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HUMAN RIGHTS, HEALTH AND ENVIRONMENTAL PROTECTION: LINKAGES IN LAW AND PRACTICE

A Background Paper for the WHO¹

International concerns with human rights, health and environmental protection have expanded considerably in the past several decades. In response, the international community has created a vast array of international legal instruments, specialized organs, and agencies at the global and regional levels to respond to identified problems in each of the three areas. Often these have seemed to develop in isolation from one another. Yet the links between human rights, health and environmental protection were apparent at least from the first international conference on the human environment, held in Stockholm in 1972. Indeed, health has seemed to be the subject that bridges the two fields of environmental protection and human rights. At the Stockholm concluding session, 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.²

Principle 1 of the *Stockholm Declaration* established a foundation for linking human rights, health, 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 towards ensuring a better and healthier environment.

In the three decades since the Stockholm Conference, the links that were established by these first declaratory statements have been reformulated and elaborated in various ways in international legal instruments and the decisions of human rights bodies. In large part, these instruments and decisions involve taking a rights-based approach to the topics, albeit with different emphases. The **first** approach, perhaps closest to that of the Stockholm Declaration, understands environmental

¹ Prepared by Dinah Shelton, Profesor of Law, Notre Dame University.

² 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).

protection as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health. Environmental protection is thus an essential instrument in the effort to secure the effective universal enjoyment of human rights. Klaus Toepfer, Executive Director of the United Nations Environment Programme, reflected this approach in his statement to the 57th Session of the Commission on Human Rights in 2001:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. ... Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.

The General Assembly similarly has called the preservation of nature “a prerequisite for the normal life of man.”³

The **second** rights-based approach, most common in international environmental agreements since 1992, is also instrumentalist, but instead of viewing environmental protection as an essential element of human rights, it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health. This approach is well-illustrated by the Rio Declaration on Environment and Development, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development. It formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level.” Thus, these procedural rights, contained in all human rights instruments, are adopted in environmental texts in order to have better environmental decision-making and enforcement. The **third**, and most recent approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right. At present, examples of this are found mainly in national law and in regional human rights and environmental treaties. Most formulations of the right to environment qualify it by words such as “healthy”, “safe”, “secure” or “clean”, making clear the link between environmental protection and the aim of human health.

³ GA Res. 35/48 of 30 Oct. 1980.

It should be noted that there are other regulatory approaches to achieving environmental protection and public health 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 and health law. This emphasis on responsibilities rather than rights echoes language from the Stockholm Declaration and subsequent instruments that emphasize the duty of each person to protect and improve the environment for present and future generations. It is also consistent with human rights instruments that affirm the duties of each individual to others to promote and observe internationally-guaranteed human rights.⁴

The following materials examine (1) treaties and declarations in the fields of human rights and environmental protection, (2) the decisions of human rights bodies, that link human rights, health, and environmental protection and (3) national constitutional provisions, laws and jurisprudence that link the three topics. Following this presentation, the paper concludes with an evaluation of the rationales supporting rights-based approaches to issues of health and environmental protection.

I. Selected Treaty and Other Provisions Linking Human Rights, Health and Environment

a. Human Rights Instruments with Provisions on Health and the Environment

Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues. The *International Covenant on Economic, Social and Cultural Rights* (16 Dec. 1966), guarantees the right to safe and healthy working conditions (art. 7 b) and the right of children and young persons to be free from work harmful to their health (art. 10-3). The right to health contained in article 12 of the Covenant expressly calls on states parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” and “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.”

The *Convention on the Rights of the Child* (New York, November 20, 1989) refers to aspects of environmental protection in respect to the child’s right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.” (Art. 24(2)(c). Information and education is to be provided to all segments of society on hygiene and environmental sanitation. (Art. 24(2)(e).

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, June 27, 1989) contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., arts. 2, 6, 7, 15). Part II of the Convention addresses land

⁴ See, e.g., Universal Declaration of Human Rights, Pmbl, art. 1, art. 29; International Covenant on Economic, Social and Cultural Rights, (16 Dec. 1966), 993 U.N.T.S. 3, Pmbl (“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.

issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. Further, governments are to ensure adequate health services are available or provide resources to indigenous groups “so that they may enjoy the highest attainable standard of physical and mental health.” (Art. 25(1)). Article 30 requires that governments make known to the peoples concerned their rights and duties.

Two regional human rights treaties contain specific provisions on the right to environment. The approach of each differs, with the African Charter linking the environment to development, while the American Convention Protocol speaks of a “healthy environment.”⁵

The *African Charter on Human and Peoples’ Rights*, (Banjul June 26, 1991) contains both a right to health and a right to environment. Article 16 of the African Charter guarantees to every individual the right to enjoy the best attainable state of physical and mental health while Article 24 states that **“All peoples shall have the right to a general satisfactory environment favorable to their development.”** The distinction between an individual and a people’s right is not made clear.

The *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*,⁶ also contains both a right to health and a right to environment, drafted in more detail than in other human rights instruments. Article 10 provides

(1) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.]

(2) In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the State’s jurisdiction; (c) Universal immunization against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11 is entitled: **“Right to a healthy environment.”** It proclaims:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation and improvement of the environment.

⁵ 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.

