailed, hampering the ability of individuals or groups to prevent dumping or obtain a remedy. Most communications mentioned violation of the right to information which led to often irreversible consequences to the environment and rights of individuals. Information had been withheld not only prior to but after incidents.

The UN Commission on Human Rights has appointed other special rapporteurs whose mandates extend to environmental matters. In 2002, for example, it named a special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This involves consideration of environmental conditions and how they impact the right to health. The World Health Organization, whose constitution proclaims a right to health, has already begun to consider this issue.

Regional human rights bodies in Europe, the Americas and Africa have all examined cases alleging violations of the right to life due to environmental harm. In the Inter-American system, the Commission established a link between environmental quality and the right to life in response to a petition brought on

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Northern states expressing opposition. France, on behalf of the European Union, argued that the question could be dealt with much more effectively through instruments such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.)

[91] U.N. Comm'n on Human Rights, *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, para. 7, U.N. Doc. E/CN.4/1995/81 (Mar. 8, 1995).

[92] U.N. Comm'n on Human Rights, *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems Which the Developing Countries Face in their Efforts to Achieve These Human Rights, Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, U.N. Doc. E/CN.4/1998/10/Add.1 (Sept. 25, 1997).

behalf of the Yanomami Indians of Brazil. The petition alleged that the government violated the American Declaration of the Rights and Duties of Man[93] by constructing a highway through Yanomami territory and authorizing the exploitation of the territory's resources. These actions led to the influx of non-indigenous people who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomami rights to life, liberty and personal security guaranteed by Art. 1 of the Declaration, as well as the right of residence and movement (Art. VIII) and the right to the preservation of health and well-being (Art. XI).[94]

Apart from receiving and examining individual complaints, the Inter-American Commission on Human Rights has the authority to study the human rights situation generally or in regard to specific issues within an OAS member state. The Commission devoted particular attention to environmental rights in reports on Ecuador[95] and Brazil.[96] In regard to Ecuador, the Commission noted that the human rights situation in the Oriente region had been under study for several years, in response to claims that oil exploitation activities were contaminating the water, air and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness.[97] After an on-site visit, it found that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts of oil exploitation in their drinking and bathing water, in the air, and in the soil. The inhabitants were unanimous in claiming that oil operations, especially the disposal of toxic wastes, jeopardized their lives and health. Many suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, many claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies.

The Commission identified relevant human rights law and emphasized the right to life and physical security. It stated 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

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[93] American Declaration, *supra* note 39.

[94] Resolution No. 1285, Case No. 7615, Brazil, Mar. 5, 1985, *available at* http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm.

[95] O.A.S., Inter-Amer. C.H.R., *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. No. OEA/Ser.L/V/II.96 Doc. 10 rev. 1 (April 24 1997).

[96] O.A.S., IACHR, *Informe Sobre La Situacion De Los Derechos Humanos En Brasil,* O.A.S. Doc. No. OEA/Ser.L/V/II.97 Doc. 29 rev. 1 (Sept. 29, 1997) (Among the problems discussed are those of environmental destruction leading to severe health and cultural consequences. In particular indigenous cultural and physical integrity are said to be under constant threat and attack from invading prospectors and the environmental pollution they create. State protection against the invasions is called "irregular and feeble" leading to constant danger and environmental deterioration).

[97] *Report on the Situation of Human Rights in Ecuador*, *supra* note 95, at introduction (The Commission first became aware of the situation in the Oriente through a petition filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the problem was more widespread and thus should be treated within the framework of the general country report.)

> contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.[98]

States parties may be required therefore to take positive measures to safeguard the fundamental and non-derogable rights to life and physical integrity, 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 also directly addressed concerns for economic development, noting that the Convention does not prevent nor discourage it, but rather requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each state may exploit its natural resources, "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."[99] The Commission returned to the procedural dimension, concluding 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... [t]he 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.[100]

The Commission called on the government to implement legislation enacted to strengthen protection against pollution, clean up activities by private licensee companies, and take further action to remedy existing contamination and prevent future recurrences. In particular it recommended that the State take measures to improve systems to disseminate information about environmental issues, and enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.[101]

The cases submitted in the African system initially invoked the right to health, protected by Art. 16 of the African Charter, rather than the right to environment contained in the same document. In *Communications 25/89, 47/90,*

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[98] *Id.* at ch. VIII, Part 2: Relevant Inter-American Law.

[99] *Id.* at ch. VIII, Analysis.

[100] *Id.* at Chapter VIII, Conclusion. The Commission also stated that the right to seek, receive and impart information and ideas of all kinds is protected by Art. 13 of the American Convention. 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 viewed as linked to Art. 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." The Commission quotes Art. 25 of the American Convention that provides everyone "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by th[e] Convention."

[101] *Id.* at Chapter VIII, Recommendations.

56/91 and 100/93 against Zaire the Commission held that failure by the Government to provide basic services such as safe drinking water constitute a violation of Art. 16. More recently, applicants successfully alleged a violation of the right to environment by Nigeria, as described later.

Öneryildiz v. Turkey, the first environmental case before the European Court involving loss of life, was decided by a Grand Chamber on November 30, 2004. The two applicants asserted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property due to a methane explosion at the municipal waste dump in an area of Istanbul. In addition to asserting a violation of the right to life and to property, the applicants complained that the administrative proceedings conducted in their case were unfair and violated the European Convention on Human Rights, article 6. At Turkey's request, the Grand Chamber took the case. In a significant development, the judgment held Turkey responsible for the deaths under a negligence standard, possibly rising to the level of gross negligence.

The waste disposal site had originally been selected when the area was uninhabited, but over time dwellings were constructed. In 1991, experts were appointed by the district council to determine whether the site met existing regulations. The report alerted authorities to a number of dangers liable to give rise to a major health risk for nearby inhabitants, particularly those living in the slum areas. The experts concluded that the site exposed humans, animals and the environment to many risks, including the spread of contagious diseases and the formation of enough methane to explode. The report was transmitted to local authorities, the governor and the Ministry of Health and Environment Office. The Environment Office urged local authorities to remedy the problems, but no action was taken. On April 28, 1993 a methane explosion occurred followed by a landslide that destroyed ten dwellings and killed thirty-nine people. Two mayors were prosecuted, found guilty and initially sentenced to three months in prison, but the sentences were commuted and enforcement of fines of less than 10 euros that had been imposed was suspended. The applicants won an administrative judgment but the compensation was never paid.

In its judgment, the Court reiterated that the right to life provision of the Convention contains not only a negative obligation to refrain from the use of force by state agents, but also imposes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation applies 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."[102] The primary duty on the state is to put into place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.

[102] Öneryildiz v. Turkey, App. No. 48939/99, 2004-XII Eur. Ct. H.R. at para. 71.

In determining state responsibility for deaths from such activities, the Court identified several factors as relevant:

— the harmfulness of the phenomena inherent in the activity

— the contingency of the risk to which the applicant was exposed

— the status of those involved in bringing about the circumstances

— whether the acts or omissions attributable to them were deliberate.

In evaluating the circumstances of this case, the Court took particular note of the dangerousness of the activity and indicated that when such activities are undertaken, the state must enact regulations governing 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 inherent risks.

