OXFORD

Environmental Law Dimensions of Human Rights

Edited by

Ben Boer

The Collected Courses of the Academy of European Law

Series Editors: Professor Loïc Azoulai,
Professor Nehal Bhuta,
Professor Marise Cremona
European University Institute, Florence
Assistant Editor: Anny Bremner
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NATIONAL LEGISLATION

List of Abbreviations

A-G	Advocate General
ACommHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AfCHPR	African Charter on Human and Peoples' Rights
AFHRD	Asian Forum for Human Rights and Development
AICHR	ASEAN Intergovernmental Commission on Human Rights
AJIL	*American Journal of International Law*
AMME	ASEAN Ministerial Meeting on the Environment
AOSIS	Alliance of Small Island States
ASEAN	Association of Southeast Asian Nations
ASEM	Asia–Europe Meeting
ASOEN	ASEAN Senior Officials on the Environment
ch.	chapter
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CER	Certified Emission Reduction
CIEL	Center for International Environmental Law
CJEU	Court of Justice of the European Union
COP	Convention Conference of the Parties
CSR	corporate social responsibility
DLDD	Desertification, Land Degradation and Drought
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	(UN) Economic and Social Council
ECtHR	European Court of Human Rights
ed.	editor, edition
EEC Treaty	Treaty Establishing the European Economic Community
EIA	environmental impact assessment

EJIL	*European Journal of International Law*
ESIA	environmental and social impact assessment
FUNAI	Fundação Nacional do Índio (Brazil)
GC	General Court
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation (World Bank Group)
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture
IUCN	International Union for Conservation of Nature
MDGs	Millennium Development Goals
MEA	multilateral environmental agreements
MERCOSUR	*Mercado Común del Sur*, Southern Common Market
NAFTA	North American Free Trade Agreement
NCP	non-compliance procedures
NEASPEC	Northeast Asian Sub-regional Programme for Environmental Cooperation
NGO	non-governmental organization
NHRIs	National Human Rights Institutions
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights

PCA	Permanent Court of Arbitration
PICT	Pacific Island Countries and Territories
PIEL	public interest environmental litigation
RECIEL	*Review of European, Comparative & International Environmental Law*
REDD	reducing emissions from deforestation and degradation
Res.	Resolution
RLI	Red List Index
SAARC	South Asian Association for Regional Cooperation
SACEP	South Asian Co-operative Environment Programme
SDGs	Sustainable Development Goals
sep. op.	separate opinion
SIDS	small island developing states
SPC	Secretariat of the Pacific Community
SPREP	Secretariat of the Pacific Regional Environment Programme
TEU	Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
trans.	translated by
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UN HR	United Nations Human Rights [Council / Committee]
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series

WHO	World Health Organization
WSSD	(UN) World Summit on Sustainable Development
YbIEL	*Yearbook of International Environmental Law*
YbILC	*Yearbook of the International Law Commission*

Notes on Contributors

Natasha Affolder is the Associate Dean (Research & International) and an Associate Professor at the University of British Columbia's Faculty of Law. Professor Affolder publishes and lectures widely on diverse aspects of transnational environmental law. She is currently the principal investigator on a major research project exploring the ascendancy of contract in environmental law. Among her professional activities, Professor Affolder is on the board of the Canadian Council of International Law, and is an advisory board member of the journals *Transnational Environmental Law* and the *McGill Journal of International Sustainable Development Law*.

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Ben Boer was appointed as Distinguished Professor at the Research Institute of Environmental Law, Wuhan University Law School in 2011, and is an Emeritus Professor in the Sydney Law School. He became Deputy Chair of the IUCN World Commission on Environmental Law in 2012. He is a member of the advisory board of the *Journal of Environmental Law*, the *Review of European*, *Comparative and International Environmental Law*, and the *Asia Pacific Journal of Environmental Law*. His previous books include *International Environmental Law in the Asia Pacific* (with Ross Ramsay and Donald Rothwell) (1997); *Heritage Law in Australia* (with Graeme Wiffen) (2006); and *Environmental Law and Sustainability since Rio* (edited with Jamie Benidickson, Antonio Benjamin and Karen Morrow, 2011 and 2013).

Stefan Gruber is an Associate Professor at the Hakubi Center for Advanced Research at Kyoto University in Japan, where he is based at the Graduate School of Human and Environmental Studies. He taught at the Sydney Law School until 2013, and continues to teach and research at universities in China on a regular basis. His research and publications concentrate on sustainable development law and policy, international environmental law, human rights, armed conflict, the conservation of cultural heritage, and the illicit trafficking of cultural property and other forms of art crime, with a focus on East and Southeast Asia.