⁶ Id.

b. Environmental Instruments with Provisions on Health and Human Rights

Concern for health is a constant theme in environmental agreements, indeed one of the principal aims of environmental protection. A standard definition of pollution, found in many legal texts, is “the introduction by man, directly or indirectly, of substance or energy into the [environment] resulting in deleterious effects of such a nature as to endanger human health, harm living resources....” etc.⁷ The preambles of European Community directives often state their aim as being “to protect human health and the environment.”⁸ Similarly, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*⁹ begins its preamble “aware of the risk of damage to human health. . .” and “the growing threat to human health” posed by hazardous wastes.

Non-binding declarations also make the link. The Stockholm Declaration proclaims in paragraph 3 its concern about

growing evidence of man-made harm in many regions of the earth: dangerous levels

⁷ See, e.g., Convention on Long-Range Transboundary Air Pollution (Geneva, 13 Nov. 1979), 1302 U.N.T.S. 217, art. 1. See also: Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 Mar. 1985), UNEP Doc. IG.53/5, art. 1(2); Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16, Sept. 1987), 26 I.L.M. 1550 (1987), PmbI, para. 3; Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 Mar. 1992), 31 I.L.M. 1330, art. 1(c); United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 I.L.M. 849, art. 1(1); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 Mar. 1974), 13 I.L.M. 546, art. 2(1); Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris, 4 June 1974), 13 I.L.M. 352, art. 1; Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 Feb. 1976), 15 I.L.M. 290, art. 2(a) and all subsequent regional seas agreements; Convention on the Non-Navigational Uses of International Watercourses (New York, 31 May 1997), 36 I.L.M. 700, art. 21(2).

⁸ 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).

⁹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 Mar. 1989), 28 I.L.M. 657.

of pollution in water, air earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.

Stockholm Principle 7 calls on States “to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health. . .” Article 1 of the Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Group of the Brundtland Commission, expressly links the three fields in declaring that “All human beings have the fundamental right to an environment adequate for their health and well-being.”¹⁰ Chapter 6 of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development, is entirely devoted to “protecting and promoting human health conditions,” while the Rio Declaration itself 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).

Procedural human rights are emphasized in environmental agreements.¹¹ Several dozen international treaties adopted since the Stockholm Conference call upon states to take specific measures to ensure that the public is adequately informed about environmental risks, including health risks, posed by specific activities.¹² In addition to the right to information, the public is also given

¹⁰ 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.

¹¹ In addition to those discussed in the text, see e.g. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes (Geneva, 18 Nov. 1991), art. 2(3)(a)(4); Convention on the Protection and Utilization of Transboundary Rivers and Lakes (Helsinki, 17 Mar. 1992), art. 16; the regional seas agreements; Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993, arts. 13-16; and United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 I.L.M. 849, art. 6. Non-binding texts include the European charter on the Environment and Health, adopted 8 Dec. 1989, First Conference of Ministers of the Environment and Health of the Member States of the European Region of the World Health Organization (“every individual is entitled to information and consultation on the state of the environment.”); Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (Bangkok, 16 Oct. 1990), A/CONF.151/PC/38 (Para. 27 affirms) “the right of individuals and nongovernmental organizations to be informed of environmental problems relevant to them, to have necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.”); Arab Declaration on Environment and Development and Future Perspectives (Cairo, Sept. 1991), A/46/632, cited in U.N. Doc. E/CN.4/Sub.2/1992/7, 20 (affirming the right to information about environmental issues).

¹² See, e.g., the *Helsinki Convention on the Transboundary Effects of Industrial Accidents*, 31 I.L.M. 1330 (1992), which, recognizing “the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment,” requires that states parties provide adequate information to the public and, whenever possible and appropriate, give them the opportunity to participate in relevant procedures and afford them access to justice. (Art. 9). Annex VIII to the Convention details the information to be provided. Agreements

broad rights of participation in decision-making and access to remedies for environmental harm. The protections afforded have increased in scope and number since the adoption of Principle 10 of the Rio Declaration on Environment and Development.¹³

Among the many international agreements utilizing procedural human rights to achieve better environmental protection in order to protect human health, the important *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, (Aarhus, June 25, 1998), signed by thirty-five States and the European Community, takes a

requiring environmental impact assessments generally demand assessment of any effect caused by a proposed activity on the environment, specifically including human health and safety. See, e.g., *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo, 25 Feb. 1991), 30 I.L.M. 800, art. 1(viii).

¹³ See, e.g., the United Nations *Convention to Combat Desertification in Those Countries Experiences Serious Drought and/or Desertification* (14 Oct. 1994), which places human beings at the center of concern to combat desertification (Preamble) and requires states parties to ensure that all decisions to combat desertification or to mitigate the effects of drought are taken with the participation of populations and local communities. (Art. 3). The Convention places an emphasis throughout on information and participation of local communities. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (September 10, 1998), EMuT, 998:26, Article 15(2), requires each state party to ensure, to the extent practicable that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention. The *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Montreal, January 29, 2000), 39 I.L.M.1027, Art. 23 concerns public awareness and participation, requiring the Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported LMOs should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the Convention.

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.