The Court included the public's right to information among the preventive measures that the state must take to protect the right to life. The Court found that its interpretation of some substantive rights to include the right to information "is supported by current developments in European standards," citing Parliamentary Assembly Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste, as well as Committee of Ministers Recommendation R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment.[103] The Court also mentioned the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment[104] and the Convention on the Protection of the Environment through Criminal Law,[105] although neither was in force at the time of the judgment. Concerning dangerous activities, Resolution 1087 (1996) makes clear that public access to clear and full information is a basic human right. In the Court's estimation, the Turkish authorities appeared to have a conflict of interest and were engaged in delaying tactics that resulted in a failure to take necessary preventive measures or to inform the public. In addition, the authorities allowed the waste collection site to operate despite not conforming to the relevant technical standards.

The Court also found that Turkey violated its duties in the aftermath of the explosion. Where lives are lost in circumstances potentially engaging the responsibility of the state, article 2 requires "an adequate response" so that any breaches are repressed and punished. The Court considered that the applicable principles in this case were to be found in decisions concerning the use of lethal force (most significantly, McCann v. United Kingdom). The duty to conduct an

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[103] *Id.* at para. 90.

[104] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 I.L.M. 1230.

[105] Convention on the Protection of the Environment Through Criminal Law, Nov. 4, 1998, Europ. T.S. 172, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm.

official investigation arises not only because criminal liability may be in question, but because in the context of dangerous activities, public authorities "are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents."[106]

Beyond the duty to investigate, the Court indicated that prosecution may be necessary:

> Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity...the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article2, irrespective of any other types of remedy which individuals may exercise on their own initiative...this is amply evidenced by developments in the relevant European standards.[107]

While individuals may not have a right to have responsible parties prosecuted or sentenced, national courts should not allow life-endangering offenses to go unpunished. In this respect, while the authorities were found to have acted with exemplary promptness in investigating the circumstances of the accident and ensuing deaths, the manner in which the Turkish criminal justice system operated did not ensure accountability or the effective implementation of domestic law, in particular the deterrent function of the criminal law. Thus, the procedural aspects of article 2 were also violated.

In similar fashion, the Court found that the government had violated the applicant's right to property contained in Article 1 of Protocol No. 1 of the European Convention on Human Rights. The Court found that there was no doubt about the causal link between the gross negligence of the state and the property losses suffered by the applicant.

Finally, the Court found a violation of the right to a remedy contained in Convention article 13. The Court noted that whenever violations of the right to life are alleged, compensation for pecuniary and non-pecuniary damage should in principle be possible as part of the range of redress available. In this case, compensation that was awarded to the applicant by a domestic proceeding had never been paid, thus rendering ineffective the purported remedy. Moreover, the manner in which the authorities discharged their procedural obligation to investigate and prosecute failed to provide the applicant with an effective remedy.

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[106] Öneryildiz, *supra* note 102. at para. 93.
[107] *Id.* at para. 93.

The Court awarded pecuniary and non-pecuniary damages, together with costs and expenses to the applicant as well as non-pecuniary damages to each of his two sons.[108]

E. Right to an Adequate Standard of Living and the Fulfillment of Basic Needs

UN human rights treaty bodies and the UN Charter-based Human Rights Commission and Sub-Commission have taken up the relationship between environmental protection and the enjoyment of human rights in the context of economic, social and cultural rights. The Human Rights Commission has appointed a Special Rapporteur on the right to food. In considering his initial report, the Commission asked that the study continue with specific attention given to the issue of safe drinking water.[109] The Commission specifically linked implementation 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 ecologically fragile areas."[110]

The Committee on Economic, Social and Cultural Rights has pursued such questions in monitoring state reports. In 1986, Tunisia reported to the Commission on Economic, Social and Cultural Rights, in the context of Art. 11 on the right to an adequate standard of living, on measures taken to prevent degradation of natural resources, particularly erosion and about measures to prevent contamination of food.[111] The Committee has referred to environmental issues in its General Comment on the Right to Adequate Food[30] and its General Comment on the Right to Adequate Housing.[31] In the first, the Committee interpreted the phrase "free from adverse substances" in Art. 11 of the Covenant to mean that the state must adopt food safety and other protective measures to prevent contamination through "bad environmental hygiene."[114] The Comment on housing states that "housing should not be built on polluted sites nor in... proximity to pollution sources that threaten the right to health of the inhabitants."[115]

The right to water has been recognized in a wide range of international documents, including treaties, declarations and other international normative instruments. Article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) stipulates that states parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to...

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[108] *Id.* at paras. 166-75.

[109] U.N. Comm'n on Human Rights, *The Right to Food*, U.N. Doc. E/CN.4/RES/2001/25, para. 9 (Apr. 20, 2001).

[110] *Id.* at para. 3.

[111] U.N. Econ. & Soc. Council [ECOSOC], *Implementation of the International Covenant on Economic, Social, and Cultural Rights*, U.N. Doc E/1990/6/Add.,14, paras. 211-86 (Oct. 8, 1996).

30. U.N. Econ, & Soc. Council [ECOSOC], General Comment 12,, *The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 para. 4 (May 12, 1999).

31. U.N. Comm'n on Human Rights, *Forced Evictions and the Right to Adequate Housing*, U.N. Doc. U.N. Doc. E/1998/22, annex IV, para. 8 (May 20, 1997).

[114] General Comment 12, *supra* note 112, at para. 10.

[115] U.N. Econ. & Soc. Council [ECOSOC], General Comment 4, *The Right to Adequate Housing*, U.N. Doc. E/1992/23 para. 8 (1991).

water supply."[116] Art. 24(2) of the Convention on the Rights of the Child (1989) requires states parties "[t]o combat disease and malnutrition... through the provision of adequate nutritious foods and clean drinking-water."[117]

In late 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 (2002) on the right to water.[118] The Committee, noting that water is a limited natural resource and a public good fundamental for life and health, calls it "a prerequisite for the realization of other human rights."[119] According to the Committee, the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. The Committee finds that while Covenant Art. 11(1) does not specifically mention water, it specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing."[120] The use of the word "including" indicates that this catalogue of rights is not exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. The right to water is also inextricably related to the right to the highest attainable standard of health (Art. 12(1)) and the rights to adequate housing and adequate food (Art. 11(1)). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

According to the Committee, the right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference such as the arbitrary disconnections or contamination of water supplies. In contrast, entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water. States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

The Committee specifies that there are three types of legal obligations imposed on states parties: obligations to *respect*, to *protect* and to *fulfil*. The obligation to *respect* requires that states parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter*

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[116] Convention on the Elimination of All Forms of Discrimination against Women, art. 14(2)(h), Dec. 18, 1979, 19 I.L.M. 33.

[117] Convention on the Rights of the Child, art. 24(2)(c), Nov. 20, 1989, 28 I.L.M. 1448.

[118] U.N. Econ. & Soc. Council [ECOSOC], General Comment 15, *The Right to Water*, U.N. Doc E/C.12/2002/11 (Jan. 20, 2003); U.N. Econ. & Soc. Council [ECOSOC], General Comment 6, *The Economic, Cultural, and Social Rights of Older Person*, U.N. Doc. E/1996/22, para. 32 (1996). The Committee had previously recognized that Art. 11 contains a right to water in its General Comment No. 6.

