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DRAFT PAPER ON:

**Human Rights and Environment: Past, Present and Future Linkages and the Value
of a Declaration**

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***Human Rights and Environment:
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Introduction

International awareness of the linkages between human rights and environmental protection has expanded considerably since conservation of the environment became a matter of national and international concern some two decades after human rights emerged on the international agenda. The international community has adopted a considerable array of international legal instruments, and created specialized organs and agencies at the global and regional levels to respond to identified problems in human rights and environmental protection, although often addressing the two topics in isolation from one another.

The links between the two subjects were apparent at least from the first international conference on the human environment, held in Stockholm in 1972. At the Stockholm concluding session, the linkage was reflected in the preamble of the concluding declaration, wherein the participants proclaimed that

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.¹

Principle 1 of the *Stockholm Declaration* established a further foundation for linking human rights and environmental protection, declaring that

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.

In resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment.

Over time, different approaches have emerged to explain how the two subjects interrelate and the legal consequences that flow from linkages between them. The various analyses have helped to demonstrate that a rights-based approach to environmental protection offers benefits in law and may serve as a foundation for public policies that conserve and protect the resource base and ecological processes on which all life depends.

Many human rights tribunals and experts take an approach similar to that of the Stockholm Declaration and understand environmental protection as a pre-condition to the enjoyment of several internationally-guaranteed human rights, especially the rights to life and health. Environmental protection is thus seen as an essential instrument subsumed in or a prerequisite to the effort to

¹ Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/CONF.48/14/Rev.1 at 3 (1973).

secure the effective enjoyment of human rights. In this sense, the General Assembly has called the preservation of nature “a prerequisite for the normal life of man.”²

International environmental agreements, especially since 1992, more commonly consider certain human rights as essential elements to achieving environmental protection. This approach is well-illustrated by the *Rio Declaration on Environment and Development*, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development. Principle 10 formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.” These procedural rights, contained in all human rights instruments, are thus adopted in environmental texts in order to have better environmental decision-making and enforcement.

Still other legal texts and authors proclaim the existence of a right to a safe and healthy environment as an independent substantive human right. At present, examples of this in positive law are found predominately in national constitutions and in regional human rights treaties. Such formulations of the right to environment qualify the phrase by words such as “healthy”, “safe”, “secure” or “clean.”

There are other legal mechanisms utilized to achieve environmental protection that are not rights-based. Economic incentives and disincentives, criminal law, and private liability regimes have all formed part of the framework of international and national environmental law. An emphasis on responsibilities rather than rights echoes the language of legal instruments that emphasize the duty of each person to protect and improve the environment for present and future generations as well as those that affirm the duty of each individual to promote and observe internationally-guaranteed human rights.³

Rights-based approaches are preferable, however, because human rights are maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will. All legal systems establish a hierarchy of norms. Constitutional guarantees usually are at the apex and “trump” any conflicting norm of lower value. Thus, to include respect for the environment as a constitutional right ensures that it will be given precedence over other legal norms that are not constitutionally-based. In addition, the moral weight afforded by the concept of rights as inherent attributes that must be respected in any well-ordered society exercises an important compliance pull. Finally, as several of the contributions to this publication attest, at the international level, enforcement of human rights law is more developed than are the procedures of international environmental law. The availability of individual complaints procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.

² GA Res. 35/48 of 30 Oct. 1980.

³ See, e.g., Universal Declaration of Human Rights, Pmb1, art. 1, art. 29; International Covenant on Economic, Social and Cultural Rights, (16 Dec. 1966), 993 U.N.T.S. 3, Pmb1 (“the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”), art. 5.

Environmental Concerns Expressed in Human Rights Texts

There are few explicit references to environmental matters in international human rights instruments, because most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 16 Dec. 1966), contains a right to health in article 12 that expressly calls on states parties to take steps for “the improvement of all aspects of environmental and industrial hygiene.” The *Convention on the Rights of the Child* (20 Nov. 1989) refers to aspects of environmental protection in Article 24, which provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” (Art. 24(2)(c)).

The links between environmental protection and human rights links have been discussed extensively in respect to the rights of indigenous peoples. *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., arts. 2, 6, 7, 15). The *UN Declaration on the Rights of Indigenous Peoples*, adopted by General Assembly Resolution 61/295 on 13 September 2007, contains similar guarantees.

The United Nations has not approved any general normative instrument on environmental rights, although the UN Human Rights Commission has had under consideration since 1994 a draft declaration on human rights and the environment. In addition, the Commission adopted several resolutions before its demise linking human rights and the environment, such as Res. 2005/60, entitled *Human rights and the environment as part of sustainable development*. The resolution called on states “to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development and reaffirmed, in this context, that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.” The resolution emphasized the needs of the vulnerable members of society and also encouraged efforts towards the implementation of the Rio Declaration on Environment and Development.

Two regional human rights treaties contain specific provisions on the right to environment. The *African Charter on Human and Peoples’ Rights*, (Banjul 26 June 1981), Article 16, guarantees to every individual the right to enjoy the best attainable state of physical and mental health while Article 24 adds that “All peoples shall have the right to a general satisfactory environment favorable to their development.” The *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*,⁴ also contains a right to environment in its Article 11, which proclaims that “Everyone shall have the right to live in a healthy environment and to have access to basic public services” and that the States Parties shall promote the protection, preservation and improvement of the environment. Also at the regional level, the preambles of European Community directives often state their aim as being “to protect human health and the environment.”⁵

⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, Nov. 17, 1988, OAS T.S. 69).

⁵ EC Council Directive No. 85/201 on Air Quality Standards for Nitrogen Dioxide, 7 Mar. 1985, L 87 O.J.E.C. (1985); EC Council Directive No. 80/779 on Air Quality Limit Values, 15 July 1980, L 229, O.J.E.C. 30 (1980).

Human Rights in Environmental Texts

Among texts concerned with environment and development, article 1 of the *Legal Principles for Environmental Protection and Sustainable Development*, adopted by the Expert Group of the Brundtland Commission, affirms that “All human beings have the fundamental right to an environment adequate for their health and well-being.”⁶ The *Rio Declaration on Environment and Development* proclaims that human beings “are entitled to a healthy and productive life in harmony with nature” (Principle 1) and provides that states should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that, *inter alia*, are found to be harmful to human health (Principle 14).

Environmental agreements generally have perceived the linkages between their aims and human rights in terms of procedural rights. Human rights law also has tended to afford procedural human rights significant attention in legal instruments,⁷ jurisprudence,⁸ and in doctrine.⁹ The focus on procedural rights has been based in part on political caution, at least at the international level. Advocates expressed concern that efforts to guarantee and enforce substantive environmental rights might be unsuccessful and the focus should thus be on the more modest aim of ensuring correct procedures in decision-making.¹⁰ Indeed, the claim of a human right to environmental quality has met resistance. Critics, including some governments, argue that such a right cannot be given content and that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental conditions.¹¹

⁶ Legal Principles for Environmental Protection and Sustainable Development, adopted by the Experts Groups on Environmental Law of the World Commission on Environment and Development (WCED), 18-20 June 1986, U.N. Doc. WCED/86/23/Add. 1 (1986), art. 1.

⁷ Most environmental agreements now contain provisions calling for public information and participation. See, e.g., Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, June 21, 1993), Art.13-16; North-American Agreement on Environmental Cooperation (September 13, 1993), Art. 2(1)(a); International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, June 17, 1994), Preamble, Arts. 10(2)(e), 13(1)(b), 14(2), 19 and 25; Convention on Co-operation and Sustainable Use of the Danube River (Sofia, June 29, 1994), Art.14; Protocol on Water and Health to the 1992 Convention on the Protection and use of Transboundary Watercourses and International Lakes (London, June 17, 1999), Art. 5(i); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, January 29, 2000), Art. 23. See in particular, the Aarhus Convention, *supra* note 3.

⁸ See, e.g. *Apirana Mahuika et al v. New Zealand*, Comm. No. 547/1992, CCPR/C/70/D/547/1993, views issued Nov. 16, 2000, in which the Human Rights Committee found no violation of Maori fishing rights, emphasizing that they had the opportunity to participate in the decision-making process relating to the fishing measures adopted.

⁹ See, e.g., Sumudu Atapattu, *The Right to a Healthy Life or the Right To Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 72-73 (2002).

¹⁰ See e.g., A.-Ch. Kiss, *Peut-on définir le droit de l'homme à l'environnement?* 1976 REV. JURIDIQUE DE L'ENVIRONNEMENT 15; A. Ch. Kiss, *Le droit à la conservation de l'environnement*, 2 REV. UNIV. DES DROITS DE L'HOMME 445 (1990); A. Ch. Kiss, *An introductory note on a human right to environment*, in E. BROWN WEISS, ed., ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW (UNU Tokyo, 1992) 551.

¹¹ See, e.g. Gunther Handl, *Human Rights and Protection of the Environment: A Mildly Revisionist View*, @ in A.A. CANCADO-TRINDADE, ed., HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION (IIDH, San Jose, Costa Rica, 1992); ALAN BOYLE AND MICHAEL ANDERSON, eds. HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Clarendon Press Oxford, 1996).

Some proponents of procedural rights also may have held an overly optimistic view that a fully-informed public with rights of participation in environmental decision-making, and access to remedies for environmental harm would ensure a high level of environmental protection. Such a beneficial outcome may result, but it cannot always be assured.¹² Democratic states as well as dictatorial regimes have adopted laws at different moments in history that have denied or restricted the enjoyment of human rights. In a democracy, such results can occur despite an informed public and an adherence to democratic process. In the environmental field, well-known problems of achieving environmental protection in the face of short term economic costs, as well as scientific uncertainty or the perception thereof, make reliance on procedure alone insufficient to ensure a safe, healthy or ecologically-sound environment.¹³ Human rights law, on the other hand, enshrined in international and constitutional law, sets limits for majority rule in addition to providing guarantees against dictatorial repression.