Ludwig Krämer was a Judge at the Landgericht Kiel from 1969 to 2004, and was an official in the Commission of the European Community's environment department from 1972 until 2004. He has been an Honorary Professor at Bremen, Copenhagen,

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Elisa Morgera is Senior Lecturer in Global Environmental Law at the University of Edinburgh School of Law. Her main research interests include international biodiversity law, corporate environmental accountability, and the rights of indigenous peoples and local communities. She is the author of *Corporate Accountability in International Environmental Law* (2009) and lead co-author of *Unraveling the Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (2014). She is a member of the Advisory Board of the *Review of European, Comparative and International Environmental Law*.

Riccardo Pavoni is Professor of International and European Law in the Department of Law at the University of Siena. He serves as Co-director of the Tulane-Siena Institute for International Law, Cultural Heritage and the Arts. Professor Pavoni has been a visiting professor at various institutions, including the Universidad Autónoma de Bucaramanga, Tulane University School of Law, Charles University in Prague and the University of Amsterdam. In 2013, he was a Lecturer at the Italian School for the Judiciary. He is the Associate Editor of the *Italian Yearbook of International Law* and a member of the Editorial Board of the *Oxford Reports on International Law in Domestic Courts*. Currently, Professor Pavoni's main research areas cover the law of international organizations, the law of international immunities, human rights law, international and European environmental law, and the relationship between international, European, and domestic law.

Introduction

Ben Boer

The past few decades have seen a slow but steady convergence of certain aspects of the realms of environmental law and human rights. While the list of rights set out in the Universal Declaration on Human Rights,[1] the 1966 Covenants[2] (with one exception[3]), and the European Convention on Human Rights contain no specific reference to the environment as such, a high quality environment is coming to be regarded as a necessary prerequisite for the enjoyment of some of the most fundamental human rights—especially the rights to life[4] and health.[5] The rights to adequate food, clean water, and proper housing are also dependent on a quality environment. Three regional instruments specifically recognize the link between human rights and protection of the environment. These are the 1981 African Charter on Human and Peoples' Rights;[6] the 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights;[7] and the 2012 Association of Southeast Asian Nations

[1] UNGA Res. 217A (III), Universal Declaration of Human Rights (10 December 1948) (hereinafter 'UDHR').

[2] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter 'ICESCR'); International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter 'ICCPR').

[3] ICESCR, *supra* note 2, Art. 12 on environmental and industrial hygiene.

[4] The right to life is included in UDHR, *supra* note 1, Art. 3; ICCPR, *supra* note 2, Art. 6(1); Art. 6 of the Convention on the Rights of the Child, GA Res. 44/25, 20 November 1989.

[5] UDHR, *supra* note 1, Art. 25(1); ICESCR, *supra* note 2, Art. 12(1); Convention on the Rights of the Child (New York, 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art. 24; and Convention on the Elimination of Discrimination against Women (New York, 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, Art. 12.

[6] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, entered into force 21 October 1986) 1520 UNTS 128, 21 ILM 58 (1982).

[7] Additional Protocol to the American Convention on Human Rights in the area of Economic, and Social, and Cultural Rights ('Protocol of San Salvador' signed 17 November 1988 entered into force 16 November 1999) (1988) OASTS 69.

(ASEAN) Human Rights Declaration.[8] The interpretation and implementation of these instruments in recent years, as discussed in several chapters of this book, confirms this convergence. It has also been evident at the level of international environmental policy from the 1970s onwards. For example, the first preambular paragraph of the Stockholm Declaration stated:

> 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. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. *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 the right to life itself.*[9]

Further, Principle One of the Stockholm Declaration also explicitly underlines the link: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'[10] The 1992 Rio Declaration on Environment and Development[11] reaffirmed the commitments of the Stockholm Declaration, but did not reiterate the strong Stockholm sentiment. Rio Principle One is more nuanced, with a less explicitly environmental rights-based approach: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'

The main successor to the Stockholm and Rio conferences, namely the 2012 Rio Conference on Environment and Development, reaffirmed respect for all human rights, particularly the rights to health, food, and safe drinking water, in its final outcome document, *The Future We Want*.[12]

[8] Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (18 November 2012), Art. 17, available at <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration> (last visited 4 October 2014).