[119] General Comment 15, *supra* note 118, at para. 1.

[120] *Id.* at para. 3.

alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from state-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law. The obligation to *protect* requires states parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia,* adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water, or from polluting and inequitably extracting water.

The obligation to *fulfil* is disaggregated into the obligations to *facilitate, promote* and *provide.* The obligation to *facilitate* requires the state to take positive measures to assist individuals and communities to enjoy the right. To *promote,* the state party must take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to *fulfil (provide)* the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil* includes, *inter alia,* according sufficient recognition to the right to water within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize the right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

The lengthy General Comment goes on to discuss "core obligations" and the state acts and omissions that may be deemed to violate the Covenant's guaranteed right to water.[121] The text sets a precedent for future actions on the substantive aspects of environmental rights.

F. Right to Privacy, Home and Family Life

In Europe, those who have suffered from environmental harm have often complained that the resulting conditions violate the right to privacy and home guaranteed by the 1950 European Convention on Human Rights and Fundamental Freedoms. Art. 8(1) provides that "[e]veryone has the right to respect for his... [privacy,]... his home and his correspondence."[122] Article 8(2) sets forth the permissible grounds for limiting the exercise of the right.[123]

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[121] *Id.* at paras. 37, 41-43..

[122] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 222.

[123] *Id.* at art. 8 (providing that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and

The former European Commission on Human Rights[124] and the European Court have held that environmental harm attributable to state action or inaction which has significant injurious effect on a person's home or private and family life constitutes a breach of Art. 8(1). The harm may be excused, however, under Art. 8(2) 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. States enjoy a margin of appreciation in determining the legitimacy of the aim pursued. Recent decisions of the court overtly balance the competing interests of the individual and the community with considerable deference to the state's decisions.

Many of the European privacy and home cases involve noise pollution. In *Arrondelle v. United Kingdom*,[125] the applicant complained of noise from Gatwick Airport and a nearby motorway. The application was declared admissible and eventually settled with the payment of 7500 pounds. *Baggs v. United Kingdom*, a similar case, also was resolved by friendly settlement.[126] Settlement of the cases left unresolved numerous issues, some of which were addressed by the Court in *Powell v. United Kingdom* in which the Court found that aircraft noise from Heathrow Airport constituted a violation of Art. 8 of the European Convention on Human Rights, but was justified under Art. 8(2) as "necessary in a democratic society" for the economic well-being of the country.[127] Noise was acceptable under the principle of proportionality, if it did not "create an unreasonable burden for the individual concerned," a test that could be met by the state if the individual had "the possibility of moving elsewhere without substantial difficulties and losses."[128]

The Court later revisited the question of noise at Heathrow because of changes in flight patterns, in *Hatton v. The United Kingdom.*[129] The initial Chamber judgment of October 2, 2001, found that the noise from increased flights at Heathrow airport between 4 a.m. and 6 a.m. violated the rights of the applicants to respect for their home and family life.[130] This judgment was overturned by a

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freedoms of others.").

[124] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Restructuring the Control Machinery Established Thereby, Jan. 11, 1998, Eur. T.S. No. 155. With the entry into force of Protocol 11 to the European Convention on Human Rights, the former Commission and the European Court were merged into a new permanent European Court which was inaugurated on November 1, 1998.

[125] Arrondelle v. United Kingdom, App. No. 7889/77, 19 Eur. Comm'n H.R. Dec. & Rep. 186 (1980).

[126] Baggs v. United Kingdom, App. No. 9310/81, 44 Eur. Comm'n H.R. Dec. & Rep. 13, paras. 14, 19-20 (1987).

[127] Powell v. United Kingdom, App. No. 9310/81, 172 Eur. Ct. H.R. (ser. A) para. 39 (1990).

[128] *Id.* In a subsequent case, the Commission found that the level and frequency of the noise did not reach the point where a violation of Art. 8 could be made out and the application was therefore inadmissible. Vearncombe v. United Kingdom & Federal Republic of Germany, App. No. 12816/87, 59 Eur. Comm'n H.R. Dec. & Rep. 186, 196-97 (1989).

[129] Hatton v. United Kingdom, App. No. 36022/97, 34 Eur. H.R. Rep. 1, paras. 3, 29.

[130] *Id.* at paras. 85, 96.

Grand Chamber decision (12-5) on July 8, 2003.[131] Both judgments considered that as neither Heathrow airport nor the airlines that use it are owned, controlled or operated by the government, the case raised an issue of the scope of a government's positive obligations to secure respect for rights by non-state actors. Both panels found that the applicable principles are broadly similar to those applied when analyzing a direct state interference with a right. The two opinions differ primarily on the degree of deference to be given the government on the question of striking the appropriate balance between the competing interests of the individual and of the community as a whole. The Chamber held that the state cannot simply refer to the economic well-being of the country[132] "in the particularly sensitive field of environmental protection."[133] Instead, the state is required to minimize the interference with rights by trying to find alternative solutions and by generally seeking to achieve their aims in the way least burdensome to human rights. The Grand Chamber held this to be a new and inappropriate test that failed to respect the subsidiary role of the Court and the wide margin of appreciation (discretion) afforded to the state.

The Grand Chamber's lengthy decision provides guidance and a somewhat higher threshold for applicants to succeed in future pollution cases. The Court clearly continues to accept that "where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8."[134] Moreover, the Court will assess the government's actions on the substantive merits, to ensure that it is compatible with Art. 8, and procedurally, "it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual."[135] It apparently will give some weight to the compatibility of the state's actions or inactions with domestic law.[136]

According to the Court, the government was acting to balance economic interests of the country with the rights of the affected persons. The Court decided that states should take into consideration environmental protection in acting within their margin of appreciation. The Court will review the state's exercise of its discretion, "but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights."[137] Applying its "fair balance" test with deference to the government, the Court assessed the economic contribution of the flights and the harm to the individuals.[138] It noted as an additional "significant" factor that the 2-3% of the population specially affected can "if they choose, move elsewhere without

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[131] *Id.*

[132] *Id.* at para. 86. Notably, British Airways filed comments in the case about the economic impact on it of banning night flights. *Id.* at paras. 64, 91-93.

[133] *Id.* at para. 86.

[134] *Id.* at para. 96.

[135] *Id.* at para. 99.

[136] *Id.* at para. 120. The Grand Chamber notes that the Hatton case is unlike either *Lopez Ostra* or *Maria Guerra*, discussed infra, because in the latter two cases the government's actions were irregular or incompatible with domestic law or procedures.

[137] *Id.* at para. 122.

[138] *Id.* at paras. 121-22.

financial loss."[139] It is not clear from the judgment that such an assumption was warranted in this case, or would be warranted in any pollution case, because the pollution is likely to have significant impact on property values.