The *Protocol on Water and Health* to the Helsinki Watercourses Convention adopted in London on June 17, 1999¹⁴ contains the most extensive treaty provisions indicating the linkages among the three topics. The objective of that Protocol is to promote the protection of human health and well-being at all appropriate levels, nationally as well as in transboundary and international contexts. The Convention notes from the outset that water is essential to sustain life and that water quality and quantity must be assured to meet basic human needs, “a prerequisite both for improved health and for sustainable development. The general provisions include an obligation for Parties to take all appropriate measures to ensure adequate supplies of wholesome drinking water free from dangers to human health (art. 4). Rights to information and public participation in decision-making are emphasized “in order to enhance the quality and the implementation of the decisions, to build public awareness of issues, to give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. (Art. 5i). Information and participation is to be supplemented by access to justice for review of relevant decisions when appropriate. The Protocol also links the issues by referring several times to “rights and entitlements” to water.

II. The Jurisprudence and Comments of Human Rights Bodies

Environmental treaties generally do not establish complaint or petition procedures. In the absence of such procedures, cases concerning the impact of environmental harm on individuals and groups have been brought to international human rights bodies. In addition, these bodies have sometimes addressed the intersection of human rights, health and environmental protection in General Comments and have posed questions to states about the topics during their consideration of periodic state reports. The cases described below indicate the range of human rights implicated by environmental harm and the various claims submitted by those alleging injury. Due to limitations of space, the discussion centers on those complaints that raise issues linking environmental harm to

¹⁴ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary WaterCourses and International Lakes (London, 17 June 1999), available at <<http://www.waterlink.net/gb/who2cf99.htm>>

the rights to life or health, or the procedural rights of information, participation and access to justice.

In addition to specific human rights treaties, United Nations organs concerned with human rights have taken up the links between human rights, health and environmental protection. The United Nations Human Rights Commission has 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 whose mandate includes consideration of complaints submitted to her. All of the reported cases involve harm to human health as a result of the transboundary movement of hazardous materials, nearly always in violation of national and international environmental law.¹⁶ In its resolutions on this matter, the Commission now consistently recognizes that such environmental violations also “constitute a serious threat to the human rights to life, good health and a sound environment for everyone.”¹⁷ In this context, the Commission also increasingly refers to cooperation between the human rights bodies and those concerned with environmental protection, supporting the development of issue-specific cooperative action among UN bodies with a wide range of mandates.

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.

The Commission also considered the report of the Special Rapporteur on the right to food and asked that the study continue with attention to be paid to 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.” Other resolutions of the Commission similarly link human rights and environmental protection, sometimes referring explicitly to the right to a safe and healthy environment.¹⁹ The Sub-Commission on Human Rights also has pressed the issue of the right to drinking water and sanitation, recommending that the Human Rights Commission authorize it to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation.²⁰ The resolution itself affirms the “right to drinking water supply and sanitation for every woman, man and child.”

1. U.N. Human Rights Committee

a. *General Comments.* The U.N. Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics.²¹ The Committee has interpreted Article 27²² of the Covenant on Civil and Political Rights broadly, observing that

culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. . . . The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole²³

b. *Communications*

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 Resolution 2001/2, Promotion of the realization of the right to drinking water and sanitation, E/CN.4/SUB.2/RES/2001/2 of 10 August 2001.

²¹ See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 6-7 [hereinafter *Compilation*].

²² CCPR Article 27 provides that members of minority groups “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” CCPR, art. 27.

²³ General Comment 23 paras. 7, 9 in *Compilation* at 41.

i. *EHP v. Canada*. In an early case, a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations. The Committee found that the case raised “serious issues with regard to the obligation of States parties to protect human life,” but declared the case inadmissible due to failure to exhaust local remedies.²⁴

²⁴ *Communication No. 67/1980, EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20. See also *Kitok v. Sweden*, *Communication No. 197/1985, II Official Records of the Human Rights Committee 1987/88*, U.N. Doc. CCPR/7/Add.1, at 442 (Swedish 1971 Reindeer Husbandry Act held not to violate rights of an individual Sami as a reasonable and objective measure necessary for the continued viability and welfare of the minority as a whole).

ii. *Bordes and Temeharo v. France*. A different case asserting risk of harm from nuclear radiation arose in which the United Nations Human Rights Committee found the case inadmissible on the ground that the claimants did not qualify as “victims” of a violation. The communication concerned France’s nuclear tests among the atolls of Mururoa and Fangataufa in the South Pacific.²⁵ The Committee seemed concerned with the remoteness of the harm.²⁶ Applicants claimed that the tests represented a threat to their right to life and their right not to be subjected to arbitrary interference with their privacy and family life. They attempted to place the burden of proof on the government, contending that French authorities had been unable to show that the tests would not endanger the health of the people living in the South Pacific or the environment by further damaging the geological structure of the atolls. The Committee held that the applicants had not substantiated their claim that the tests had violated or threatened violation with the rights invoked. As for their contention that the tests increased the likelihood of catastrophic accident, “the Committee notes that this contention is highly controversial even in concerned scientific circles; it is not possible for the Committee to ascertain its validity or correctness.” Thus, as in the prior case, the lack of scientific certainty coupled with the burden of proof on the applicants, limited the claimant’s ability to obtain relief through human rights proceedings.

iii. *Ilmari Lansman et al. v. Finland*. The Committee found that Article 27 was not violated by the extent of stone-quarrying permitted by Finland in traditional lands of the Sami.²⁷ The Committee observed that a state may wish to encourage development or economic activity, but found that the scope of its freedom to do so must be tested by reference to the obligations of the state under article 27. The Committee referred to its General Comment on Article 27, according to which measures must be taken “to ensure the effective participation of members of minority communities in decisions which affect them.” The Committee concluded that the amount of quarrying that had taken place did not constitute a denial of the applicants’ right to culture. It noted that they were consulted and their views taken into account in the government’s decision and that measures were taken to minimize the impact on reindeer herding activity and on the environment.²⁸

²⁵ Communication No. 645/1995, *Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, 30 July 1996.