[9] Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev. 1(1973) (16 June 1972) (emphasis added).

[10] See also A. Kiss, 'The Right to the Conservation of the Environment', in R. Picolotti and D. Taillant (eds), *Linking Human Rights and the Environment* (2003).

[11] Rio Declaration on Environment and Development, A/Conf.151.151/26 (Vol. 1) (13 June 1992) 31 ILM 874.

[12] Rio+20 Outcome Document, 'The Future We Want', UN Doc. A/CONF.216/L.1 (19 June 2012): food: para 8; water and sanitation para 121; health para 121, available at <http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf> (last visited 4 October 2014). However, groups such as Human Rights Watch and the Centre of International Environmental Law have pointed out that Rio+20 fell short of fully integrating human rights and environmental protection. See 'Rio+20 Outcome Document Undermined by Human Rights Opponents'

While an agreed formulation of a right to the environment has not yet been settled, it is the subject of investigation by the Independent Expert on Human Rights and the Environment appointed by the United Nations Human Rights Council in 2011.[13] In 2013, the Independent Expert reported on a mapping exercise which examined the text of human rights treaties, statements by human rights treaty bodies, decisions of regional human rights tribunals, resolutions of the Human Rights Council (UN HR Council), statements by states, and a range of other sources. In presenting the report to the Council he stated:

> [T]he human rights bodies have developed a coherent body of environmental human rights obligations, which contained three principal elements: procedural obligations with regard to environmental protection, substantive obligations to protect against environmental harm which interferes with human rights and in particular that states are obliged to adopt a legal framework to protect against such harm.[14]

The Independent Expert concluded that:

> In sum, on the basis of this mapping project, I believe that it is now beyond argument that human rights law includes obligations relating to the environment.
>
> At the same time, I recognize that not all States have formally accepted all of these norms. While some of the statements cited in my report are from legally binding treaties, or from tribunals that have the authority to issue decisions that bind the States subject to their jurisdiction, other statements do not in themselves have binding effect.
>
> Nevertheless, they are all from sources with authority to interpret and apply human rights obligations. Taken together, the statements provide strong evidence of converging trends among these human rights bodies towards uniformity and certainty in the application of human rights law to environmental issues. These trends are further supported by State practice reflected in the Universal Periodic Review process and by international environmental instruments.
>
> In this light, I strongly encourage States to accept these statements as evidence of actual or emerging international law.[15]

(22 June 2014), available at <http://www.amnesty.org/en/news/rio20-outcome-document-undermined-human-rights-opponents-2012-06-22> (last visited 4 October 2014).

[13] UN HR Council, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox', UN Doc. A/HRC/22/43 (24 December 2012).

[14] J.H. Knox, 'Human Rights Obligations to Protect the Environment' Statement by Independent Expert on human rights and the environment Human Rights Council, 25th Session 10 March 2014, at 2, available at <http://ieenvironment.org/2014/03/11/the-independent-experts-report-to-the-human-rights-council/> (last visited 5 November 2014).

[15] *Ibid*., at 3; see also J.H. Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mapping Report, A/HRC/25/53 (30 December 2013).

Each chapter of this book records some aspect of the links between environmental law and human rights in substantive and/or procedural terms. The chapters fall loosely into four themes. The first explores human rights and the environment in the context of the private sector. The second canvasses the decisions of the European and Inter-American courts in respect of substantive and procedural aspects of human rights and environmental justice. The third examines human rights and the environment in the Asian region with respect to institutional and judicial developments on the one hand, and the issues of rights associated with various kinds of forced human displacement on the other; the final theme is about the future direction of human rights and the environment.

In Chapter 1, Natasha Affolder argues for greater legal accountability of corporations with respect to development activities that have an impact on the human rights of citizens. Her objective is to move discussion about the private sector and environmental rights 'beyond predictable normative debates' in order to focus on aspects of private sector engagement with environmental norms that are otherwise little addressed in existing scholarship. She explores the incoherence of the public–private divide and the 'partial vision' of the private sector being limited to large multinationals. She seeks to understand how environmental rights and wrongs 'are constructed through the mundane, and less examined, day-to-day activities of business owners and private organizations, small and large'. She then shifts focus from actors to legal tools and in particular how the private sector makes contractual arrangements with communities, governments, and others to govern environment protection and to deal with environmental impacts. She observes that a 'contractualization' of environmental governance entrenches market mechanisms and a conception of the role of law as a task of 'protecting private property rights and freedom of contract'. Finally, she looks at the production, circulation, and framing of environmental information through metrics and indicators and the consequent encouragement of an 'audit' culture leading to an infiltration of legal conceptions of 'appropriate' business behaviour. She intends the chapter to 'trouble our thinking about environmental rights and to illuminate a wider set of issues that can inform the nexus between environmental rights in the private sector'. She concludes that:

> [A]n awareness of the multiple levels of private engagement with environmental rights creates space acknowledging tension between rights-based approaches and market approaches [and that] . . . [h]uman rights discourses may provide a rare opportunity for push-back against the global 'green economy' that is increasingly shaped by the dictates of markets, and the demands of marketing actors.

In Chapter 2, Elisa Morgera focuses on the difficult issue of the accountability of multinational corporations in the context of the Convention on Biological Diversity and its concept of benefit-sharing. She notes that multinationals are able to influence development and implementation of national and international law through lobbying, negotiations, compromise and weakening of controls. She traces the development of the ways in which law has been able to refocus corporations from profit maximization to taking responsibility for a broader range of stakeholders regarding communal concerns. The chapter emphasizes the important distinction between corporate *responsibility* and corporate *accountability*, with the latter being a means for promoting environmentally sound conduct. She traces the factual and normative links between environmental damage inflicted by corporations and the issue of human rights, observing that according to a UN survey on business and human rights 'nearly a third of cases of alleged environmental harm had corresponding impacts on human rights'. In the context of links between human rights and the environment, Morgera focuses on the convergence of international standards on corporate environmental accountability and their relevance from the perspective of human rights, pointing to environmental impact assessment as one example where human rights dimensions have become an important consideration in the decision-making process concerning development activity. She observes:

> [S]takeholder engagement and participation in the assessment—elements common to human rights assessments—also significantly contribute to integrating human rights concerns into the environmental self-assessments. . . .

She goes on to critically examine the cross-fertilization between environmental and human rights initiatives to promote corporate accountability by analysing the standards and processes developed under the Convention on Biological Diversity, particularly with regard to indigenous peoples and local communities. She concludes with an exploration of the links between corporate accountability and the green economy, and calls for greater scholarly attention to be directed to a number of aspects of benefit-sharing in the context of corporate responsibility and human rights.

Riccardo Pavoni's chapter is a wide-ranging but in-depth comparative analysis of the environmental jurisprudence of the European and Inter-American human rights courts, remarking on the growing links between the jurisprudence of the two systems. He explores the development of procedural rights relating to participation in the Inter-American system and compares that with the development of procedural rights in the European case law. He also canvasses the increasingly important issue of the rights of activists in

defending the environment, and dwells on the case of *Kawas-Fernández*,[16] which involved the murder of the president of an environmental foundation that was protesting against development affecting protected areas in Honduras. (This issue has gained more focus with the statements of the UN Independent Expert on Human Rights and the Environment concerning environmental defenders in recent years.[17]) Pavoni refers to the important statement of the Inter-American Court on Human Rights in relation to the defence of human rights which 'is not limited to civil and political rights, but necessarily involves economic, social and cultural rights monitoring, reporting and education' and to its argument that 'there is an undeniable link between the protection of the environment and the enjoyment of other human rights'. He goes on to explain the reasons for the growth of public interest environmental litigation in the Americas compared with the European system, and focuses in particular on the important jurisprudence concerning the environmental rights of indigenous peoples. He concludes with several observations on the convergence of the two systems with respect to environmental rights, noting that there is a continuing dialogue between them with respect to environmental matters, but that the European system has something to learn from its Inter-American counterpart, especially concerning the links between the rights to information and freedom of expression.

Chapter 4 by Ludwig Krämer focuses on a particular procedural issue in the debate over human rights and the environment, namely the right of access to environmental justice, tracing in some detail the jurisprudence of the European Court of Justice in this regard from the early 1960s. He argues that Article 263 of the Treaty on the Functioning of the European Union (TFEU) concerning access to environmental justice has been given a very restrictive interpretation by the Court, and that its interpretation has been based more on political than legal grounds. He opines that the Court has to reconsider its interpretation of Article 263 in the light of the finding by the Aarhus Convention Compliance Committee that the Court's current interpretation is in breach of the European Union's obligations under the Aarhus Convention. Of particular interest is Krämer's critical appraisal of the reasoning of the Court in a series of cases with regard to the requirement of Article 263(4) that a natural or legal person must be *directly* concerned by the measure in question. He also focuses on what he terms the Court's dilemma with regard to access to justice under the Aarhus Convention,[18] as the

[16] *Kawas-Fernández v. Honduras*, IACtHR, Judgment of 3 April 2009.