On the procedural side, the Court agreed that the government must undertake appropriate investigations and studies "in order to allow them to strike a fair balance between the various conflicting interests",[140] but this does not require "comprehensive and measurable data... in relation to each and every aspect of the matter to be decided."[141] Looking at the studies done, the Court found that the government did not exceed its margin of appreciation in striking the balance, and following the procedures it did to allow more night flights at Heathrow. Thus there was no violation of Art. 8. The Grand Chamber (with one dissenting vote) upheld the Chamber's judgment finding a violation of Art. 13 (right to a remedy) and awarded some costs and fees to the applicants.[142]

In the aftermath of the *Hatton* judgment, other cases based on noise pollution have had mixed success. In *Ashworth v. United Kingdom*,[32] an admissibility decision taken 20 January 2004, the applicants complained that the noise caused by low flying aircraft, including aerobatic activity and helicopter training, amounted to an interference with the right to respect for their private and family lives and their homes. They attempted to distinguish their circumstances from those in *Hatton* in two respects. First, they argued that the economic value of the private airport near Denham was far less than that of Heathrow and thus the balance should be tipped in their favor as far as abating the noise nuisance, because an airport serving no important national economic interests could not justify infringement of their rights. Secondly, they specifically argued diminished property values due to the noise. Neither argument was successful.

The Court agreed that the noise levels generated by flights at the airport were sufficient to render article 8 applicable. As in *Hatton*, however, the Court found that the state enjoys a wide margin of appreciation in balancing competing interests, including economic and environmental ones. It noted that there was no failure of compliance with the requirements of domestic law. The Court also reiterated its decision in *Hatton* that it was reasonable to take into consideration the individual's ability to leave the area. While one applicant asserted that property values had fallen by one-third, the Court pointed to the absence of

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[139] *Id.* at para. 127. As several applicants in the case had moved away from Heathrow by the time the Court heard the case, the record may have included information on the economic impact of the moves. *Id.* at paras. 10-16.

[140] *Id.* at para. 128. The dissent points out that the report on the economic well-being of the country were prepared for the government by the aviation industry and no attempt was made to assess the impact of the aircraft noise on the applicants' sleep. *Id.* at para. 15 (J. Costa, dissenting; J. Ress, dissenting; J. Turmen, dissenting; J. Zupancic, dissenting; J. Steiner, dissenting.).

[141] *Id.* para. 128.

[142] Hatton, *supra* note 129, at paras. 153-54, (J. Kerr, dissenting).

32. Ashworth v. United Kingdom, Eur. Ct. H.R. (2004), http://www.richardbuxton.co.uk/reference/view.php?table=transcripts&id=10&flag=name.

evidence on this point. Taking these factors into consideration, the Court held the application inadmissible.[33]

In contrast to *Hatton* and *Ashworth*, the applicant in *Moreno Gómez v. Spain* (judgment of 16 November 2004) succeeded in claiming a violation based on noise pollution from 127 nearby bars, pubs and discotheques.[143] The Court again examined whether a "fair balance" had been struck between the competing interests of the individual and the community as a whole in respect to the state's failure to take action to put a stop to third-party actions. The Court unanimously held that the noise levels were such as to amount to a breach of the rights protected by Article 8 of the European Convention on Human Rights. The fact that the city council did not enforce its own noise abatement measures was seen as contributing to the repeated flouting of the rules which it had established. The fact that the activities in question violated local law was a significant factor in the Court's evaluation and holding. The applicant was awarded her full claim of damages as well as costs and expenses.[144]

López Ostra v. Spain[145] is the major decision of the Court on pollution as a breach of the right to private life and the home. The applicant and her daughter suffered serious health problems from the fumes of a tannery waste treatment plant which operated alongside the apartment building where they lived (note that the European Convention on Human Rights does not contain a right to health). The plant opened in July 1988 without a required license and without having followed the procedure for obtaining such a license. The plant malfunctioned when it began operations, releasing gas fumes and contamination, which immediately caused health problems and nuisance to people living in the district. The town council evacuated the local residents and re-housed them free of charge in the town center during the summer. Despite this, the authorities allowed the plant to resume partial operation. In October the applicant and her family returned to their flat where there were continuing problems. The applicant finally sold her house and moved in 1992.

The decision is significant for several reasons. First, the Court did not require the applicant to exhaust administrative remedies to challenge operation of the plant under the environmental protection laws, but only to complete remedies applicable to enforcement of basic rights. Mrs. López exhausted the latter remedies after the Supreme Court of Spain denied her appeal on a suit for infringement of her fundamental rights and the Constitutional Court dismissed her complaint as manifestly ill-founded. Two sisters-in-law of Mrs. López Ostra, who lived in the same building, followed the procedures concerning environmental law. They brought administrative proceedings alleging that the plant was operating unlawfully. On September 18, 1991 the local court, noting a continuing nuisance and that the plant did not have the licenses required by law, ordered that it should

33. *Id.*

[143] Moreno Gómez v. Spain, App. No. 4143/02, paras. 49, 61-63 (2004).

[144] *Id.* at paras. 65-71.

[145] López Ostra v. Spain, 303 Eur. Ct. H.R. (ser. A) at paras. 17-22 (2004).

be closed until they were obtained. However, enforcement of this order was stayed following an appeal. The case was still pending in the Supreme Court in 1995 when the European Court issued its judgment. The two sisters-in-law also lodged a complaint, as a result of which a local judge instituted criminal proceedings against the plant for an environmental health offence. The two complainants joined the proceedings as civil parties.

The European Court of Human Rights noted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. As in the noise cases, it found that the determination of whether this violation had occurred should be tested by striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and her private and family life. In doing this, the Court applied its "margin of appreciation" doctrine, allowing the state a "certain" discretion in determining the appropriate balance, but finding in this case that the margin of appreciation had been exceeded.[146] It awarded Mrs. Lopez damages, court costs, and attorneys fees.[147]

In *Guerra v. Italy*,[148] the Court reaffirmed that Art. 8 can impose positive obligations on states to ensure respect for private or family life. Citing the *López Ostra* case, the Court reiterated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life."[149] The Court found a violation of Art. 8, noting that the individuals waited throughout the operation of fertilizer production at the company for essential information "that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory."[150] The Court's decision is strained and seemingly due to reluctance to extend Art. 10 on freedom of information to impose positive obligations on the state. The actual basis of the complaint, as discussed below, was the government's failure to provide environmental information, not pollution. The Court also declined to consider whether the right to life guaranteed by Art. 2 had been violated, considering it unnecessary in light of its decision on Art. 8. The decision seems unwarranted, given that deaths from cancer had occurred in the factory and, at the least, consideration of the loss of life would impact on the amount of compensation due.

Finally, Art. 8 has been useful primarily when the environmental harm consists of pollution. Issues of resource management and nature conservation or biological diversity are more difficult to bring under this rubric.

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[146] *Id.* at paras. 51, 58.
[147] *Id.* at paras. 65, 69-71.
[148] Guerra, *supra* note 43, at para. 60.
[149] *Id.* at para. 60.
[150] *Id.* at para. 60.

G. Freedom of Association

Several cases in the European human rights system mark the first efforts to address issues of nature protection through human rights law and procedures. All of the cases were brought against France and concern a French law requiring certain owners of small areas of land to belong to the local hunting association and to permit hunting on their property. The applicants oppose hunting and complained that the French legal obligations violated their right to peaceful enjoyment of their possessions, their right to freedom of association, and the right to freedom of conscience. They also maintained that the obligations are discriminatory.