²⁶ The applicants also co-authored a complaint on the same case and submitted it to the European Commission on Human Rights, where it was registered as Case No. 28204/95. The case was declared inadmissible on 4 December 1995.

²⁷ Communication No. 511/1992, *Ilmari Lansman et al. v. Finland*, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996).

²⁸ Other cases involving Sami reindeer breeders include Communication No. 431/1990, *O.S. et al. v. Finland*, decision of 23 March 1994, and Communication No. 671/1995, *Jouni E. Lansmann et al. v. Finland*, decision of 30 October 1996.

iv. *Apirana Mahuika et al v. New Zealand*²⁹. The communication claimed violations of the rights of self-determination, right to a remedy, freedom of association, freedom of conscience, non-discrimination, and minority rights as a result of New Zealand's efforts to regulate commercial and non-commercial fishing in light of a dramatic growth of the fishing industry. The government and the Maori, whose rights are guaranteed by the Treaty of Waitangi, executed a Deed of Settlement on September 23, 1992 to regulate all fisheries issues between the parties. The authors of the communication represented tribes and sub-tribes that objected to the Settlement, contending that they had not been adequately informed and that the negotiators did not represent individual tribes and sub-tribes. The government acknowledged its duty to ensure recognition of the right to culture, including the right to engage in fishing activities, but argued that the Settlement met the obligation because the system of fishing quotas reflected the need for effective measures to conserve the depleted inshore fishery, carrying out the government's "duty to all New Zealanders to conserve and manage the resource for future generations." "based on the reasonable and objective needs of overall sustainable management." The Committee emphasized "that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy." The complicated process of consultation undertaken by the government was held to comply with this requirement, because the government paid special attention to the cultural and religious significance of fishing for the Maori.

2. U.N. Committee on Economic, Social and Cultural Rights.

a. *Periodic Reporting*. In the context of the periodic reporting procedure, states sometimes report on environmental issues as they affect guaranteed rights. In 1986, Tunisia reported to the Commission on Economic, Social and Cultural Rights, in the context of Article 11 on the right to an adequate standard of living, on measures taken to prevent degradation of natural resources, particularly erosion, and about measures to prevent contamination of food.³⁰ Similarly, the Ukraine reported in 1995 on the environmental situation consequent to the explosion at Chernobyl, in regard to the right to health. Committee members sometimes request specific information about environmental harm that threatens human rights. Poland, for example, was asked to provide information in 1989 about measures to combat pollution, especially in upper Silesia.³¹

b. *General Comments*. The Committee referred to environmental issues in its General Comment on the Right to Adequate Food³² and its General Comment on the Right to Adequate Housing. In the first, the Committee interpreted the phrase "free from adverse substances" in Article 11 of the Covenant to mean that the state must adopt food safety and other protective measures to prevent contamination through "bad environmental hygiene." The Comment on housing states that

²⁹ *Communication No. 547/1992, Apirana Mahuika et al v. New Zealand*, CCPR/C/70/D/547/1993, views issued November 16, 2000.

³⁰ E/1986/3/Add.9.

³¹ E/1989/4/Add.12.

³² General Comment 12, E/C.12/1999/5.

“housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants.”³³ On November 8, 2000, the Committee issued General Comment 14 “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Article 12).”³⁴ The Comment states in paragraph 4 that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinates of health, such as . . . a healthy environment.” General Comment 14 adds that “[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels” and should be entitled to adequate reparation.³⁵

3. Committee on the Elimination of Discrimination against Women

³³ General Comment 4 of 13 December 1991, United Nations, *Compilation*, HRI/GEN/1/Rev.3, 63, para. 5.

³⁴ U.N. CESCR, General Comment 14, U.N. Doc. E/C.12/2000/4 (2000).

³⁵ *Id.* Para. 59.

CEDAW linked environment to the right to health in its Concluding Observations on the State report of Romania, expressing its “concern about the situation of the environment, including industrial accidents, and their impact on women’s health.”³⁶

4. Committee on the Rights of the Child

In the context of the State reporting procedure, the Committee has issued observations calling for better compliance with Article 24(2)(c). In its Concluding Observations on the State report submitted by Jordan, the CRC recommended that Jordan “take all appropriate measures, including through international cooperation, to prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children and to strengthen procedures for inspection.”³⁷ The CRC’s Concluding Observations on South Africa also expressed the Committee’s “concern . . . at the increase in environmental degradation, especially as regards air pollution” and “recommend[ed] that the State party increase its efforts to facilitate the implementation of sustainable development programmes to prevent environmental degradation, especially as regards air pollution.”³⁸

4. Regional Systems

African Charter on Human and Peoples Rights. The cases submitted to the African system have generally invoked the right to health, protected by Article 16 of the African Charter, rather than the right to environment contained in the same document. In Communications 25/89, 47/90, 56/91 and 100/93 against Zaire the Commission held that failure by the Government to provide basic services such as safe drinking water constituted a violation of Article 16.³⁹

³⁶ U.N. CEDAW, Concluding Observations on Romania, U.N. Doc. CEDAW/C/2000/II/Add.7 at para. 38 (2000).