[17] See UN HR Council, *supra* note 13, paras 27, and 61, and Report of the Special Rapporteur on the situation of human rights defenders, paras 123–126, UN Doc.A/HRC/19/55.

[18] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, entered in force 30 October 2001) 2161 UNTS 447 (hereinafter 'Aarhus Convention').

General Court has ruled that the Aarhus Convention ranks lower than EU primary law, and therefore cannot affect the interpretation of Article 263(4). The dilemma lies in the fact that Article 216(2) TFEU provides that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'; this includes the Aarhus Convention. Thus in Krämer's analysis, the Court is obliged to interpret Article 263(4) so as to ensure that access to the courts is granted to the fullest extent possible. In its concluding paragraphs, the chapter suggests that the way forward is to grant environmental non-governmental organizations standing on the basis of specified criteria as is done in a range of jurisdictions in Europe, and indeed, in a number of jurisdictions around the world.

Chapter 5 by Ben Boer focuses on the development of links between the human rights and environmental law regimes in the four major regions that constitute the Asia-Pacific. He canvasses the growth of both governmental and non-governmental human rights institutions, as well as the various developments with regard to human rights instruments. He notes that at a regional level the development of a substantive environmental right is still in its early stages. He focuses on the ASEAN Human Rights Declaration completed in 2012, and the inclusion of a right to a 'safe, clean and sustainable environment', together with related rights. He notes that the actual implementation of the Declaration may be limited at this stage by the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights, because they provide that 'as a basic principle, decision-making is to be based on consultation and consensus', which will restrict its ability to make specific determinations. The chapter also looks at the constitutionalization of environmental rights at national level in the Asia-Pacific, as well as legal actions in various Asian courts using constitutional 'right to life' provisions as a basis for the establishment of environmental rights. Further, it examines the question of whether the Aarhus Convention might be acceded to by jurisdictions in the Asian region, quoting Kofi Annan's statement that the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'. Boer states that '[d]espite this sentiment, the possibility of extending the Aarhus Convention to Asia and Pacific countries is currently fairly remote.' The chapter concludes that, while progress has been made in the development of closer links between environmental law and human rights in the region, overall, the situation remains patchy, especially in comparison to the European, Inter-American and African human rights systems.

In Chapter 6, Stefan Gruber examines the fact that climate change will likely displace vast numbers of people in many areas of the world, including the Asia-Pacific region. He emphasizes the devastating effect of such

events on the human rights of those affected, such as the right to life, and the human rights to food, water, health, and adequate housing. He stresses the need for legal recognition of and assistance for such displaced persons at an international level. While the chapter focuses on the direct effects of climate change with regard to the human rights questions arising from forced displacement, Gruber also canvasses the often climate-related matters of land degradation and its sub-set of desertification, which are also responsible for displacement and which raise many of the same issues. The chapter uses a range of examples, drawn from island communities in the Pacific, river deltas in South and Southeast Asia, and the arid areas in Northern China, exploring the impact of these phenomena on human rights and potential legal solutions for their protection. Gruber considers, and rejects, the possibility of using the 1951 Refugee Convention[19] as an instrument to assist people displaced by environmental causes, especially the effects of climate change. He then canvasses the question of whether the climate change regime itself might be used as a basis for dealing with climate refugees, or whether a new instrument needs to be developed based on the fundamental concepts found in the Universal Declaration and the 1966 Covenants. Consistently with the theme of convergence discussed in this 'Introduction', Gruber argues that 'while recognizing the overall importance of a rights-based approach in this context, it should not be developed in isolation from environmental law considerations, but in conjunction with them'.