The Court decided the first of the cases, *Chassagnou v. France*, on April 29, 1999.[151] It found a violation of all the rights except freedom of conscience, which it decided it need not address because of the other findings. The report was submitted to the Committee of Ministers. The other two cases, *Dumont v. France* and *Montion v. France*, involved identical issues.[152]

H. Right to Property

Art. 1 of Protocol 11 of the European Convention on Human Rights, ensures that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."[153] The former European Commission accepted that pollution or other environmental harm may result in a breach of Art. 1 of Protocol 11, but only where such harm results in a substantial reduction in the value of the property and that reduction is not compensated by the state; in effect, both pollution and land use regulations for the purpose of environmental protection are treated as raising issues of expropriation. The case of *Pialopoulos v. Greece*, judgment of 15 February 2001, concerned planning restrictions that prevented applicants from building a shopping center on their land.[154] The case was filed after ten years of delays and, according to the applicants, these delays and the restrictions amounted to expropriation of property without compensation. The Court accepted that the impugned measures aimed at environmental protection, and thus served a legitimate state interest, but held that the applicants were entitled to compensation and that without it their property rights had been violated.

I. Cultural, Minority and Indigenous Rights

Indigenous groups have invoked provisions of the Covenant on Civil and Political Rights to protect their land and culture from environmental degradation. The United Nations Human Rights Committee has interpreted Art. 27[155] of the

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[151] Chassagnou v. France, App. Nos. 25088/94, 28331/95, and 28443/95, 29 Eur. H.R. Rep. 615, para. 1 (1999).

[152] *Id.* at paras. 16, 18, 23-24, 28-29.

[153] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Restructuring the Control Machinery Established Thereby, art. I, Jan. 11, 1998, Eur. T.S. No. 155.

[154] Pialopoulos v. Greece, App. No. 37095/97, 33 Eur. H.R. Rep. 977, paras. 10-12 (2001).

[155] ICCPR, *supra* note 1, at art. 27 (providing that members of minority groups "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.").

Covenant on Civil and Political Rights in a broad manner to encompass resource and land rights:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.... The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[156]

The invocation of Art. 27 presents the matter under the rubric of the right to cultural life rather than the right to physical life, even though the survival of the group, *qua* group, may be at stake. In a rare case decided on the merits, the Committee decided that Art. 27 was not violated by the extent of stone-quarrying permitted by Finland in traditional lands of the Sami.[157] The Committee explicitly rejected the European doctrine of margin of appreciation, holding that measures whose impact amounts to a denial of the right to culture will not be compatible with the Covenant, although those which simply have a "certain limited impact on the way of life of persons belonging to a minority" will not necessarily violate the treaty.[158] The Committee concluded that the amount of quarrying which had taken place did not constitute a denial of the applicants' right to culture. It noted that they were consulted and their views taken into account in the government's decision. Moreover, the Committee determined that measures were taken to minimize the impact on reindeer herding activity and on the environment. In regard to future activities, "if mining activities in the Angeli area were to be approved on a large scale and significantly expanded" then it might constitute a violation of Art. 27.[159] According to the Committee, "[t]he State party is under a duty to bear this in mind when either extending existing contracts or granting new ones."[160]

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[156] U.N. Human Rights Comm. General Comment No. 23, *The Rights of Minorities*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, paras. 7, 9 (Aug. 8, 1994).

[157] U.N. Human Rights Comm., *Ilmari Lansman v. Finland, Communication No. 511/1992: Finland*, U.N. Doc. CCPR/C/52/D/511/1992, para. 10 (Nov. 8, 1994).

[158] *Id.* at para. 9.4.

[159] *Id.* at para. 9.8.

[160] *Id.* at para. 9.8. Other cases involving Sami reindeer breeders include O.Sara. v. Finland and Länsman v. Finland. *See* U.N. Human Rights Comm., O. Sara v. Finland, *Communication No. 431/1990: Finland*, U.N. Doc. CCPR/C/50/D/431/1990 para. 2(1) (Mar. 24, 1994); U.N. Human Rights Comm., Länsman v. Finland, *Communication No. 671/1995: Finland*, U.N. Doc. CCPR/C/58/D/671/1995 para. 2(1) (Nov. 22, 1996).

The balance between minority rights and protection of marine living resources was at stake in *Apirana Mahuika v. New Zealand.*[161] The petitioners claimed violations of the rights of self-determination, right to a remedy, freedom of association, freedom of conscience, non-discrimination, and minority rights as a result of New Zealand's efforts to regulate commercial and non-commercial fishing after a dramatic growth of the fishing industry. The government and the Maori, whose rights are guaranteed by the Treaty of Waitangi, executed a Deed of Settlement in 1992 to regulate all fisheries issues between the parties. The authors of the communication represented tribes and sub-tribes that objected to the Settlement, contending that they had not been adequately informed and that the negotiators did not represent them. The government acknowledged its duty to ensure recognition of the right to culture, including the right to engage in fishing activities, but argued that the Settlement met the obligation because the system of fishing quotas reflected the need for effective measures to conserve the depleted inshore fishery, carrying out the government's "duty to all New Zealanders to conserve and manage the resource for future generations... based on the reasonable and objective needs of overall sustainable management."[162] The Human Rights Committee held for the government and emphasized:

> [T]he acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.[163]

The process of consultation undertaken by the government complied with this requirement, because the government paid special attention to the cultural and religious significance of fishing for the Maori.

The case law of the Inter-American human rights system has contributed considerably to recognizing the rights of indigenous peoples in respect to their environmental and natural resources. The case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* decided by the Inter-American Court of Human Rights, involved the protection of Nicaraguan forests in lands traditionally owned by the Awas Tingni.[164] The case originated as an action against government-sponsored logging of timber on native lands by Sol del Caribe, S.A. (SOLCARSA), a subsidiary of the Korean company Kumkyung Co. Ltd.. The government granted SOLCARSA a logging concession without consulting the Awas Tingni community, although the government had agreed to consult them subsequent to granting an earlier concession. The Awas Tingi filed a case at the Inter-American Commission, alleging that the government violated their rights to cultural integrity,

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[161] *See* U.N. Human Rights Comm., Apirana Mahuika v. New Zealand, *Communication No. 547/1993: New Zealand,* U.N. Doc. CCPR/C/70/D/547/1993 para. 5(3) (Nov. 15, 2000).

[162] *Id.* at para. 7.5.

[163] *Id.* at para. 9.5.

[164] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No.79, para. 140 (Aug. 31, 2001).

religion, equal protection and participation in government. The Commission found in 1998 that the government had violated the human rights of the Awas Tingni and brought the case before the Court on June 4, 1998, alleging violation by Nicaragua of Arts. 1, 2, 21 and 15 of the American Convention, due to the state's failure to demarcate and to grant official recognition to the territory of the community. The Commission requested that the Court award compensation.