³⁷ U.N. Committee on the Rights of the Child, Concluding Observations on Jordan, U.N. Doc. CRC/C/15/Add.125 at para. 50 (2000).

³⁸ U.N. Committee on the Rights of the Child, Concluding Observations on South Africa, U.N. Doc. CRC/C/15/Add.122 (200) at para. 30. *See also* Concluding Observations on Kyrgyzstan, U.N. Doc. CRC/C/15/Add.127 (2000); Concluding Observations on Grenada, U.N. Doc. CRC/15/Add.121 (2000).

³⁹ The finding followed the consolidation of 4 communications asserting torture, killings arbitrary detention, unfair trials, restrictions on the right to association and peaceful assembly, suppression of freedom of the press, denial of

Organization of American States: American Declaration and Convention

a. Petitions

i. *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*. The complaint protested government-sponsored logging of timber on indigenous forest lands in Nicaragua. The government granted the logging concession without consulting the Awas Tingni community, despite having agreed previously to do so. The community alleged violation of the rights to cultural integrity, religion, equal protection and participation in government. In 1998, the Inter-American Human Rights Commission found in favor of the Awas Tingni and submitted the case to the Inter-American Court. On August 31, 2001, the Court issued its judgment, declaring that the State violated the right to judicial protection (art. 25 of the American Convention) and the right to property (Article 21 of the Convention). It unanimously held that the State must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. Pending demarcation of the indigenous lands, the State must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use or enjoyment of those properties located in the Awas Tngni lands. The Court also awarded reparations.

the right to education and the right to health. In regard to the latter the Commission said “Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.” AHG/207(XXXII), Annex VIII at 8.

ii. *Yanomami v. Brazil*. The Inter-American Commission established a link between environmental quality and the right to life in response to a petition brought on behalf of the Yanomani Indians of Brazil. The petition alleged that the government violated the American Declaration of the Rights and Duties of Man⁴⁰ by constructing a highway through Yanomani territory and authorizing exploitation of the territory's resources. These actions led to the influx of non-indigenous who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI).⁴¹

⁴⁰ Pan American Union, Final Act of the Ninth Conference of American States, Res. XXX, at 38 (1948), reprinted in OAS, *Basic Documents Pertaining to Human Rights in the Inter-American System* (1996).

⁴¹ Case 7615 (Brazil), INTER-AM.CH.R., 1984-1985 *Annual Report* 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

b. *Country Studies*. The Inter-American Commission on Human Rights has the authority to study the human rights situation generally or in regard to specific issues with a member state of the OAS. In three recently published studies, the Commission devoted particular attention to environment, health and human rights.⁴² In regard to *Ecuador*, the Commission was responding to claims that oil exploitation activities were contaminating the water, air and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness.⁴³ After an on site visit, it found that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts of oil exploitation in their drinking and bathing water, in the air, and in the soil. The inhabitants were unanimous in claiming that oil operations, especially the disposal of toxic wastes, jeopardized their lives and health. Many suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, many claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies. The Commission emphasized the right to life and physical security stating that:

[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.⁴⁴

Thus, States Parties may be required to take positive measures to safeguard the fundamental and non-derogable rights to life and physical integrity, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury. The Commission also directly addressed concerns for economic development, noting that the Convention does not prevent nor discourage it, but rather requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each state may exploit its natural resources, "the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."⁴⁵ The Commission concluded that

[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ... The quest to guard against environmental conditions which threaten human health requires that individuals have

⁴² Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997)[hereinafter *Report on Ecuador*]; Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1 (1997); Inter-Am. C.H.R., *Third Report on the Situation in Paraguay*, OEA/Ser.L/V/II.110, Doc. 52, 9 March 2001.

⁴³ *Report on Ecuador*, v. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report.

⁴⁴ *Report on Ecuador*, *id.* at 88.

⁴⁵ *Ibid.* at 89.

access to: information, participation in relevant decision-making processes, and judicial recourse.⁴⁶

⁴⁶ *Ibid.* at 92, 93.

This holding clearly sets general standards for environmental rights in the Inter-American system. The Commission elaborated further, stating that the right to seek, receive, and impart information and ideas of all kinds is protected by Article 13 of the American Convention. According to the Commission, information that domestic law requires be submitted as part of environmental impact assessment procedures must be “readily accessible” to potentially affected individuals. Public participation is viewed as linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.” Finally, the right of access to judicial remedies is called “the fundamental guarantor of rights at the national level.”⁴⁷

The *Report on Brazil* discusses problems of environmental destruction leading to severe consequences on the rights to health and culture. Indigenous cultural and physical integrity are said to be under constant threat and attack from invading prospectors and the environmental pollution they create. State protection against the invasions is called “irregular and feeble” leading to constant danger and environmental deterioration.

In its 2001 country study on Paraguay, the Inter-American Commission recommended that the government adopt strategies to fight poverty, including protecting environmental resources and the social capital of poor communities, noting that these are resources people can draw upon to escape poverty. In addition to pointing to deforestation, the Commission noted water pollution and flooding of traditional lands by hydroelectric projects. The Commission recommended that the State adopt the necessary measures to protect indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, “which are fundamental for their health and survival as communities.”