Among the many international agreements utilizing procedural human rights to achieve better environmental protection is the important regional *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, (Aarhus, June 25, 1998). The treaty takes a comprehensive approach. The Convention builds on prior texts, especially Principle 1 of the Stockholm Declaration, which it incorporates and strengthens. The Preamble forthrightly proclaims 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.” 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. These provisions are repeated in Article 1 where States parties agree to guarantee the rights of access to information, public participation, and access to justice. Article 19 opens the door to accession by States outside the ECE region, provided that they are members of the UN and that the accession is approved by the Meeting of the Parties of the Convention. Although environmental treaties generally do not establish petition procedures, there has been some movement in this direction.¹⁴

The Practice of UN Human Rights Bodies

Given the lack of international environmental complaint procedures, cases concerning the impact of environmental harm on individuals and groups have been brought to international human rights bodies. In addition, treaty bodies have sometimes addressed the intersection of human rights

¹² See Marc Paellemarts, *The Human Right to a Healthy Environment as a Substantive Right*, in HUMAN RIGHTS AND THE ENVIRONMENT 11, 15 (Maguelonne Dejeant-Pons & Marc Paellemarts eds., COE Strasbourg, 2002).

¹³ The danger of placing confidence in the decision-making process is illustrated by *Zander v. Sweden*, App. No. 14282/88, Eur. Ct. Hum. Rts [1993] Ser. A, No. 279B. The applicants complained about contamination of their well water by cyanide from a neighboring dump site. The municipality initially furnished temporary water supplies, but later, adhering to the normal regulatory procedures, the town raised the permissible level of cyanide in the city water supply. The permit for the dump was later renewed and expanded, while the applicant’s request for safe drinking water was denied. Ultimately, the applicant did win his human rights case on procedural grounds, because the European Court found that the applicant’s right of access to justice under Article 6 was violated. The applicants had been unable to obtain judicial review by Swedish courts of the board’s permitting decision, while under Swedish law, they were entitled as of right to seek precautionary measures against water pollution. By the time this decision was rendered, however, the pollution had already taken place and may have been irreversible.

¹⁴ See ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005.

and environmental protection in General Comments and have posed questions to states about the topic during their consideration of periodic state reports. The former United Nations Human Rights Commission appointed a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,¹⁵ conferring a mandate that included investigating complaints about such trade.¹⁶ In its resolutions on this matter, the Commission consistently recognized that such environmental violations “constitute a serious threat to the human rights to life, good health and a sound environment for everyone.”¹⁷

The Commission also named a Special Rapporteur on the right to food whose mandate included the issue of drinking water.¹⁸ The Commission specifically linked the issue of the right to food with sound environmental policies and noted that problems related to food shortages “can generate additional pressures upon the environment in ecologically fragile areas.” Like the mandate on toxic and hazardous wastes, the right to food mandate has been extended by the UN Human Rights Council. Other resolutions of the Commission similarly linked human rights and environmental protection, sometimes referring explicitly to the right to a safe and healthy environment.¹⁹

A human rights dimension has also emerged in the context of climate change discussions. Resolution 7/23 entitled “human rights and climate change”, adopted by the Human Rights Council in March 2008, expressed concern that “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights”. On 25 March 2009, the Council adopted resolution 10/4 “Human rights and climate change” in which it, *inter alia*, notes that “climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights ...”.

Regional and National Jurisprudence on Environmental Rights

Apart from the African Commission on Human and Peoples’ Rights, no international human rights tribunal monitors compliance with a treaty-based “right to environment” provision, because no such right was written into UN human rights treaties or the European²⁰ and American²¹ Conventions. Instead UN treaty bodies and the Inter-American and European tribunals, hear

¹⁵ Resolution 2001/35, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, E/CN.4/RES/2001/35.

¹⁶ See the Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, Addendum, Commission on Human Rights, E/CN.4/2001/55/Add.1 (21 Dec. 2000), documenting *inter alia* damage to tissues from arsenic poisoning, risks to health from the dumping of heavy metals, illnesses from pesticide use at banana plantations, deaths from petrochemical dumping, and kidney failure in children due to contaminated pharmaceuticals.

¹⁷ Commission on Human Rights, Resolutions 199/23 and 2000/72.

¹⁸ Resolution 2001/25, The right to food, E/CN.4/RES/2001/25 of 20 April 2001.

¹⁹ In Resolution 2001/65, entitled “Promotion of the Right to a Democratic and Equitable International Order, the Commission affirmed that “a democratic and equitable international order requires, *inter alia*, the realization of . . . [t]he right to a healthy environment for everyone.”

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention].

²¹ American Convention on Human Rights, 22 Nov. 1969, 1114 U.N.T.S. 123, O.A.S.T.S.No. 36 [hereinafter American Convention].

complaints about failures to enforce national environmental rights²² or about environmental degradation that violates one or more of the guaranteed rights in the agreements over which they have jurisdiction.²³ The general treaty interpretation rules of the Vienna Convention on the Law of Treaties,²⁴ especially Article 31(3), and interpretive principles developed by human rights tribunals to ensure the effective enjoyment of rights have proven particularly important in giving substance to environmental rights.

Human rights tribunals increasingly have given effect to various human rights linked to environmental protection by reference to international environmental principles, standards and norms. In addition, they have emphasized the importance of giving effect to national environmental rights provisions. In so doing they have brought about some convergence in the two fields, giving substantive content to environmental rights and corresponding state obligations. To give two examples, in its *Öneryıldız v. Turkey*²⁵ judgment, the European Court of Human Rights referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment²⁶ and the Convention on the Protection of the Environment through Criminal Law²⁷ despite the fact that the majority of member States, including the respondent State, had neither signed nor ratified the two Conventions. In the *Taşkın and Others v. Turkey*²⁸ case, the Court built on its case-law concerning Article 8 of the European Convention on Human Rights and Fundamental Freedoms in matters of environmental protection, largely on the basis of principles enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Turkey had not signed the Aarhus Convention.

Both national and international courts have used environmental law and science to give content to the level of environmental protection required by human rights law. This approach can involve reference to World Health Organization standards on acceptable emissions levels, incorporation of the precautionary principle to judge the adequacy of measures taken by a government, or reference to environmental treaties and declarations. The breadth of the search for standards depends in part on whether or not there is a textual guarantee of environmental quality and if there is, on the descriptions of that quality.

In the Western Hemisphere, the Inter-American Commission and Court have articulated the right to an environment at a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all inter-American normative instruments. In the cases presented to these institutions, applicants have asserted violations of the rights to life, health, property, culture, and access to justice, but some of them have also cited to guarantees of freedom of religion and respect for culture. The Commission's general approach to environmental

²² In many of the cases discussed *infra* the applicants cite to constitutional provisions guaranteeing the right to a safe and healthy or other quality environment. See, e.g. *Okyay v. Turkey*, App. No. 36220/97, Eur.Ct.H.R. Reports of Judgments and Decisions [hereinafter Reports] 2005-VII (12 July), 43 EHRR 788 (2006) and *Kyriatos v. Greece*, app. No. 4666/98, Reports 2003-VI (22 May)(extracts) discussed *infra* at notes 96 and 128.

²³ Most commonly invoked are the rights to life, health, property, culture, information, privacy, and home life. See Shelton, "Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?", 35 DENV. J. INT'L L. & POL'Y 129 (2006).

²⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, arts. 31 and 32.

²⁵ *Öneryıldız v. Turkey* (GC), Reports 2004-VI (30 Nov.)

²⁶ ETS no. 150 – Lugano, 21 June 1993.

²⁷ ETS no. 172 – Strasbourg, 4 November 1998.

²⁸ *Taşkın and Others v. Turkey*, no. 49517/99, §§ 99 and 119, 2004-X Eur. Ct. H.R. 145 (2005).

protection has been to recognize that a basic level of environmental health is not linked to a single human right, but is required by the very nature and purpose of human rights law:

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.²⁹

Similarly, using environmental standards, the European Court has given some indications of the quality of environment required to comply with the Convention's substantive guarantees. In its first major decision³⁰ involving environmental harm as a breach of the right to private life and the home, guaranteed by Article 8 of the European Convention, the European Court held that severe environmental pollution may affect individuals' "well-being" to the extent that it constitutes a violation of Article 8. The pollution need not reach the point of affecting health, if the enjoyment of home, private and family life are reduced and there is no fair balance struck between the community's economic well-being and the individuals effective enjoyment of guaranteed rights.³¹

The Court further explained the *Lopez Ostra* standard in *Fadayeva v. Russia*,³² noting that because "no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention," the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The requisite effects or interference need not reach the level of proven injury to health; it is enough if there are serious risks posed.³³ In *Fadayeva*, the applicant succeeded on her claim because she was made more vulnerable to various diseases, even though quantifiable harm to her health was deemed not proved; in addition, the Court found that her quality of life at her home was adversely affected.

When the applicant's claim of interference is inadequate or subsidiary to concerns that do not fall within the scope of Article 8, the claim will be rejected. In *Kyrtatos v. Greece*³⁴ the applicants complained of the noise and lights resulting from tourist development projects near their home. These complaints were not considered sufficiently serious to bring the case within the scope of Article 8, because the applicants had not asserted any deleterious consequences or serious impacts from the alleged pollution. The Court also seemed convinced, probably correctly, that the applicant's main claim concerned "interference with the conditions of animal life in the swamp." In the Court's view, such interference could not constitute an attack on the private or family life of the applicants. The Court referred to the fact that the applicants did not own the protected area. Thus, even though they alleged that the area, which adjoined their property, had lost all its scenic beauty

²⁹ Inter-Am.Comm.H.R., *Report on the Situation of Human Rights in Ecuador*, OAS doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1, April 24, 1997, at 92 [hereinafter Report on Ecuador].