On August 31, 2001, the Court issued its judgment on the merits and reparations. The Court decided by 7 votes to 1 to declare that the state violated the Convention right to judicial protection (Art. 25) and the right to property (Art. 21). It unanimously declared 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 the demarcation of the indigenous lands, the state was instructed to 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 Awas Tingni lands. By a vote of 7 to 1, the Court also declared that the state must invest US $50,000 in public works and services of collective benefit to the Awas Tingni as a form of reparations for non-material injury and US $30,000 for legal fees and expenses.[165]

The *Maya Indigenous Communities and their Members v. Belize*[166] case claimed that the state violated the rights of Mayan communities in relation to their lands and natural resources by granting numerous concessions for logging and oil development. The petition alleged that the state's actions violate rights guaranteed by the American Declaration on the Rights and Duties of Man: the right to life, the right to equality before the law, the right to religious freedom and worship, the right to a family and protection thereof, the right to the preservation of health and to well-being, the right to judicial protection, the right to vote and to participate in government, and the right to property. Although a case had been filed in Belize to stop the logging and to affirm Mayan rights to the land and resources, no judgment had been issued after more than three and a half years. Negotiations aiming at a friendly settlement were unsuccessful. The Commission found violations of the right to property, equal protection under the law, and the right to judicial protection.

The Inter-American Commission's *Third Report on the Situation in Paraguay*[167] addressed environmental protection in Chapter V on Economic, Social and Cultural Rights and in Chapter IX on the Rights of Indigenous Peoples. The Commission expressed concern about lack of protection for the habitats of indigenous groups, specifically referring to deforestation and ecological

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[165] *Id.* at paras. 167-69.

[166] Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 1 (2004).

[167] Inter-Am. C.H.R., *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110, doc. 52, (2001),

degradation, contrary to the provisions of Art. 64 of the Paraguayan Constitution. According to complaints received, "[t]he environment is being destroyed by ranching, farming, and logging concerns, who reduce the [indigenous people's] traditional capacities and strategies for food and economic activity."[168] In addition to pointing to the deforestation, the Commission noted that the waters had been polluted and hydroelectric projects had flooded traditional lands and destroyed a unique system of islands that contained invaluable biodiversity. The Commission recommended that the state "[a]dopt the necessary measures to protect the habitat of the indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities."[169]

III. THE RIGHT TO A SAFE AND HEALTHFUL ENVIRONMENT

The concept of a right to a healthy and safe environment has generated debate and contradictory developments since the first efforts were made to use international human rights law and procedures to enhance environmental protection. Clearly, not every social problem must result in a claim becoming expressed as a human right and there remains disagreement even about some of the human rights already enunciated. The volume of the debate increases when further claims are formally proposed for addition to the list of guaranteed human rights. Nonetheless, the recognition that human survival depends upon a safe and healthy environment places the claim of a right to environment fully on the human rights agenda. Moreover, recognizing a right to environment could encompass elements of nature protection and ecological balance, substantive areas not generally protected under human rights law because of its anthropocentric focus.

An immediate, practical objective of international human rights law is to gain international recognition of specific human rights. Successfully placing personal entitlements within the category of individual human rights preserves them from the ordinary political process.[170] Individual rights thus significantly limit the political will of a democratic majority, as well as a dictatorial minority. In attempting to attain a widely accepted policy goal, even a representative democracy may not produce legislation that e.g. limits or abolishes the individual right to be free from cruel, inhuman, or degrading treatment or punishment. This absolute limitation on domestic political decisions is potentially an important consequence of elaborating a right to environment, particularly given the high short-term costs involved in many environmental protection measures and the resulting political disfavor they experience.

Ultimately, the definition of a right to environment would have to include substantive environmental standards to restrict harmful air pollution and other types of emissions. Although establishing quality standards requires extensive international regulation of environmental sectors based upon impact studies, such

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[168] *Id.* at ch. IX, para. 38.

[169] *Id.* at ch. IX, para. 50.

[170] In most legal systems, human rights are of constitutional status and override ordinary legislative or executive acts.

regulation is by no means impossible. Adoption of quality standards demands extensive research and debate involving public participation, but substantive minima are a necessary complement to the procedural rights leading to informed consent. Otherwise, a human rights approach to environmental protection would be ineffective in preventing serious environmental harm.

Establishing the content of a right through reference to independent and variable standards is often used in human rights, especially with regard to economic entitlements, and needs not be a barrier to recognition of the right to a specific environmental quality. Rights to an adequate standard of living and to social security are sometimes defined in international accords such as the European Social Charter or Conventions and Recommendations of the International Labor Organization. States implement these often flexible obligations according to changing economic indicators, needs, and resources. The human rights treaties provide a "framework" containing the basic guarantees on which international, national and local laws and policies are elaborated.

A similar approach can be utilized to give meaning to a right to environment. Both the threats to humanity and the resulting necessary measures are subject to constant change based on advances in scientific knowledge and conditions of the environment. Thus, it is impossible for a human rights instrument to specify precisely what measures should be taken, i.e., the products which should not be used or the chemical composition of air which must be maintained. These technical requirements can be negotiated and regulated through international environmental norms and standards, giving content to the right to environment by reference to independent environmental findings and regulations capable of rapid amendment. The variability of implementation demands imposed by the right to environment in response to different threats over time and place does not undermine the concept of the right, but merely takes into consideration its dynamic character.

More than 100 constitutions throughout the world guarantee a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources.[171] Over half of the constitutions, including nearly all adopted since 1992, explicitly recognize the right to a clean and healthy environment.[172] Ninety-two

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[171] *See e.g.*, CONSTITUTIONAL LAW OF THE REPUBLIC OF ANGOLA art. 24(1) (providing "[a]ll citizens shall have the right to live in a healthy and unpolluted environment."); CONSTITUTION OF THE ARGENTINE NATION art. 41(1) (providing "[a]ll inhabitants are entitled to the right to a healthy and balanced environment fit for human development . . ."); CONSTITUTION OF THE AZERBAIJAN REPUBLIC art. 39(1) (providing "[e]veryone has the right to live in a healthy environment."); CONSTITUTION OF BRAZIL art. 225 (providing "[a]ll persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life . . .").

[172] EARTHJUSTICE, HUMAN RIGHTS AND THE ENVIRONMENT 30 *available at* http://www.earthjustice.org/library/references/2004UNreport.pdf. Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, El Salvador, Ethiopia, Finland, Georgia, Honduras, Hungary, Kyrgyzstan, Latvia, Macedonia, Mali, Moldova, Mongolia, Mozambique, Nicaragua, Niger, Norway, Paraguay, Philippines, Portugal, Russia, Sao Tome and

constitutions impose a duty on the government to prevent harm to the environment.[173] Within federal systems, including those whose federal constitution lacks mention of the environment, state or provincial constitutions contain environmental rights.[174]

The constitutional rights granted are increasingly being enforced by courts.[175] In India, for example, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi.[176] In some instances, the courts issued orders to cease operations.[177] The Indian Supreme Court has based the closure orders on the principle that health is of primary importance and that residents are suffering from health problems due to pollution. South African courts also have deemed the right to environment to be justiciable.[178] In Argentina, the right is deemed a subjective right entitling any person to initiate an action for environmental protection.[179] Colombia also recognizes the

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Principe, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Tajikistan, Togo, Turkey, Ukraine, Yugoslavia. In addition to these, the constitutions of Comoros and Guatemala recognize a right to health that is not explicitly tied to the state of the environment.