Council of Europe: European Convention on Human Rights

In the European human rights system, most cases have involved either the right to information (art. 10) or the right to privacy and family life (art. 8). Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms provides that “everyone has the right to respect for his private, his home and his correspondence.” The second paragraph of the Article sets forth the permissible grounds for limiting the exercise of the right.⁴⁸ Decisions of the former Commission and the Court indicate that environmental harm

⁴⁷ The Commission quotes Article 25 of the American Convention that provides everyone “the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by th[e] Convention.”

⁴⁸ Paragraph 2 provides: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.” A related provision, Article 1 of Protocol 1, ensures that “every natural or legal person is entitled to the peaceful enjoyment of his possessions.” The European Commission has accepted that pollution or other environmental harm may result in a breach of Article 1 of Protocol 1, but only where such harm results in a substantial reduction in the value of the property and that reduction

attributable to state action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Article 8(1). The harm may be excused under Article 8(2) if it results from an authorized activity of economic benefit to the community in general, as long as there is no disproportionate burden on any particular individual; *i.e.* the measures must have a legitimate aim, be lawfully enacted, and be proportional. States enjoy a margin of appreciation in determining the legitimacy of the aim pursued.

is not compensated by the state. The Commission added that the right to peaceful enjoyment of possessions “does not, in principle, guarantee the right to the peaceful enjoyment of possessions in a pleasant environment.” *Rayner v. United Kingdom* (1986), 47 DR 5, 14.

i. *Noise Pollution Cases.* Most of the early European privacy and home cases involved noise pollution. In *Arrondelle v. United Kingdom*,⁴⁹ the applicant complained of noise from Gatwick Airport and a nearby motorway. The application was declared admissible and eventually settled.⁵⁰ The settlement left unresolved numerous issues, some of which were addressed by the Court in *Powell & Raynor v. United Kingdom*.⁵¹ The Court found that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified under Article 8(2) as “necessary in a democratic society” for the economic well-being of the country. Noise was acceptable under the principle of proportionality, if it did not “create an unreasonable burden for the person concerned,” a test that could be met by the state if the individual had “the possibility of moving elsewhere without substantial difficulties and losses.”⁵² More recently, in *Hatton and Others v. The United Kingdom*, judgment 2 October 2001, a Chamber of the European Court found that the noise from increased flights at Heathrow airport between 4 a.m. and 6 a.m. violated the rights of the applicants to respect for their home and family life, in large part because the sleep deprivation this caused raised health concerns. According to the Court, in balancing individual rights and the general welfare, the State cannot simply refer to the economic well-being of the country “in the particularly sensitive field of environmental protection.” Instead, the State is required to minimize the interference by trying to find alternative solutions and by generally seeking to achieve their aims in the way least burdensome to human rights. The Court also found a violation of article 13 (right to a remedy) and awarded compensation to the applicants. A separate opinion of Judge Costa speaks directly of “the right to a healthy environment” noting that “since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people’s lives.”

ii. *Lopez-Ostra v. Spain.* The major decision of the Court on environmental harm as a breach of the right to private life and the home is *Lopez-Ostra v. Spain*.⁵³ The applicant and her daughter suffered serious health problems from the fumes of a tannery waste treatment plant which operated alongside the apartment building where they lived. The plant opened without a required license and without having followed the procedure for obtaining

⁴⁹ *Arrondelle v. United Kingdom*, (1980)19 DR 186; (1982) 26 DR 5.

⁵⁰ *Baggs v. United Kingdom*, a similar case, was also resolved by friendly settlement. *Baggs v. United Kingdom*, (1985) 44 DR 13; (1987) 52 DR 29.

⁵¹ *Powell and Rayner v. United Kingdom*, ECHR (1990) Series A, No. 172.

⁵² Contrast the *Vearncombe* case, where the Commission found that the level and frequency of the noise did not reach the point where a violation of article 8 could be made out and therefore the application was inadmissible. *Vearncombe et al. v. United Kingdom and Federal Republic of Germany* (1989), 59 DR 186.

⁵³ *Lopez-Ostra v. Spain*, ECHR (1994), Series A, No. 303C.

one. The applicant was eventually forced to move due to the pollution levels. The Court noted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life. It found that the determination of whether this violation had occurred should be tested by striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The Court found that the state exceeded its "margin of appreciation" and awarded compensation.

iii. In *Anna Maria Guerra and 39 others against Italy*⁵⁴ the applicants complained of pollution resulting from operation of a chemical factory situated near their town; the risk of major accidents at the plant; and the absence of regulation by the public authorities. Invoking Article 10 (freedom of information), the applicants asserted in particular the government's failure to inform the public of the risks and the measures to be taken in case of a major accident, prescribed by the domestic law transposing the EC 'Seveso' directive.⁵⁵

The former European Commission on Human Rights⁵⁶ admitted the complaint insofar as it alleged a violation of the right to information. It did not accept the claim of pollution damage as it affected the right to life. The essential question before the Commission was whether the right to information imposed on the government a positive duty to inform. By a large majority, the Commission concluded that Article 10 imposes on states the positive duty to collect, collate, and disseminate information which would otherwise not be directly accessible to the public or brought to the public's attention. The Commission relied upon

⁵⁴ Case 14967/89, *Guerra and Others v. Italy*, 1998-1 ECHR, Judgment of 19 February 1998.