³⁰ *Lopez Ostra v. Spain*, Eur. Ct. Hum. Rts [1994] Ser. A, No. 303C.

³¹ In *Powell & Raynor v. United Kingdom*, Eur. Ct.Hum.Rts [1990] Ser. A No. 172, the European Court found that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified as "necessary in a democratic society" for the economic well-being of the country and was acceptable under the principle of proportionality because it did not "create an unreasonable burden for the person concerned." The latter text could be met by the State if the individual had "the possibility of moving elsewhere without substantial difficulties and losses."

³² *Fadayeva v. Russia*, no. 55723/00, judgment of 9 June 2005, 2005/IV Eur. Ct.H.R. 255 (2005).

³³ The evidentiary issues in this case are discussed *infra* at section 3 C.

³⁴ *Kyrtatos v. Greece*, Application 41666/98, Reports 2003-VI (22 May)(extracts).

and had changed profoundly in character from a natural habitat for wildlife to a tourist development filled with noise and light, the Court denied the Article 8 claim, reasoning that

even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 sec. 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.³⁵

The Court has consistently held to the view that nature protection as such is not part of the Convention's guarantees. If such a guarantee exists under national law, however, there may be a separate claim for failure to enforce that law, as there was in this case.

In deciding the merits of admissible cases, the Court has cited to environmental instruments that refer to environmental quality. *Taşkin and Others v. Turkey*,³⁶ involved challenges to the development and operation of gold mine, which the applicants alleged caused environmental damage to the detriment of people in the region. Appropriate procedures had been followed; the challenge was to the substance of the decision taken. Applicants had litigated the issue and won in domestic courts. The Turkish Supreme Administrative Court repeatedly concluded that the operating permit in issue did not serve the public interest and that the safety measures which the company had taken did not suffice to eliminate the risks involved in such an activity. Before the European Court, the applicants alleged a violation of Article 8.

In reviewing the applicable legal framework, the Court referred to Rio Principle 10 and the Aarhus Convention, as they set forth procedural rights. In addition, however, the Court also quoted from a Parliamentary Assembly resolution on environment and human rights³⁷ that addressed the substantive issues in the case. The Assembly resolution recommended that member states ensure appropriate protection of life, health, family and private life, physical integrity and private property, taking particular account of the need for environmental protection, and that member states recognize a human right to a healthy, viable and decent environment. The latter includes the objective obligation for states to protect the environment in national laws, preferably at the constitutional level. Given this recommendation and the domestic Constitutional guarantees, the Court found a violation despite the absence of any accidents or incidents with the mine. The mine was deemed to present an unacceptable risk.

The European Court's application of environmental standards reached a new level in a chamber judgment delivered 27 January 2009 in the case of *Tatar v. Romania*. The case arose in the aftermath of an ecological disaster at a gold mine in Romania, which resulted in high levels of sodium cyanide and heavy metals being released into local freshwaters. The contaminated water passed into the Tisza River in Hungary and eventually into the Danube River, causing pollution as far as the Black Sea. After two Romanians, father and son, were unable to achieve any accountability or redress through Romanian administrative and penal procedures, they brought an

³⁵ Id. para. 53. On this point, the dissenting judge disagreed, unable to see a major difference between the destruction of a forest and the destruction of the extraordinary swampy environment the applicants had been able to enjoy near their house before the development projects.

³⁶ *Taşkin and Others v. Turkey*, App. No. 46117/99, 2004 Eur. Ct. Hum.Rts. 621 (10 Nov.).

³⁷ Parliamentary Assembly Recommendation 1614 (2003) of 27 June 2003. See also *Okyay and Others v. Turkey*, *supra*.

action in the European Court, alleging violations of Convention articles 2 and 8. The Court decided to proceed with the case solely under article 8. As in other cases, the Court made note of the right to a healthy and balanced environment under the Romanian Constitution and of the domestic law implementing this right. It focused in large part on the procedural rights to information, public participation and redress, but it also considered the substantive obligations of the government under international environmental standards. The Court relied on UNEP findings about the causes and consequences of the accident, as well as WHO determinations about the health consequences of exposure to sodium cyanide, placing heavy reliance on them in the absence of adequate domestic fact-finding. The Court referred to international standards on best practices for the mining industry and, significantly, quoted extensively from the Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development, and the Aarhus Convention. It also included an extract from the ICJ's *Gabčíkovo-Nagymaros* judgment about environmental protection, resolutions of the Parliamentary Assembly, and legal texts of the European Union. Two of its conclusions were particularly important. First, the European Court declared in this case that the precautionary principle has moved, on the European level, from being a philosophical concept to being a juridical norm with content to be applied. This means the government must take action to adopt reasonable and adequate measures capable of respecting the rights of individuals against serious risks to their health and well-being, even where scientific certainty is lacking. Secondly, the Court recalls to Romania the obligation under Stockholm Principle 21 and Rio Principle 14 to prevent significant transboundary harm, in noting that both Hungary and Serbia were affected by the mining accident. These international norms, the Court finds, should have been applied by the Romanian government. It is the first time the Court has made reference to this obligation. Sadly, having unanimously found a violation of article 8, the Court by a vote of five to two, rejected any compensatory damages for the applicants and awarded them only their costs of litigation.

Noise pollution cases often turn on compliance with local environmental laws. Where the state conducts inspections and finds that the activities do not exceed permissible noise levels established for the area, at least in the absence of evidence of serious and long-term health problems, the Court is unlikely to find that the State failed to take reasonable measures to ensure the enjoyment of Article 8 rights.³⁸ In other words, where no specific environmental quality is guaranteed by the constitution or applicable human rights instrument, the courts accord considerable deference to the level of protection enacted by state or local authorities.³⁹

The Scope of State Obligations

Enforcement of environmental rights involves courts in not only determining the mandated environmental quality, but also in assessing whether or not the government has taken the requisite actions to achieve that quality. This is not a strict liability standard, but the courts have not been entirely clear about what exactly is the standard of care for governmental acts and omissions. Human rights tribunals have made clear that the state may be responsible whether pollution or other environmental harm is directly caused by the State or whether the State's responsibility arises from its failure to regulate properly private-sector activities.⁴⁰ Human rights instruments require States not only to respect the observance of rights and freedoms but also to guarantee their

³⁸ See e.g. *Leon and Agnieszka Kania v. Poland*, no. 12605/03, 21 July 2009, para. 102; *Borysewicz v. Poland*, no. 71146/01, 1 July 2008, para. 55.

³⁹ See, e.g. *Hatton and Others v. the United Kingdom*, (GC) no. 36022/97, Reports 2003-VIII.

⁴⁰ See: *Mareno Gomez v. Spain*, no. 4143/02, 16 Nov. 2004, para. 55; *Giacomelli v. Italy*, paras. 78-79; *Surugiu v. Romania*, no. 48995/99, 20 April 2004.

existence and the free exercise of all of them against private as well as State actors. Thus any act or omission by a public authority which impairs guaranteed rights may violate a state's obligations.⁴¹ This is particularly important in respect to the environment, where most activities causing harm are undertaken by the private sector.

In the Inter-American system, positive obligations for the state to act derive not only from the generic obligations of Convention Article 1,⁴² but also from specific rights, including Convention Article 4, which guarantees an individual's right to have his or her life respected and protected by law.⁴³ In the case of *Yanomami v. Brazil*⁴⁴ the Inter-American Commission found that the government had violated the Yanomami rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI)⁴⁵ because the government failed to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians."⁴⁶

The *Yanomami* case did not go into detail about the conduct required of a government or the standard of care the Commission would expect. Other cases and country studies have helped to clarify some issues in this respect, specifying that governments must enact appropriate laws and regulations, and then fully enforce them. In a country report on Ecuador, the Commission referred generally to the obligation of the state to respect and ensure the rights of those within its territory and the responsibility of the government to implement the measures necessary to remedy existing pollution and to prevent future contamination which would threaten the lives and health of its people, including through addressing risks associated with hazardous development activities, such as mining.⁴⁷ Governments must regulate industrial and other activities that potentially could result in environmental conditions so detrimental that they create risks to health or life.⁴⁸ Furthermore, the government must enforce the laws that it enacts as well as any constitutional guarantee of a particular quality of environment.⁴⁹ The Commission was clear: "Where the right to life, to health

⁴¹ *Velasquez Rodriguez Case*, 4 Inter-Am. Ct. H.R. (ser. C) at 155 (Judgment of July 29, 1988) (concerning disappearance of civilians perpetrated by the Honduran army); *Godinez Cruz Case*, 5 Inter-Am. Ct. H.R. (ser. C) at 152-53 (Judgment of Jan. 20, 1989).

⁴² Article 1 provides: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...." American Convention, *supra* note 15, art. 1.

⁴³ Art 4(1) reads: Every person has the right to have his life respected. This right shall be protected by law....No one shall be arbitrarily deprived of his life.

⁴⁴ *Yanomami Case*, Res. No. 12/85, Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985*, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), 24.

⁴⁵ *Id.* at 33

⁴⁶ *Id.* at 32.

⁴⁷ Report on Ecuador, IACHR 1997, at 94.

⁴⁸ *Id.*, p. v.