[173] *Id.* at 30. Andorra, Angola, Argentina, Armenia, Bahrain, Belarus, Benin, Bolivia, Brazil, Bulgaria, Cambodia, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi, Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Palau, Panama, Papa New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.

[174] P.A. CONST. art. I, § 27 (providing that "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." For a commentary see, John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II -- Environmental Rights and Public Trust*, 104 DICK. L. REV. 97 (1999); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I -- An Interpretative Framework for Article I, Section 27* 103 DICK. L. REV. 693 (1999).

[175] For a discussion of African cases, see Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL L. 131 (2001).

[176] Dr. Jona Razaque, *Background Paper Number 4: Human Rights and the Environment: The National Experience of South Asia and Africa* (2002) *available at* http://www.unhchr.ch/environment/bp4.html. As early as 1991, the Supreme Court interpreted the right to life guaranteed by Art. 21 of the Constitution to include the right to a wholesome environment. In a subsequent case, the Court observed that Article 21's guarantee of right to life includes the right to enjoy pollution-free water and air.

[177] *See, e.g., M.C. Mehta v. Union of India (Calcutta Tanneries Matter)*, (1997) [Supreme Court] 2 SCC 441, para. 20, *available at* http://www.elaw.org/resources/printable.asp?id=1043.

[178] Anna R. Welch, *Access to Water: Obligations of State and Non-State Actors Regarding the Human Right to Water under the South African Constitution*, SUSTAINABLE DEV. L. & POL'Y 58, 58-61 (2005).

[179] Adriana Fabra & Eva Arnal, *Background Paper Number 6: Review of Jurisprudence on Human Rights and the Environment in Latin America* (2002) *available at* http://www.ohchr.org/english/issues/environment/environ/bp6.htm (discussing Argentinian jurisprudence, the case of Kattan v. National Government, and the case of *Irazu Margarita v. Copetro S.A.*, in which the court stated that a fundamental right is the right to live in a healthy and balanced

enforceability of the right to environment.[180] 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.[181]

Most international human rights instruments were drafted before the emergence of environmental law as a common concern and, as a result, do not mention the environment. On the global level the U.N. Convention on the Rights of the Child, Art. 24, is unique in speaking of the provision of clean drinking water and the dangers and risks of pollution.[182] At present no global human rights treaty proclaims a general right to environment.

On the regional level, the African Charter on Human and Peoples' Rights was the first international human rights instrument to contain an explicit guarantee of environmental quality (Art. 24).[183] Subsequently, the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights included the right of everyone to live in a healthy environment (Art. 11).[184] In Europe, neither the European Convention for the Protection of Human Rights and Fundamental Freedoms nor the European Social Charter contains a right to environmental quality, and the former European Commission on Human Rights held that such a right cannot be directly inferred from the Convention. Also within Europe, the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine[185] takes a human rights approach to biotechnology, but does not mention environmental protection. Concerned with human dignity and respect for the human being, the Convention requires prior informed consent before there is any intervention in the health field.

Given the innovations in Africa, it is probably appropriate that the African Commission on Human and Peoples' Rights should be the first international human rights body to decide a contentious case involving violation of the right to a general satisfactory environment. The case is a landmark not only in this respect, but also in the Commission's articulation of the duties of governments in Africa to

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environment and warned that aggression to the environment ends up threatening life itself, as well as the psychological and physical integrity of the person).

[180] *Id.* (citing *Fundepublico v. Mayor of Bugalagrande*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991, in which the court stated that "It should be recognized that a healthy environment is a *sina qua non* condition for life itself and that no right could be exercised in a deeply altered environment.").

[181] *Id.*

[182] United Nations Convention on the Rights of the Child, *supra* note 67, at art. 24.

[183] African Charter, *supra* note 39, at art. 24.

[184] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 14, 1988, 28 I.L.M. 156. (guaranteeing the right to a healthy environment in Art. 11: "(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services; (2) The States Parties shall promote the protection, preservation and improvement of the environment"). Art. 11 is not, however, one of the rights in the Protocol that is subject to the petition procedure established by the American Convention. *See* Dinah Shelton, *Environmental Rights, in* PEOPLES' RIGHTS 185 (Philip Alston ed., 2001).

[185] Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 4, 1997, 36 I.L.M. 817.

monitor and control the activities of multinational corporations. Acting on a petition filed by two non-governmental organizations on behalf of the people of Ogoniland, Nigeria, the African Commission on Human and Peoples' Rights found Nigeria had breached its obligations to respect, protect, promote, and fulfill rights guaranteed by the African Charter on Human and Peoples' Rights.[186] The Commission held that Nigeria had violated the right to enjoy Charter-guaranteed rights and freedoms without discrimination (Art. 2), the right to life (Art. 4), the right to property (Art. 14), the right to health (Art. 16), the right to housing (implied in the duty to protect the family (Art. 18(1)), the right to food (implicit in Arts 4, 16, and 22), the right of peoples to freely dispose of their wealth and natural resources (Art. 21), and the right of peoples to a "general satisfactory environment favorable to their development" (Art. 24).[187] Most of the violations stemmed from actions taken by or involving the Nigerian National Petroleum Development Company (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC).[188]

The Communication alleged that the military government of Nigeria was involved in oil production through NNPC in consortium with SPDC and that the operations produced contamination causing environmental degradation and health problems; that the consortium disposed of toxic wastes in violation of applicable international environmental standards and caused numerous avoidable spills near villages, consequently poisoning much of the region's soil and water; that the government aided these violations by placing the state's legal and military powers at the disposal of the oil companies; and that the government executed Ogoni leaders and, through its security forces, killed innocent civilians and attacked, burned, and destroyed villages, homes, crops, and farm animals. The Communication also alleged that the government failed to monitor the activities of the oil companies, provided no information to local communities, conducted no environmental impact studies, and prevented scientists from undertaking independent assessments.

Assessing the claimed violations of the rights to health (Art. 16) and to a general satisfactory environment (Art. 24), the Commission found that the right to a general satisfactory environment imposes clear obligations upon a government, requiring the state "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."[189] Moreover:

> [g]overnment compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting

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[186] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Case No. ACHPR/COMM/A044/1, paras. 1-9, 69 (Afr. Comm'n Hum. & Peoples' Rts. May 27, 2002), *available at* http://www.umn.edu/humanrts/africa/comcases/allcases.html.

[187] *Id* at para. 69.

[188] *Wiwa v. Royal Dutch Petroleum, Co.*, 226 F.3d 88 (2d Cir. 2000). This lawsuit was directed against Shell for its involvement in these activities.

[189] *The Social and Economic Rights Action Center, supra* note 186, at para. 52.

> independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[190]

Applying these obligations to the facts of the case, the Commission concluded that although Nigeria had the right to produce oil, it had not protected the Article 16 and Article 24 rights of those in the Ogoni region.[191]

The Commission found numerous other rights violated, as well, and concluded its analysis by emphasizing that collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa, that the Commission intended to apply them, and that "there is no right in the African Charter that cannot be made effective."[192] While governments may labor under difficult circumstances in trying to improve the lives of their peoples, they must reconsider their relationships with multinational corporations if these relationships fail to be mindful of the common good and of the rights of individuals and communities. The Commission gave the right to environment meaningful content by requiring the state to adopt various techniques of environmental protection, such as environmental impact assessment, public information and participation, access to justice for environmental harm, and monitoring of potentially harmful activities. The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights.[193]

On the global level, a number of non-binding instruments include references to environmental rights or a right to an environment of a specified quality. In 1988, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, considering the question of the movement of toxic and dangerous products and wastes, adopted resolution 1988/26 which refers to the right of all peoples to life and the right of future generations to enjoy their environmental heritage. It notes that the movement and dumping of toxic and dangerous products endangers basic human rights, including the right to live in a sound and healthy environment.

During its 1989 session, the Sub-Commission added the topic of human rights and the environment to its agenda, adopting a resolution to undertake a study of the environment and its relation to human rights. The Human Rights Commission,

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[190] *Id.* at para. 53.

[191] *Id.* at para. 54.

[192] *Id.* at para. 68.

[193] The Inter-American Commission on Human Rights has adopted a similar approach in the context of countrywide studies of the human rights performance of OAS member states. *See Report on the Situation of Human Rights in Ecuador*, *supra* note 95; *Report on the Situation of Human Rights in Brazil*, *supra* note 96.

influenced in part by preparations for UNCED, approved the Sub-Commission decision on March 15, 1990.[194] The Sub-Commission thereupon appointed a Special Rapporteur who presented reports on the subject between 1991 to 1994.[195] In her 1993 report, the Special Rapporteur left open the question of the preparation of a new international instrument on the right to a satisfactory environment or environmental rights. However, the report acknowledged such a right in its discussion, integrating it with a right to development, with action to ensure the enjoyment of all human rights, and with a right to prevention of environmental harm.

The Special Rapporteur annexed a set of Draft Principles on Human Rights and the Environment to her final report in 1994. The Human Rights Commission decided to request a report of the Secretary General on the issues raised by the report and Draft Principles, based on the comments of states, intergovernmental and non-governmental organizations. The Secretary-General submitted reports in 1997 and 1998. At its 1998 session, the Commission decided to appoint a review committee to submit a revised version of the Draft Declaration. More recently, in Res. 2001/65, the U.N. Human Rights Commission affirmed that "a democratic and equitable international order requires, inter alia, the realization of... [t]he right of every person and all peoples to a healthy environment."[196] The Commission's resolutions on toxic and dangerous wastes similarly refer consistently to the human rights to life, health and a sound environment for every individual and affirm that illicit traffic in and dumping of toxic and dangerous products and wastes is a serious threat to these rights.[197]

IV. CONCLUSIONS AND RECOMMENDATIONS

The interrelationship between human rights and environmental protection is undeniable. Human rights depend upon environmental protection, and environmental protection depends upon the exercise of existing human rights such as the right to information and the right to political participation. Despite this common core, the two topics remain distinct. Environmental protection probably cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program. Also, some human rights are not directly affected by environmental considerations, e.g. the right to a name or to be free from *ex post facto* laws. Moreover, without the link of property or privacy, health, conscience or association, it is difficult to see human rights tribunals moving more broadly into nature protection, given the current human rights

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[194] The United States and Japan both abstained on the resolution, stating that environmental issues should be dealt with exclusively by environmental bodies.

[195] Dr. Adriana Farba, *Background Paper 3: The Intersection of Human Rights and Environmental Issues: A Review of Institutional Developments at the International Level* (2002), *available at* http://www.ohchr.org/english/issues/environment/environ/bp3.htm.

[196] U.N. Comm'n on Human Rights, *Promotion of a Democratic and Equitable International Order*, U.N. Doc. E/CN.4/2003/L.11/Add., art. 4(l) (Apr. 24, 2003).

[197] U.N. Comm'n on Human Rights, *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, U.N. Doc. E/CN.4/2003/L.11/Add.3, pmbl. (Apr. 22, 2003).

catalogue. Neither scenic areas, flora and fauna, nor ecological balance are viewed as part of the rights to which humans are entitled, absent explicit recognition of the right to a specific environment. No doubt debate will continue over whether such a recognition serves to enhance environmental protection or simply to further the anthropocentric, utilitarian view that the world's resources exist solely to further human well-being.

If a right to environment becomes widely accepted as part of the human rights catalogue, there remains the problem of balancing it with other human rights. The General Assembly has pronounced itself many times on the indivisibility, interdependence, interrelatedness, and universality of all human rights.[198] In December 1997 it reiterated its conviction of this reality and emphasized that transparent and accountable governance in all sectors of society, as well as effective participation by civil society, are an essential part of the necessary foundations for the realization of sustainable development.[199] Yet, the possibility of collision or conflict between rights cannot be avoided. For example, among the human rights guaranteed by international law is the right of each family to decide on the number and spacing of their children. Demographic pressures have been recognized as a threat to environmental quality and economic development, leading to demands that national birthrates be lowered to achieve sustainable development.[200] The possibility that some human rights may be limited to achieve the right to environment is seen in the Constitution of Ecuador where Art. 23 establishes "the right to live in an environment free from contamination."[201] 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."[202] As noted by the Inter-American Commission on Human Rights, the Constitution thus establishes a hierarchy according to which environmental protection may have priority over other entitlements.

Human health may be seen as the most significant 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 health and kills and thus not only destroys the environment, but infringes human rights as well. From the perspective of the law

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[198] World Conference on Human Rights, June 14-25, *Vienna Declaration and Program of Action*, U.N. Doc. A/CONF.157/24 para. 5 (1993).

[199] G.A. Res. 52/136, at 2, U.N. Doc. A/RES/52/136 (Mar. 3, 1998) *available at* http://www.un.org/Depts/dhl/resguide/r52.htm.

[200] *See*, Report of the International Conference on Population and Development, Cairo, September 5 - 13, 1994, U.N. Pub. E.95.XIII.18.

[201] CONSTITUCION POLITICA DE LA REPUBLICA DEL ECUADOR, art. 23.

[202] *Id.*

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 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.

NGOs and individuals concerned with environmental deterioration and its impact on the enjoyment of human rights may consider some of the following strategies for furthering consideration of this issue by states and international organizations.

1. Review state reports to human rights bodies to see whether there is information about environmental conditions as they affect the enjoyment of guaranteed rights. Prepare a shadow report and present it to the relevant human rights body as well as to the state. Appear when the state report is scheduled for review by the human rights body.

2. Develop better interdisciplinary fact-finding and modeling to demonstrate the causal links between environmental deterioration and the enjoyment of human rights. In particular work to establish the links between water and air pollution and enjoyment of the right to health.

3. Build on the *Öneryildiz* and similar cases to emphasize risk analysis and dissemination of information as a part of the right to life and other substantive human rights.

4. Lobby the United Nations Human Rights Commission (or newly created Council) for adoption of the Draft Declaration on Human Rights and the Environment.

5. Continue litigating before national, regional and global human rights bodies whenever resource use and/or pollution threatens the enjoyment of substantive or procedural environmental rights.

6. Create and maintain a data base of national cases enforcing environmental rights.