⁵⁵ EEC Directive on the Major Accident Hazards of Certain Industrial Activities, 82/501/EEC, 1982 O.J. 230, amended by 87/216/EEC, 19 March 1987. The "Seveso" law required disclosure of the production process; the substances present and their quantities; possible risks for employees, workers, the population and the environment; security measures, and rules to follow in case of accident. Other laws supplemented the right to environmental information.

⁵⁶ The European Commission on Human Rights ceased to function with the entry into force of Protocol 11 to the European Convention which created a permanent European Court of Human Rights. Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted May 11, 1994, entered into force Nov. 1, 1998, E.T.S. 155, *reprinted in* 33 I.L.M. 960 (1994). The new Court was inaugurated on Nov. 1, 1998.

"the present state of European law" which it said confirmed public information as one of the essential instruments for protecting the well-being and health of the populace in situations of environmental danger. The Commission referred specifically to the Chernobyl resolution, adopted by the Parliamentary Assembly of the Council of Europe, which it said recognized a fundamental right to information concerning activities that are dangerous for the environment or human well-being. A Grand Chamber of the European Court of Human Rights subsequently heard the case, reversed the Commission on its expanded reading of Article 10, and reaffirmed that Article 10 generally only prohibits a government from interfering with a person's freedom to receive information that others are willing to impart.⁵⁷ Eight of the 20 judges suggested in separate opinions that positive obligations to collect and disseminate information might exist in some circumstances.

⁵⁷ According to the Court, "[t]hat freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion." *Guerra and Others v. Italy*, 1998-I ECHR, Judgment of 19 February 1998, para. 53.

The Court did unanimously find a violation of Article 8, the right to family, home and private life, noting that the individuals waited throughout the operation of fertilizer production at the company for essential information “that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.” Citing the *Lopez Ostra* case, the Court reiterated that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life.”⁵⁸ The Court declined to consider whether the right to life guaranteed by Article 2 had been violated, considering it unnecessary in light of its decision on Article 8, despite the fact that deaths from cancer had occurred in the factory and this would have a clear bearing on damages. In regard to the latter, the Court found that applicants had not proved pecuniary damages but were entitled to non-pecuniary damage. The applicants also sought a clean-up order, which the Court declined to give on the ground that it lacks the power to issue orders.

iv. *Article 6 cases.* In the European system, Article 6,⁵⁹ which provides judicial guarantees of a fair trial, has been construed as including a right of access to justice.⁶⁰ Applicability of Article 6 depends upon the existence of a dispute concerning a right recognized in the law of the state concerned, including those created by licenses, authorizations and permits that affect the use of property or commercial activities.⁶¹ In *Oerlemans v. Netherlands*⁶² Article 6 was deemed to apply where a Dutch citizen could not challenge a ministerial order designating his land as a protected site. In *Zander v. Sweden*,⁶³ Article 6 applied to persons who had been denied a remedy for threatened environmental harm resulting from contamination of their well water by cyanide from a neighboring dump

⁵⁸ *Ibid.* para. 60. The Court appears to have strained to avoid overturning its prior case law interpreting Article 10. The basis of the complaint was the government’s failure to provide environmental information, not pollution like that found in the *Lopez-Ostra* case.

⁵⁹ Article 6, para. 1 states: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

⁶⁰ *Golder v. United Kingdom*, ECHR (1975), Series A, No. 18; *Klass v. Germany*, ECHR (1978), Series A, No. 28.

⁶¹ *Bentham v. Netherlands*, ECHR (1985), Series A, No. 97.

⁶² *Oerlemans v. Netherlands*, ECHR (1991), Series A, No. 219.

⁶³ *Zander v. Sweden*, ECHR (1993), Series A, No. 279B.

site. The municipality furnished temporary water supplies but subsequently raised the permissible level of cyanide and halted the city supply. When the company maintaining the dump site sought a renewed and expanded permit, the applicants argued that the threat to their water supply would be sufficiently high that the company should be obliged to provide free drinking water if pollution occurred. The board granted the permit and denied the applicants' request. They sought but could not obtain judicial review of the decision. The Court found a violation of Article 6.

Some environmental threats have been deemed too remote to give rise to a claim within the purview of Article 6(1). In *Balmer-Schafroth and Others v. Switzerland*,⁶⁴ applicants argued that they were entitled to a hearing over the government's decision to renew an operating permit for a nuclear power plant. The Court found that the applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, because they failed to show that the operation of the power station exposed them personally to a danger that was serious, specific, and, above all, imminent, with a degree of probability that made the outcome of the proceedings "directly decisive" for the right they invoked. Seven judges dissented, objecting that the Court had failed to specify why the connection that the applicants were trying to make was "too tenuous." They said Article 6 should have applied to allow the applicants to establish before a tribunal the degree of danger they were facing rather than requiring them to prove at the outset the existence of a risk and its consequences. A likelihood of risk and damage should be sufficient, based on the precautionary principle.

The right to a remedy extends to compensation for pollution. In *Zimmerman and Steiner v. Switzerland*⁶⁵, the Court found Article 6 applicable to a complaint about the length of proceedings for compensation for injury caused by noise and air pollution from a nearby airport.