⁴⁹ In the Ecuador report, the Commission heard allegations that the Government had failed to ensure that oil exploitation activities were conducted in compliance with existing legal and policy requirements. The Commission's on site delegation also heard that the Government of Ecuador had failed to enforce the inhabitants' constitutionally protected rights to life and to live in an environment free from contamination. The domestic law of Ecuador recognizes the relationship between the rights to life, physical security and integrity and the physical environment in which the individual lives. The first protection accorded under Article 19 of the Constitution of Ecuador, the section which establishes the rights of persons, is of the right to life and personal integrity. The second protection establishes "the right to live in an environment free from contamination." Accordingly, the Constitution invests the State with responsibility for ensuring the enjoyment of this right, and for establishing by law such restrictions on other rights and freedoms as are

and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced.”⁵⁰

The State must also comply with and enforce the international agreements to which it is a signatory, whether these are human rights instruments or ones related to environmental protection. In the Ecuador report, the Commission noted that the state is party to or has supported a number of instruments “which recognize the critical connection between the sustenance of human life and the environment”, including: the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, the ICCPR and the ICESCR, the Stockholm Declaration, the Treaty for Amazonian Cooperation,⁵¹ the Amazon Declaration,⁵² the World Charter for Nature,⁵³ the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,⁵⁴ the Rio Declaration on Environment and Development,⁵⁵ and the Convention on Biological Diversity.⁵⁶ Through the standard-setting and enforcement process, the State must “take the measures necessary to ensure that the acts of its agents . . . conform to its domestic and inter-American legal obligations.”⁵⁷

States thus are not exempt from human rights and environmental obligations in their development projects: “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”⁵⁸ In the case of the *Saramaka People v. Suriname*,⁵⁹ the Inter-American Court set forth three safeguards it deemed essential to ensure that development is consistent with human rights and environmental protection: (1) the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; (2) the state must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; and (3) the state must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state’s supervision, perform a prior environmental and social impact assessment.⁶⁰ It is notable that these requirements parallel the Bonn Guidelines on Access and Equitable Benefit-Sharing, adopted pursuant to the Convention on Biological Diversity, although the Court does not cite them, referring instead to views of the UN Human Rights Committee,⁶¹ ILO Convention No. 169, World Bank policies,⁶² and the 2007 UN

necessary to protect the environment. Thus, the Constitution establishes a hierarchy according to which protections which safeguard the right to a safe environment may have priority over other entitlements. *Id.* pp. 78-86.

⁵⁰ *Id.*

⁵¹ Treaty for Amazonian Cooperation, 17 I.L.M. 1045 (1978).

⁵² Amazon Declaration, 28 I.L.M. 1303 (1989).

⁵³ World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/37/51 (1982).

⁵⁴ Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 161 U.N.T.S. 229 (1940).

⁵⁵ Rio Declaration on Environment and Development, *supra* n. .

⁵⁶ Convention on Biological Diversity, 31 I.L.M. 818 (1992).

⁵⁷ Report on Ecuador, *supra* at 92.

⁵⁸ *Id.* at 89.

⁵⁹ *Case of the Saramaka People v. Suriname*, Inter-Am. Ct. Hum. Rts, Ser. C No. 172 (28 Nov. 2007).

⁶⁰ *Id.* at para. 129.

⁶¹ See ICCPR, General Comment No. 23, *The Rights of Minorities* (Art. 27), U.N. Doc. CCPR/C/21 Rev 1/Add.5, Aug. 4, 1994 and *Apirana Mahuika et al. v. New Zealand*, U.N. doc CCPR/C/70/D/47/1993, Nov. 15, 2000.

Declaration on the Rights of Indigenous Peoples.⁶³ The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21(2) of the Inter-American Convention.⁶⁴

The European Court's jurisprudence is similar. The Court requires at a minimum that the State should have complied with its domestic environmental standards.⁶⁵ The issue of compliance with domestic law is particularly important when there is a domestic constitutional right to environmental protection. The European Court will review governmental actions in the light of the domestic law. *Okyay and Others v. Turkey*⁶⁶ concerned the failure of Turkish authorities to enforce constitutional rights and statutory environmental laws. The applicants had successfully challenged in domestic courts the operations of thermal-power plants in Southwest Turkey, which they claimed would damage the environment and pose risks for the life and health of the Aegean region's population. They explicitly argued that Article 56 of the Turkish Constitution guaranteed them the right to life in a healthy and balanced environment. They did not argue that they had suffered any economic or other loss. The European Court agreed that they had a right under Turkish law to protection against damage to the environment and that their rights under Article 6(1) had been violated due to the failure of Turkish authorities to comply in practice and within a reasonable time with the domestic court's judgments.

Domestic Constitutional laws and provisions are also important in cases where the applicants have no independent claim under the European Convention for severe pollution, but instead are seeking nature protection or protection of the environment more generally. In *Kyrtatos v. Greece*,⁶⁷ as in the *Okyay* case, the applicants' claim involved a constitutional provision protecting the environment. In domestic courts, the applicants and the Greek Society for the Protection of the Environment and Cultural Heritage asserted that the local prefect's decisions to allow development projects, and consequently the building permits, were illegal because the area concerned was a swamp safeguarded by Article 24 of the Greek Constitution, which protects the environment. The domestic court held that the prefect had violated Article 24 of the Constitution, because the decision put in jeopardy an important natural habitat for various protected species, including birds, fishes and sea-turtles. It followed that the building permits were also unlawful and had to be quashed. The decision was not enforced by the local authorities, who instead issued further building permits. Given the constitutional provision, the European Court found a violation of Article 6(1), because the domestic law gave environmental rights to the applicants and the government had failed to enforce them.

The African Commission also has identified governmental obligations in this field by reference to environmental norms. In *SERAC v. Nigeria*, the African Commission held that Article 24 "imposes clear obligations upon a government to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."⁶⁸ Compliance with these obligations

⁶² See World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples, OP/BP 4.10.

⁶³ UN Declaration on the Rights of Indigenous Peoples, approved by the General Assembly Sept. 14, 2007.

⁶⁴ Article 21(2) provides that [n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

⁶⁵ See, e.g. *Ashworth and Others v. the United Kingdom*, App. No. 39561/98, 20 Jan. 2004; , *Moreno Gomes v. Spain*, 2004-X Eur. Ct. H.R. 327 (2005).

⁶⁶ *Okyay and Others v. Turkey*, *supra* note 16 at 57.

⁶⁷ *Kyrtatos v. Greece*, *supra* note 94.

⁶⁸ *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Comm. 155/96, Case No. ACHPR/COMM/A044/1, May 27, 2002.

includes ordering or permitting independent scientific monitoring of threatened environments, requiring environmental and social impact studies, monitoring hazardous materials and activities, as well as the providing information and an opportunity for the public to participate in decision-making.⁶⁹ While the Commission did not cite to specific environmental agreements, the obligations it mentions are part of international environmental law.

Beyond ensuring that any domestic environmental rights are enforced, the European Court scrutinizes the adequacy of the domestic law, to see if the State has ensured a fair balance between the interests of the community and the rights of those affected. The Court accords each state a wide margin of appreciation in this respect, because national authorities “are in principle better placed than an international court to assess the requirements” in a particular local context and to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community,⁷⁰ especially in a technical sphere like environmental protection.⁷¹ The wide margin of appreciation afforded governments means that the Court will only find a violation if there is a “manifest error of appreciation” by the national authorities in striking a fair balance between the competing interests of the different private actors.⁷² The final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court⁷³ but “only in exceptional circumstances” will the court look beyond the procedures followed to disallow the conclusions reached by domestic authorities on the environmental protection measures to be taken on the projects and activities allowed to proceed.⁷⁴ Even if it finds that the State decided wrongly, the Court will not determine exactly what should have been done to reduce the pollution in a more efficient way.⁷⁵

Another human rights supervisory body has also found violations of substantive guarantees due to the failure of the government to legislate to protect the environment. The first and, to date, only European Social Charter complaint to concern environmental conditions, lodged April 4, 2005, claimed violations of the Charter’s right to health provisions⁷⁶ because the State had not adequately prevented negative environmental impacts nor had it developed an appropriate strategy to prevent and respond to the health hazards stemming from lignite mining. The complaint also alleged that there was no legal framework guaranteeing security and safety of persons working in lignite mines. The European Committee of Social Rights concluded that the government had violated the Charter.⁷⁷ On the issue of the right to health (Article 11), the Committee examined the Greek National Action Plan for greenhouse gas emissions and found it inadequate in the light of the State’s obligations under the Kyoto Protocol and the principle requiring use of the “best available techniques.”⁷⁸ While the Committee found that Greek regulations on information and

⁶⁹ *Id.* para. 53.

⁷⁰ *Giacomelli*, para. 80.

⁷¹ *Fadayeva v. Russia*, at para 104, citing *Hatton*, para. 122.

⁷² *Id.*

⁷³ *Id.*, paras. 102-103.

⁷⁴ *Id.* para. 105, citing *Taskin*.

⁷⁵ In particular, the Court says it would be going too far to assert that the State or the polluting undertaking were under an obligation to provide the applicant with free housing. Para. 133. It is enough to say that the situation called for a special treatment of those living near the plant.

⁷⁶ Complaint No. 30/2005 *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*.

⁷⁷ The Committee transmitted its decision on the merits to the Committee of Ministers and to the Parties on 6 December 2006. The Committee of Ministers adopted its resolution on the matter on January 15, 2008.

⁷⁸ According to the Committee, “[t]he Greek National Action Plan for 2005-2007 (NAP1) provides for greenhouse gas emissions for the whole country and all sectors combined to rise by no more than 39.2% until 2010, whereas Greece was committed, in the framework of the Kyoto Protocol, to an increase in these gases

public participation were satisfactory, the evidence showed “that in practice the Greek authorities do not apply the relevant legislation satisfactorily” and very little had been done to organize systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out.

The imposition of substantive environmental quality standards does not exclude, but rather reinforces procedural rights. Indeed, human rights tribunals have read the procedural rights and corresponding State obligations into substantive human rights guarantees such as the right to life and to privacy and home life. This approach has been important in instances where the guarantees of procedural rights in human rights instruments are not strong, as is the case in the European Convention. In *Guerra v. Italy*,⁷⁹ the applicants alleged that the Italian authorities violated Convention Articles 2, 8 and 10 by failing to mitigate the risk of a major accident at a nearby chemical factory and by withholding information from local residents about the risks and emergency procedures. The “right to information” claim was dismissed, because the European Convention does not require the collection and dissemination of information about the environment, but the European Court effectively incorporated this requirement into the applicant’s Article 8 claim as the “procedural dimension” of the obligation of states to secure effective respect for the applicants’ right to family and home life.

In *Oneriyildiz v. Turkey*, the European Court of Human Rights made reference to several environmental texts, both binding and non-binding in holding the Turkish government responsible for the loss of life and property resulting from a methane explosion at a waste site. The binding texts deemed relevant were the Lugano Convention on hazardous activities⁸⁰ and the Strasbourg Convention on Protection of the Environment through Criminal Law.⁸¹ The European Court used the Lugano Convention to define “dangerous activity” and “damage” incurring the liability of public authorities. It noted the duty under the Strasbourg Convention for authorities to establish criminal offenses for loss of life involving the disposal or treatment of hazardous wastes.

The Court also made reference in particular to non-binding Council of Europe texts, including 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. In addition to Parliamentary Assembly texts, the Court cited the Committee of Ministers Recommendation No. R(96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment.

On the merits of this case, the Court explained that the right to life provision, Article 2 of the European Convention “must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection

of no more than 25% in 2010. When air quality measurements reveal that emission limit values have been exceeded, the penalties imposed are limited and have little dissuasive effect. Moreover, the initiatives taken by DEH (the public power corporation operating the Greek lignite mines) to adapt plant and mining equipment to the “best available techniques” have been slow. “

⁷⁹ *Guerra v. Italy*, App. No: 14967/89, Reports 1998-I, no. 64.

⁸⁰ Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, E.T.S. No. 150.

⁸¹ Convention on Protection of the Environment through Criminal Law, Strasbourg, 4 Nov. 1998, E.T.S. No. 172. The Court noted that the Strasbourg Convention was not in force, but found it “very much in keeping with the current trend towards harsher penalties for damage to the environment.”

sites.” According to European standards, waste disposal is a hazardous activity, therefore Article 2 applies. The resulting duty of care depends on several factors: the harmfulness of the phenomena inherent in the activity; the contingency of the risk to the applicant; the status of those involved in creating the risk, and whether or not the conduct was deliberate. The court merged procedural rights into the substantive evaluation, finding that “particular emphasis” should be placed on the public’s right to information concerning the risks to life and the duty to investigate when loss of life occurs.⁸² Assessing the evidence, the Court found that the authorities must have known of the risk and of the need to take preventive measures “particularly as there were specific regulations on the matter.”⁸³ As such they had an obligation as well under Convention Article 2, “to take such preventive measures as were necessary and sufficient to protect those individuals...”⁸⁴ The government failed in its duty.

Like *Oneryildiz*, the case of *Budayeva and Others v. Russia*,⁸⁵ concerned governmental knowledge of hazards and the failure to act upon that knowledge. The difference was that the latter case involved repeated natural disasters rather than hazards originating in human activities. The standard of care did not differ appreciably, however. Governmental authorities aware of mudslide hazards in a mining district failed to take reasonable precautions, with resulting deaths in a village and loss of property. They pleaded violations of Article 2 (right to life) and Protocol 1, Article 1 (right to property). The Court held the government responsible for the loss of life, but found that the causal link was not established in respect of the latter claims. The applicants could not demonstrate that “but for” the official failures to act, their property would have been safe. The July 2000 mudslide was of unprecedented severity.

Looking at the substantive aspect of the government’s obligations respecting dangerous activities, the Court placed special emphasis on the adoption of regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human life.⁸⁶ Such regulations must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.⁸⁷ Supervision and monitoring are also required. The choice of particular practical measures is in principle a matter within the State’s margin of appreciation and the Court will seek to avoid placing an impossible or disproportionate burden on authorities.⁸⁸

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

The wide margin of appreciation afforded in environmental matters, due to their technical complexity and the variations in State priorities and resources, is given even greater weight in the

⁸² *Id.* para. 90.

⁸³ *Id.* para. 101.

⁸⁴ *Id.*

⁸⁵ *Budayeva and Others v. Russia*, App. No. 15339/02 & Ors (20 March 2008).

⁸⁶ *Id.*, para. 132.

⁸⁷ *Id.*

⁸⁸ *Id.*, para. 135.

sphere of emergency relief after the fact, in responding to weather events. The Court held that the State's positive obligation is less in the context of natural disasters, "which are as such beyond human control," than in the sphere of dangerous activities of a man-made nature. The right to peaceful enjoyment of possessions, which is not absolute, requires only that the state do what is reasonable in the circumstances.⁸⁹ The standard of care is different and higher when the risk involves potential loss of life. The State in this situation has a positive obligation to do everything within the authorities' power in the sphere of disaster relief for the protection of the right to life. The origin of the threat and the extent to which one or another risk is susceptible to mitigation are factors to be evaluated in determining the scope of the state's positive obligations.⁹⁰ The Court found that the authorities had been given warnings about the risks, including the state of disrepair of the dam, and had failed to provide resources for strengthening the defense infrastructure – resources that became available immediately after the mudslide. The government provided no explanation and the Court concluded that the restoration of the defense infrastructure between 1999 and 2000 was "not given proper consideration by the decision-making and budgetary bodies prior to the hazardous season of 2000."⁹¹ Nor were any alternative land-planning policies being implemented or monitoring stations set up. The Court noted that the public's procedural right of information can only be implemented if the government obtains the relevant information, which in this case was indispensable for ensuring the residents' safety. The authorities' failure to ensure the functioning of an early warning system was thus also unjustified.

C - Causality, Evidence and Precaution

Assessing risk is an important issue in determining substantive environmental rights. The precautionary principle has begun to play a role in bringing more risks within the ambit of human rights litigation. The *Taşkin* case described above was one based on risk, stemming from the use of cyanide in gold extraction. The Court referred to the various reports that had been done on site which highlighted the risks. Domestic judicial findings also demonstrated the threat to the environment and lives of the neighbouring population. The Court found Article 8 to be applicable "where the dangerous effects of an activity to which the individuals *are likely to be exposed* have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for purposes of Article 8 of the Convention."⁹² The Court held that this broad reading was necessary to ensure the effectiveness of Article 8.

The evidentiary basis of the *Taşkin* decision was the domestic court judgment. The Court also held that "in view of" the conclusion of the domestic court on the absence of a public interest in allowing the gold mine, it did not need to examine the case from the perspective of the normal wide margin of appreciation afforded governments in environmental matters. Therefore, there was a violation of Article 8.

The problem of fact-finding and lack of expertise is frequently said to be a hurdle to giving substantive content to environmental rights. At the international level, this has not proved to be a high hurdle thus far, because in most of the cases domestic fact-finding had already revealed the

⁸⁹ *Id.*, at para. 174. While the Court found that the measures taken by the state were negligent, it found the causal link was not well-established. The mudslide of 2000 being exceptionally strong, the Court said it was unclear whether a functioning warning system or proper maintenance of the defence infrastructure would have mitigated the damage.

⁹⁰ *Id.*, at para. 137.

⁹¹ *Id.*, at para. 149.

⁹² *Taşkin*, at para. 113 [emphasis added].

risks entailed or the consequent harm. This was the case in *Oneriyildiz, Taşkin*⁹³ and *Fadayeva*.⁹⁴ In the last-mentioned case, a government decree had recited statistics on the increases in respiratory and blood diseases linked to air pollution, as well as the increased number of deaths from cancer.⁹⁵ The government had also determined by legislation the safe levels of various polluting substances, many of which were exceeded in the security zone where the applicant lived. The mayor of the city said the steel plant was responsible for more than 95% of industrial emissions into the town's air,⁹⁶ while a State Report on the Environment indicated that the plant in question was the largest contributor to air pollution of all metallurgical plants in Russia. The two statements reduced questions about causality.⁹⁷ In the end both parties agreed that the applicant's place of residence was affected by industrial pollution caused by the steel plant, but they disagreed over the degree and effects of the pollution. The government claimed that the disturbance caused by the pollution was not so severe as to raise an issue under Article 8. The applicant and the European Court disagreed. The Court elaborated on its test for finding that environmental conditions are sufficiently severe to be encompassed within the guarantees of Article 8:

The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.”

Causality was an issue on the applicant's health claims. Her medical records indicated problems, but did not attribute them to any specific causes. The doctors stated, however, that her problems would be exacerbated by working in conditions of vibration, toxic pollution and an unfavorable climate.⁹⁸ The applicant also submitted an expert report⁹⁹ which linked the plant specifically to increased adverse health conditions of persons residing nearby. The Court found that the medical evidence did not establish a causal link between the pollution at her residence and her illnesses, but accepted that the evidence, include submissions by the government, was clear about the unsafe excessive pollution around her home. The Court also made reference to the expert report and the findings of the domestic courts. The Court noted that Russian legislation defined the maximum permissible concentrations as “safe concentrations of toxic elements.” Therefore, exceeding these limits produced a presumption of unsafe conditions potentially harmful to health and well-being of those exposed to it. This presumption, together with the evidence submitted, led the court to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the steel plant. Alternatively, even if that harm could not be

⁹³ *Id.*

⁹⁴ See also *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, judgment of 26 Oct. 2006, also involving the same steel plant built during the Soviet era.

⁹⁵ Russia's Constitution, art. 42 guarantees as follows: “Everyone has the right to a favorable environment, to reliable information about its state, and to compensation for damage caused to his health or property by ecological disease.” The provision was not invoked in the case.

⁹⁶ The Court noted that this made the case different from and more easily definable than other air pollution cases where multiple minor sources cumulate to produce the problem.