III. National Law and Jurisprudence

More than 100 constitutions throughout the world guarantee a right to a clean and healthy environment,⁶⁶ impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. Over half of these constitutions explicitly recognize the right to a clean and healthy environment, including nearly all constitutions adopted since 1992.⁶⁷ Ninety-two constitutions impose a duty on the

⁶⁴ *Balmer-Schafroth v. Switzerland*, 1997-IV ECHR, Judgment of 26 Aug. 1997.

⁶⁵ *Zimmerman and Steiner v. Switzerland*, ECHR (1983), Series A, No. 66.

⁶⁶ 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).

⁶⁷ Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Ecuador, El Salvador, Equatorial Guinea, Eritrea (draft), Finland, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Iran, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Macedonia, Madagascar, Malawi,

government to prevent harm to the environment.

Mali, Malta, Mexico, Micronesia, Mongolia, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Niger, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Sao Tome and Principe, Saudi Arabia, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Sri Lanka, Suriname, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Togo, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yugoslavia, Zambia.

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.⁶⁸ In some instances, the courts issued orders to cease operations.⁶⁹ 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.⁷⁰ Colombia also recognizes the enforceability of the right to environment.⁷¹ In Costa Rica, the court stated that the right to health and to the environment are necessary to ensure that the right to life is fully enjoyed.⁷²

United States courts have heard complaints about human rights and environmental

⁶⁸ As early as 1991, the Supreme Court interpreted the right to life guaranteed by article 21 of the Constitution to include the right to a wholesome environment. See *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480 (1991). In a subsequent case, the Court observed that the "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life." *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, 1991 (1) SCC 598.

⁶⁹ See, e.g., *M.C. Mehta v. Union of India & Others*, JT 1996, reprinted in 1 *The Environmental Activists' Handbook* at 631.

⁷⁰ *Kattan, Alberto and Others v. National Government*, Juzgado Nacional de la Instancia en lo Contenciosoadministrativo Federal. No. 2, Ruling of 10 May 1983, La Ley, 1983-D, 576; *Irazu Margarita v. Copetro S.A.*, Camara Civil y Comercial de la Plata, Ruling of 10 May 1993 (available at www.eldial.com) ("The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person. .").

⁷¹ *Fundepublico v. Mayor of Bugalagrande and Others*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991 ("It should be recognized that a healthy environment is a *sine qua non* condition for life itself and that no right could be exercised in a deeply altered environment.").

⁷² *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.

abuses leading to substantial health problems in various countries.⁷³ 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.⁷⁴ Similarly, four Nigerians sued Royal Dutch Shell for its actions in Nigeria including pollution of the air and water of the Ogoni region. Another case has been brought concerning 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.⁷⁵

IV. The Rights-Based Approaches to Health and Environmental Protection

Nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights, including the right to health. In nearly every instance, 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. These cases demonstrate several benefits of using one or more of the rights-based approaches to environmental and health problems. First, the emphasis on rights of information, participation, and access to justice encourages an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Experience shows better environmental decision-making and implementation when those affected are informed and participate in the process: the legitimacy of the decisions exercises a pull towards compliance with the measures adopted. Another benefit of a rights-based approach is the existence of international petition procedures that allow those harmed to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threaten human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation. In other instances, however, the problem appears to be the result of a combination of governmental lack of capacity and lack of political will. The pollution may be caused by powerful enterprises whose business and investment are important to the state or the state may have inadequate monitoring systems to ensure air or water quality. Even in these instances, however, petition procedures can help to identify problems and encourage a dialogue to resolve them, including by the provision of technical assistance.

Given the extensive treaty provisions and case law that use existing human rights, it may be asked whether or not a recognized and explicit right to a health, safe and environmentally-sound environment would add to the existing protections and further the international values represented by environmental law and human rights. At the national

⁷³ Jurisdiction over the matters are based on the federal Alien Tort Claim Statute, 28 U.S.C. 1350 (1789).

⁷⁴ *Jota v. Texaco, Ind.*, 157 F. 3d 153 (2d. Cir, 1998); *Aguinda v. Texaco*, 2000 WL 122143 (Jan. 31, 2000).

⁷⁵ *Doe v. Unocal Corp.* 67 F. Supp. 2d 1140 (C.D. Cal. 1999).

level more than eighty constitutions now contain provisions establishing the right to a safe and healthy environment and/or the duty of the state to protect the environment and health of its inhabitants. The primary argument in favor of such a right is that it elevates the entire spectrum of environmental issues to a place as a fundamental value of society, to a level equal to other rights and superior to ordinary legislation. In the absence of guaranteed environmental rights, constitutionally-protected property rights may be given automatic priority instead of balanced against health and environmental concerns. Other rights may similarly be invoked to strike down environmental and health measures that are not themselves rights-based.

Even where there is a guaranteed right to environment, it still must be balanced against other rights should there be a conflict. In a few instances a specific priority may be established by law. The Constitution of Ecuador, article 19, provides for example “the right to live in an environment free from contamination.” The Constitution invests the state with responsibility for ensuring the enjoyment of this right and “for establishing by law such restrictions on other rights and freedoms as are necessary to protect the environment.” Other states may reconcile conflicts through other balances, but including the right makes it possible to do so.

In sum, the links between human rights, health, and environmental protection are today well-established in international law, accepted by states in agreements and implemented in practice. Further attention to the links and to the potential conflicts between the goals of the three subject areas will be of benefit to all concerned.