⁹⁷ The Court noted that the parties produced official documents containing generalized information on industrial pollution, because basic data on air pollution are not publicly available. Para. 30.

⁹⁸ *Fadayeva v. Russia* at para. 45.

⁹⁹ The court made it a point to recite the qualifications of the expert when discussing the report. See *id.*, para. 46 n. 1.

quantified, the pollution “inevitably made the applicant more vulnerable to various illnesses” and affected her quality of life at home.¹⁰⁰ Therefore Article 8 applied.

The European Court’s standard of proof is high¹⁰¹ but flexible and takes into account the fact that governments often are the sole repository of relevant evidence. In a subsequent case involving the same Russian steel mill as was the subject of the Fadayeva judgment, the Court explained:

“There is no doubt that serious industrial pollution negatively affects public health in general. However, it is often impossible to quantify its effects in each individual case, and distinguish them from the influence of other relevant factors, such as age, profession, etc. The same concerns possible worsening of the quality of life caused by the industrial pollution. The “quality of life” is a very subjective characteristic which hardly lends itself to a precise definition. Therefore, taking into consideration the evidentiary difficulties involved, the Court has no other choice than to repose trust primarily, although not exclusively, in the findings of the domestic courts and other competent authorities in establishing factual circumstances of the case. . . . However, the Court cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such situation it has to assess the evidence in its entirety.”¹⁰²

The European Court took into account that “it was widely recognized” that the environmental situation was unfavorable for the residents of the town around the steel mill and adversely affected their health and well-being.

The analysis raises the question of what evidence is sufficient to raise the presumption the Court creates in the *Fadayeva* case. It should not be limited to legislative findings, because as *Zander v. Sweden* indicates, safe levels may be changed to accommodate economic interests without necessarily being based on sound science. The World Health Organization (WHO) and other scientific bodies have determined through epidemiological studies what constitutes safe levels of concentration of toxic, carcinogenic, mutagenic and other hazardous substances.¹⁰³ Reliable evidence of such studies can and should be introduced to demonstrate presumed harm when such levels are exceeded, even if local legislation permits higher concentrations. A petition to the Inter-American Commission, recently declared admissible, relies on such WHO standards to assert that the average sulfur dioxide levels from a metallurgical complex are detrimental to the lives and health of the nearby community in Peru.¹⁰⁴

Indeed, in the case of *Fägerskiöld v. Sweden*¹⁰⁵ the Court cited to World Health Organization guidelines¹⁰⁶ on noise pollution, in rejecting the admissibility of an application

¹⁰⁰ *Id.* para. 88.

¹⁰¹ The European Court has long demanded “proof beyond reasonable doubt.” *Fadayeva* para. 79. This proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

¹⁰² *Ledyayeva*, para. 90.

¹⁰³ The WHO has developed guidelines for safe and acceptable water quality and quantity. World Health Organization, “Guidelines for Drinking Water Quality” (3d ed. 2004). Independent surveillance of water quality, quantity, accessibility, affordability and long term availability are part of the WHO framework.

¹⁰⁴ Inter-American Commission on Human Rights, Report No. 76/09, Case 12.718, *Community of La Oroya, Peru*, admissibility decision of 5 August 2009, OAS/Ser/L/V/II.135, doc. 23.

¹⁰⁵ *Fägerskiöld v. Sweden*, no. 37664/04, (admissibility), 26 Feb. 2008.

concerning wind turbines constructed and operating near the applicants' property. The Court noted that the guidelines are set at the level of the lowest adverse health effect associated with noise exposure. The Court also referred to even lower maximum levels adopted by most European countries. Applying these standards to the noise level tests submitted in the case, the Court found that the levels of noise did not exceed the WHO guidelines and were minimally above the recommended maximum level in Sweden. Therefore the environmental nuisance could not be found to reach the level of constituting severe environmental pollution. The Court also rejected the applicants' claims that their property rights were violated because the wind turbines decreased the value of their property. Assuming that there was an interference with property rights, the Court found that it was justified on several grounds, one of them being that the operation of the wind turbines was in the general interest as it is an environmentally friendly source of energy which contributes to the sustainable development of natural resources. The Court considered whether these beneficial environmental consequences were sufficient to outweigh the negative impact on the applicants. The Court reiterated its findings that the negative consequences were not severe, while the availability of renewable energy is beneficial for both the environment and society. Moreover the government had taken measures to mitigate the negative impacts on the applicants. In sum, the alleged interference was proportionate to the aims pursued and no violation of property rights occurred.

In the Greek case on lignite mining,¹⁰⁷ the European Social Charter Committee similarly relied on what it called "ample and unambiguous scientific evidence" that lignite caused air pollution has a harmful effect on human health and life, without specifying the health risks. Despite the beneficial impacts of lignite use in providing energy independence, access to electricity at a reasonable cost and economic growth, the Committee found that the government's actions violated the State's national and international obligations to combat pollution that caused health problems. It pointed to the right to environment in the Greek constitution, as well as national environmental protection legislation and regulations, noting that these were not applied and enforced in an effective manner. In sum, Greece had not struck a reasonable balance between the interests of persons living in the lignite mining areas and the general interest and there was thus a violation of the right to protection of health under the Charter.

National Recognition of the Links

On the national level, more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment,¹⁰⁸ impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. At the national or provincial level, constitutional provisions vary in the chosen description of the environmental quality that is protected. While many of the older provisions refer to a "healthy" or "healthful" environment, more recent formulations add references to ecology and/or biodiversity to the guarantee, although the right may be stated in a limited manner. The Quebec provincial Charter, for example, provides "Every person has a right to live in a healthful environment in which biodiversity is preserved, to

¹⁰⁶ World Health Organization, "Guidelines for Community Noise" (Geneva 1999)

¹⁰⁷ *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, European Committee on Social Rights (2006).

¹⁰⁸ Examples include: Angola ("all citizens shall have the right to live in a healthy and unpolluted environment." art. 24-1); Argentina ("all residents enjoy the right to a healthy, balanced environment which is fit for human development ..." art. 41); Azerbaijan ("everyone has the right to live in a healthy environment."); Brazil ("everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life." art. 225).

the extent and according to the standards provided by law.”¹⁰⁹ The French Constitution, amended to add a Charter of the Environment in 2005,¹¹⁰ affords French citizens the right to live in a “balanced environment, favorable to human health.”¹¹¹ The French *Conseil Constitutionnel* has used the Charter to review legislative enactments,¹¹² finding that the Charter constitutes a “fundamental freedom” of constitutional value allowing for the suspension of an administrative decision under French procedural law.¹¹³ Eastern European countries have also altered or changed their constitutions since the fall of the Soviet Union to include a substantive right to the environment and courts have found these rights justiciable.¹¹⁴ In Latin America, Article 19 of the 1980 Constitution of Chile provides for a “right to life” and a “right to live in an environment free of contamination” and establishes that certain other individual rights may be restricted to protect the environment.¹¹⁵ The Government of Chile is required to “ensure that the right to live in an environment free of contamination is not violated” and to “serve as a guardian for and preserve nature/the environment.”¹¹⁶

States in the U.S. have the power to provide their citizens with rights additional to those contained in the federal constitution¹¹⁷ and state constitutions revised or amended from 1970 to the

¹⁰⁹ Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 46.1

¹¹⁰ Charter for the Environment, art. 1, <http://www.legifrance.gouv.fr/html/constitution/const03.htm>. See, generally Ole Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?* 21 GEORGETOWN INT’L ENV’T L. REV. 73 (2008); David Marrani, *The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications*, 10 ENV. L. REV. 9 (2008); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 113-14 (2005-2006).

¹¹¹ Legifrance, Charter for the Environment, art. 1, <http://www.legifrance.gouv.fr/html/constitution/const03.htm>.

¹¹² See e.g., Conseil Constitutionnel decision no. 2005-514DC, Apr. 28, 2005, R. 305 (*Loi relative à la création du registre international français*); Marrani, *supra* note 110.

¹¹³ See Marrani, *supra* note 110, at 21-22.

¹¹⁴ The Hungarian Constitution, for example, states, “Hungary recognizes and implements everyone’s right to a healthy environment.” A MAGYAR KÜZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 18 (Hung.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD; see also Gyula Badni, *The Right to Environment in Theory and Practice: The Hungarian Experience*, 8 CONN. J. INT’L L. 439 (1993).

¹¹⁵ CHILE CONST, art. 19 §§ 1, 8.

¹¹⁶ *Id.* art. 19, § 8. In 1988, the Supreme Court of Chile held that the constitutional-environmental provisions established a substantive right. Residents of the village of Chanaral filed suit against a government-run copper mine to restrain the company from continuing to discharge tailings on local beaches and coves. Based on a site visit, the Court found much of the shore and local waters inert and enjoined further dumping within one year. *Pedro Flores y Otros v. Corporacion Del Cobre, Codeloco*, Division Salvador. Recurso de Proteccion, (1988) 12.753.FS. 641 (Chile), <http://www.unescap.org/drrpad/vc/document/compendium/chl.htm> (summary).

¹¹⁷ The United States federal constitution does not mention the environment – unsurprising given that the constitution was written in 1789. Nonetheless, in 1968, the same year the government of Sweden proposed to the United Nations that it convene its first international conference on the human environment, U.S. Senator Gaylord Nelson introduced a draft constitutional amendment that would have recognized in the Bill of Rights that “[e]very person has the inalienable right to a decent environment.” The proposal failed, as have later attempts to recognize such a right. See: H.R. J. Res. 1321, 90th Cong., 2d Sess. (1968); H.R. J. Res. 1205, 91st Cong., 2d Sess. (1970). Most recently, Representative Jesse Jackson, Jr. proposed a constitutional amendment “respecting the right to a clean, safe, and sustainable environment. H.R.J. Res. 33, 108th Cong. (2003).

present have added environmental protection among their provisions.¹¹⁸ To mark the occasion of the first Earth Day in 1970, the Pennsylvania legislature adopted a proposed amendment to the state constitution,¹¹⁹ subsequently approved overwhelmingly by voters in the state,¹²⁰ and added what is now Article I, section 27 to the state constitution:

Section 27. Natural resources and the public estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic 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.

The amendment and others like it were intended to elevate environmental protection as a fundamental value to a constitutional status above the states' legislative and regulatory norms and to protect the environment beyond issues of human health.¹²¹ A second aim was to expand standing to sue to allow public interest litigation on behalf of the environment.¹²² Illinois, Massachusetts¹²³ and Montana¹²⁴ all amended their constitutions in 1972 to provide in similar

¹¹⁸ See Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; Haw. Const. art. XI; Ill. Const. art. XI; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; Ohio Const. art. II, § 36; Pa. Const. art. I, § 27; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59; Utah Const. art. XVIII; Va. Const. art. XI, § 1. For discussions of these provisions, see: A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 229 (1972); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 ENVTL. L. REP. 50028-29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, 1984 ANN. SURV. AM. L. 13, 28-29; Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. Haw. L. REV. 123, 126-27 (1990); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997).

¹¹⁹ Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, PA. B. ASS'N Q., Apr. 1987, at 85, 87, quoted in Kirsch, supra n. 30 at 1170.

¹²⁰ The vote was more than 3 -1 in favor of the amendment, with close to 2 million voters. See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123-24 (1990) in Kirsch, supra n. 30 at note 3.

¹²¹ The Pennsylvania Supreme Court has indicated that environmental litigants may sue for generalized harm because "[a]esthetic and environmental well-being are important aspects of the quality of life in our society" and because its constitution establishes a local government's duty to protect its citizen's "quality of life." *Commonwealth, Pa. Game Comm'n v. Commonwealth, Dept. of Env'tl. Resources*, 509 A.2d 877, 883-84 (Pa. Comm2. Ct. 1986), aff'd 555 A.2d 812 (Pa. 1989).

¹²² For example: Hawaii's Constitution, Article XI, section 9, is clear on the right and its justiciability: "Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings." See *Life of the Land v. Land Use Comm'n of the State of Hawai'i*, 623 P.2d 431 (Haw. 1981) (granting standing to an environmental organization which sought to challenge a reclassification of certain lands which were not owned by any of the organization's members. The Supreme Court held that the plaintiffs' "aesthetic and environmental interests," were "personal" rights guaranteed by Art. XI, sec. 9 of the Constitution). See also *Richard v. Metcalf*, 921 P.2d 122 (Haw. 1997); *Kahuna Sunset Owners Ass'n v. Mahui County Council*, 948 P.2d 122 (Haw. 1997).

¹²³ Massachusetts guarantees the right to clean air and water, freedom from excessive and unnecessary noise, and the natural scenic, historic, and aesthetic qualities of their environment. Mass. Const. art. XLIX.

fashion for a right to a clean and healthful environment. The scope and content of this right has been a subject of litigation in all of these states.

The Supreme Court of Montana has provided the most detail about the substantive implications of a right to a specified environmental quality. In *Montana Environmental Information Center et al v. Department of Environmental Quality*¹²⁵ the plaintiffs contended that the Constitution's environmental protections were violated by the legislature when it amended state law to provide a blanket exception to requirements governing discharges from water well without regard to the degrading effect that the discharges would have on the surrounding or recipient environment. The monitoring of well tests was also inadequate because it was done without regard to the harm caused by those tests. Plaintiffs asserted that specific groundwater discharges degraded high quality waters, as shown by the government's own adopted water quality standards. The Court concluded that "the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." The Court concluded that the delegates who adopted the provision intended to provide language and protections which were both anticipatory and preventive.

The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked....

We conclude that the constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment is implicated based on the Plaintiffs' demonstration that the pumping tests proposed by SPJV would have added a known carcinogen such as arsenic to the environment in concentrations greater than the concentrations present in the receiving water and that the DEQ or its predecessor after studying the issue and conducting hearings has concluded that discharges containing carcinogenic parameters greater than the concentrations of those parameters in the receiving water has a significant impact which requires review pursuant to Montana's policy of nondegradation....¹²⁶

¹²⁴ Montana's amendment provides: The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose. Mont. Const. XLIX.

¹²⁵ 296 Mont. 207, 988 P.2d 1236 (1999).

¹²⁶ The Montana Supreme Court further applied its constitutional provision in the case *Cape-France Enterprises v. The Estate of Peed*, 305 Mont. 513, 29 P.3d 1011 (2001), in which it held that "the protections and mandates of this provision apply to private action – and thus to private parties – as well" as to state action. Thus, "it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks." The court held that it would be a violation of the state's obligation under the constitution for it to grant specific performance of a contract for the sale of the land in question. See Naber, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment – An examination of Cape-France Enterprises v. Estate of Peed*, 64 MONT. L. REV. 357 (2003);

Other national courts have similarly given broad reading to constitutional guarantees, and have done so through reference to national and international environmental standards. Article 24 of the South African Constitution provides that:

Everyone has a right to (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹²⁷

The South African Constitutional Court explicitly relied on international environmental principles in giving substantive content to this Constitutional guarantee. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*¹²⁸ addressed the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. The Court characterized the case as one that required the integration of the need to protect the environment with the need for social and economic development. In the Court's view, the international principle of sustainable development provided the applicable framework for reconciling these two needs.¹²⁹

Sustainable development "recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources" but it envisages that decision-makers "will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments."¹³⁰ In the Court's view, the National Environmental Management Act, which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development, defined to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations." In turn, this broad definition of sustainable development integrates environmental protection and socio-economic development, and incorporates the internationally-recognized principle of inter-generational and intra-generational equity.¹³¹

B. Thompson, *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT.L.REV. 157 (2003).

¹²⁷ S. AFR. CONSTT. ch. IV, § 24.

¹²⁸ Case no CCT 67/06; ILDC 783 (ZA 2007). The case arose out of a decision by a provincial Department of Agriculture, Conservation and Environment to grant private parties permission to construct a filling station.

¹²⁹ *Id.* paras. 56-57.

¹³⁰ *Id.* paras. 58.

¹³¹ *Id.* paras. 59. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive. The Court quoted the factors set forth in the domestic National Environmental Management Act, Section 2(4)(a):

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

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

The Court saw a second objective inherent in the Constitutional and legislative guarantees: to identify and predict the actual or potential impact of development and to consider ways of minimising negative impact while maximising benefit. Thirdly, and finally, the Court pointed out that NEMA requires application of the precautionary approach, “a risk averse and cautious approach,” that takes into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach was seen to be especially important because NEMA requires that the cumulative impact of a development on the environmental and socio-economic conditions be investigated and addressed.¹³² The precautionary principle required the authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. “This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.”¹³³

The Court thus set aside the decision of the environmental authorities and required reconsideration consistent with the judgment. As to the role of the courts in giving effect to environmental rights, the Court was clear:

The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.¹³⁴

Where no specific quality of environment is constitutionally-guaranteed, national courts may still have jurisdiction to judge governmental action or inaction with reference to environmental laws and standards. Environmental protection laws in many, if not most states, provide for citizen lawsuits as a means of enforcing legislative and regulatory standards. Such

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

¹³² Section 24(7)(b) of NEMA provides:

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

¹³³ *Id.* para. 98.

¹³⁴ *Id.*, para. 102.

suits have played a significant role in enforcing clean air and water acts,¹³⁵ as well as endangered species laws. As with human rights litigation, citizens sue the government to secure its performance of mandatory duties under the law;¹³⁶ in addition, however, suits may be brought against regulated industries and other polluters in order to halt environmental harm. Courts have upheld citizen suit provisions and enforced substantive limits on permissible activities. In general, government officials are held to a due diligence standard.¹³⁷ The criteria used to assess whether or not due diligence has been exercised could be useful in human rights cases to decide whether or not a government has taken the requisite measures to respect and ensure environmental rights. In general, due diligence is tested by whether or not the government sought compliance through an enforcement action against the actor causing harm; whether or not the government monitored the actor's activities after conclusion of the enforcement action; and whether or not the penalties assessed provided adequate deterrence against repetition of the violation.¹³⁸

The constitutional rights granted are increasingly being enforced by courts. In India, for example, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi. In some instances, the courts issued orders to cease operations.¹³⁹ The Indian Supreme Court has based the closure orders on the principle that health is of primary importance and that residents are suffering health problems due to pollution. South African courts also have deemed the right to environment to be justiciable. In Argentina, the right is deemed a subjective right entitling any person to initiate an action for environmental protection.¹⁴⁰ Colombia also recognizes the enforceability of the right to environment.¹⁴¹ In Costa Rica, a court stated that

¹³⁵ The U.S. Clean Air Act of 1970, 42 U.S.C. § 7604, was the first of some twenty environmental statutes in the U.S. to provide for citizen enforcement by allowing suit to be brought for injunctive relief to force compliance and to require the Environmental Protection Agency (EPA) to perform mandatory duties imposed on it by the statute. See Michael D. Axline ENVIRONMENTAL CITIZEN SUITS (Butterworth Legal Publishers, 1995); James R. May, "Now More than Ever: Recent Trends in Environmental Citizen Suits," 10 Widener Law Review 8 (2004). The 1972 Clean Water Act, 33 U.S.C. § 1365 is similar, but also authorized citizens to sue polluters for civil penalties. Similar provisions exist in nearly all statutes under the authority of the EPA.

¹³⁶ See, e.g. *Friends of the Earth v. United States EPA*, 2006 U.S. App. LEXIS 10264 (D.C. Cir. 2006)(successfully challenging the EPA determination that pollution caps under the Clean Water Act could be done on a seasonal or annual basis and not as daily loads).

¹³⁷ Where the agency is engaged in appropriate enforcement of the law through judicial action, citizen suits are inadmissible. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 219 (3rd Cir. 1979), cert denied 441 U.S. 961 (1979); *PIRG of N.J. v. Fritzsche, Dodge & Olicott, Inc.*, 759 F.2d 1131 (3rd Cir. 1985).

¹³⁸ In *Citizens for a Better Environment v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470 (D.S.C. 1995), rev'd on other grounds, 149 F.3d 303 (4th Cir. 1998); rev'd on other grounds, 528 U.S. 167 (2000), a civil penalty of \$100,000 was considered inadequate and a citizen suit for additional penalties was allowed to proceed.

¹³⁹ See, e.g., *M.C. Mehta v. Union of India & Others*, JT 1996, reprinted in 1 The Environmental Activists' Handbook at 631.

¹⁴⁰ *Kattan, Alberto and Others v. National Government*, Juzgado Nacional de la Instancia en lo Contencioso administrativo Federal. No. 2, Ruling of 10 May 1983, La Ley, 1983-D, 576; *Irazu Margarita v. Copetro S.A.*, Camara Civil y Comercial de la Plata, Ruling of 10 May 1993 (available at www.eldial.com)("The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.").

¹⁴¹ *Fundepublico v. Mayor of Bugalagrande and Others*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991 ("It should be recognized that a healthy environment is a *sina qua non* condition for life itself and that no right could be exercised in a deeply altered environment.").

the right to health and to the environment are necessary to ensure that the right to life is fully enjoyed.¹⁴²

United States courts also have heard complaints about human rights and environmental abuses in various other countries.¹⁴³ In 1993, residents of Ecuador and Peru brought actions alleging that a U.S.-based multinational oil company contaminated lands and rivers causing severe health consequences.¹⁴⁴ Similarly, a group of Nigerians brought action and ultimately settled a case against Royal Dutch Shell for its activities in Nigeria's Delta Region. Another case that settled alleged violations of the rights to life and health of local communities and environmental harm resulting from the construction of the Yadana gas pipeline in Burma.¹⁴⁵

In sum, national and international tribunals increasingly are being asked to consider the link between environmental degradation and internationally-guaranteed human rights. In some instances, the complaints brought have not been based upon a specific right to a safe and environmentally-sound environment, but rather upon rights to life, property, health, information, family and home life. Underlying the complaints, however, are instances of pollution, deforestation, water pollution, and other types of environmental harm. International petition procedures thus allow those harmed to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threaten human well-being. Petitioners have been afforded redress and governments have taken measures to remedy the violation. Petition procedures at the least can help to identify problems and encourage a dialogue to resolve them. In addition, the emphasis given rights of information, participation, and access to justice can encourage an integration of democratic values and promotion of the rule of law in broad-based structures of governance.

Gaps, Conflicts and the Question of a Declaration

As the international and national texts and jurisprudence above indicate, the law has evolved considerably in recent years in recognizing the links between human rights and environmental protection, attempting to give effect to both fundamental values of society. Yet, in the absence of a clear international text articulating the links between human rights and the environment, the difficulties facing courts presented human rights claims based on environmental harm are significant, at least when the government has made some effort to address the matter. The deferential standard of review adopted by the European Court is echoed in domestic courts which make efforts to determine when domestic laws and policies are so deficient that they run afoul of human rights guarantees. In *Clean Air Foundation Limited & Gordon David Oldham v. The Government of the Hong Kong Special Administrative Region*,¹⁴⁶ the applicants sought judicial review of the authorities' alleged failure to take the necessary measures to combat air pollution. The applicants contended that Hong Kong's air is so polluted that it is poisoning the people who live there, shortening their lives in breach of the Bill of Rights and various international covenants which have been extended to Hong Kong, in particular the right to health as set forth in Article 12 of the International Covenant on Economic, Social and Cultural Rights.¹⁴⁷ The Court accepted that

¹⁴² *Presidente de la sociedad Marlene S.A. v. Municipalidad de Tibas*, Sala Constitucional de la corte Supreme de justicia. Decision No. 6918/94 of 25 Nov. 1994.

¹⁴³ Jurisdiction over the matters are based on the federal Alien Tort Claim Statute, 28 U.S.C. 1350 (1789).

¹⁴⁴ *Jota v. Texaco, Ind.*, 157 F. 3d 153 (2d. Cir, 1998); *Aguinda v. Texaco*, 2000 WL 122143 (Jan. 31, 2000).

¹⁴⁵ *Doe v. Unocal Corp.* 67 F. Supp. 2d 1140 (C.D. Cal. 1999).

¹⁴⁶ CAL 35/2007, Court Of First Instance, Constitutional And Administrative Law List, No. 35 OF 2007 Judgment of 26 July 2007.

¹⁴⁷ Article 12 reads:

Article 12 it imposes a duty on state authorities to combat air pollution, even if it cannot be an absolute duty to ensure with immediate effect the end of all pollution. Nonetheless, the Court held that the issue was one of policy, not law. It stated: “A policy may, of course, be unlawful. But because a policy is considered to be unwise, short-sighted or retrogressive does not make it unlawful. It has long been accepted that policy is a matter for policy-makers and that to interfere with the lawful discretion given to policy-makers would amount to an abuse of the supervisory jurisdiction vested in the courts.”¹⁴⁸ The applicants submitted that they did not seek merely to review the wisdom of government’s policies in respect of air pollution, but rather to determine whether the Government had met its obligations in law. The Court was unable to agree, finding that the real issues in the case were not issues of legality and did not go to the Government acting outside of its powers. Instead, they went to the question of why the Government had not chosen to pursue certain policies.

Some commentators have questioned whether legally trained, non-technical judges are the appropriate arbiters of a clean and healthy environment and whether the judicial branch of government is the appropriate venue for resolving these value-laden, science-based environmental decisions.¹⁴⁹ As the Hong Kong case illustrates, a number of judges have expressed similar concerns about the institutional capacity and propriety of court involvement in environmental decision-making.

Adjudicating cases under broadly-worded standards is not new for judges, however, nor is it uncommon for them to be faced with adjudicating highly technical matters. Courts must regularly, and on a case-by-case basis, define what constitutes “reasonable,” “fair,” or “equitable” conduct. With the adoption of constitutional environmental rights provisions and increasing acceptance of the links between environmental degradation and the violation of other human rights, national and international tribunals struggle to give substance to environmental rights without overstepping the judicial function. In general, courts have taken the view that such enactments serve to place environmental protection in a position superior to ordinary legislation. Over time, Courts tend to create a balancing test to avoid too readily undoing the deliberative decisions reached by the political branches of government.

Human rights law is not about stopping all human activities, but about recognizing that they utilize scarce resources and produce emissions and waste that inevitably have individualized and cumulative environmental impacts. These impacts have to be considered, measured and monitored, with the result that some activities will be limited or prohibited. Environmental science helps determine the causal links between the activities and the impacts, giving courts a set of data on which to base decisions about whether or not a proper balance of interests has been obtained, one which ensures an equitable outcome and minimizes the risk of harm to the environment and human rights. The substance of environmental rights involves evaluating ecological systems, determining the impacts that can be tolerated and what is needed to maintain and protect the natural base on which life depends. Environmental quality standards, precaution, and principles of

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) ...

(b) The improvement of all aspects of environmental and industrial hygiene...

¹⁴⁸ Id.

¹⁴⁹ Barton Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003).

sustainability can establish the limits of environmental decision-making and continue to give specific content to environmental rights.

Nonetheless, it must be recognized that to some degree the focus or objective of human rights law and environmental law remains different. Human rights law aims to ensure the equal rights and fundamental freedoms of all *human beings* while environmental protection is concerned with broader issues of nature protection, which has intrinsic value irrespective of its utilization by or worth to human beings (World Charter for Nature). The narrower human rights perspective is reflected in the 1969 resolution adopted at the 45th session of the Economic and Social Council, in which the focus of the upcoming Stockholm Conference was described as impairment of the environment by pollution, the effects of such pollution ... on “the condition of man, his physical and mental well-being, his dignity and his enjoyment of basic human rights in developing as well as developed countries”(ECOSOC resolution 1346 (XLV)).

A Declaration on Human Rights and Environment could usefully address and provide greater clarity about the linkages as well as potential conflicts between human rights and environmental protection. Its scope could include (1) the impacts of environmental degradation on human rights and the need to prevent and remedy such impacts; (2) the need to guarantee environmental protection for its own sake (intrinsic value of nature) and how human rights can contribute to that protection; (3) how to reconcile and balance the utilization of resources for human needs with long term protection of the biosphere; (4) inter-generational equity; (5) holistic and balanced governance.

The UN Human Rights Commission’s special rapporteur on human rights and the environment prepared a 1994 draft Declaration on Human Rights and the Environment without the involvement of UNEP or other expert bodies from the environmental law field. The lack of broad-based participation in the drafting process may have contributed to the perception that the text was unbalanced, overly-ambitious, and not reflective of the state of the law. For whatever reason, the draft was not adopted by the Commission nor has it appeared on the agenda of the Human Rights Council. There are elements in it that are worthwhile and could provide the basis for discussions of a new text that would consensus support. In the years since 1994, the law on environmental rights has considerably advanced and a declaration could be drafted to reflect the state of the law as summarized above. A declaration based on existing human rights and environmental law would bring together in a single instrument the many disparate strands referred to and thus provide essential guidance to governments, tribunals, and non-state actors whose activities impact both human rights and environmental protection. The primary hurdle is likely to be one of convincing critics that such a declaration would restate existing law and not be an exercise in extensive law-making.