In Chapter 7, Alan Boyle asks a basic question that is central to the themes of this book: 'Why should environmental protection be treated as a human rights issue?' He sets out a range of possible answers: 'Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans. . . .' He argues that economic and social rights have broadened to take into account the public interest in environmental protection to the extent that there should now be a right to a decent environment in some form. The chapter demonstrates how the European Court of Human Rights has, in a series of cases, used various human rights such as the right to private life, and the right to life itself, 'to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information'. Boyle canvasses the importance of the Aarhus Convention in representing an extension of environmental rights on the one hand and of the corpus of human rights law on the other. This leads to his discussion of the work of the UN Independent Expert with

[19] Convention Relating to the Status of Refugees (Geneva, 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

regard to recommendations concerning the enjoyment of a 'safe, clean, healthy and sustainable environment' as an aspect of human rights. Boyle then asks some penetrating questions concerning whether we want a right to a decent environment, and if so: 'Do we want to expand rather than simply interpret the existing corpus of international human rights law?' In exploring this latter question, he argues that such a right is best seen 'within the context of economic, social and cultural rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene', rather than within the framework of civil and political rights. He uses climate change as an example to illustrate his point, while recognizing the inherent challenges of using existing human rights law to address the plight of transboundary climate change victims. He makes the very important observation that the response of human rights law must be in global terms, 'treating the global environment equally with climate change as the common concern of humanity'. That message is underlined by the UN Independent Expert on Human Rights and the Environment in his statement on the occasion of World Environment Day 2014:

> Environmental degradation, including harm from climate change, desertification, air and water pollution, and exposure to toxic substances, impairs the enjoyment of a vast range of human rights, including the right to life, to health and to an adequate standard of living.[20]

* * *

This book derives primarily from a series of lectures given at the Summer School on Human Rights Law presented by the Academy of European Law at the European University Institute in Italy in 2012. Several chapters have stretched beyond their original scope and all of them have been updated to take into account more recent developments. On behalf of the contributors, I thank the Directors of the Academy of European Law for making this book possible. A special debt of gratitude is owed to Anny Bremner for her work beyond the call of duty, especially her patient negotiation with the authors, excellent copy-editing and liaising with Oxford University Press. I also thank Dr Valentina Spiga for her copy-editing and meticulous attention to footnotes.

Finally, I also express my heartfelt thanks to Natasha Flemming, Ela Kotkowska, and Matthew Humphrys at Oxford University Press for bringing this work to completion.

[20] UN rights expert urges States to fulfil human rights obligations related to environmental protection—For World Environment Day—Thursday 5 June 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14664&LangID=E> (last visited 26 November 2014).

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Square Pegs and Round Holes?

Environmental Rights and the Private Sector

Natasha Affolder

1. Introduction

Literature addressing corporations and environmental protection often pulls towards one of two poles: despair or celebration. The first emphasizes the environmental destruction wrought by corporate activities and the need for greater legal accountability; the other celebrates the innovative contributions of corporations and 'market tools' to advancing a sustainability agenda. Legal scholars tend to entrench these polarized visions, maintaining an invisible wall between public international law and private environmental governance. This chapter argues that these polarizing visions, and accompanying doctrinal separations, eclipse a host of other questions, particularly a more nuanced appreciation of the intersection of the private sector and environmental rights. Attempts to frame the private sector as 'hero' or 'villain' obscure the plurality of actors that the label 'private' sector captures, the often-conflicting roles adopted, and the significance of the increasingly market-dominated backdrop against which environmental rights conflicts necessarily play out.[1]

What does accounting for the private sector in our understanding of environmental rights entail? Clearly, at a minimum, it requires more than the simple addition of a chapter entitled 'business' or 'private sector' approaches. An 'add-on' approach diminishes the ability to articulate theories of corporate legal responsibility. These articulations remain stalled by reliance on conceptions of rights and responsibilities authored with only states and

[1] The conception of environmental rights advanced in this chapter emphasizes both the procedural human rights through which environmental protection is furthered and the developing substantive rights to a healthy environment. For a discussion of the former, see D. K. Anton and D. L. Shelton, *Environmental Protection and Human Rights* (2011), at 356. On the latter, see D. R. Boyd, *The Environmental Rights Revolution* (2012), at 20.

individuals in mind. It is 'square pegs' and 'round holes'. Fully accounting for the private sector involves abandoning approaches that relegate private sector standards and strategies to a separate narrative.

This chapter takes seriously the need to challenge certain 'immutable' scripts about corporations; about the retreat of the state; about the nature of rights; and about what law is—scripts which prevent nuanced thinking about private actors and environmental rights. The chapter is offered as a counterweight to visions of environmental law-making that give lopsided attention to states. The key objective is to move discussion about the private sector and environmental rights beyond certain predictable normative debates. It seeks to illuminate a number of aspects of 'private' sector engagement with environmental norms that are little noticed in the existing scholarship. This attention to some of the less glamorous aspects of private sector activity—the due diligence practices, the choices of legal techniques, and strategies for framing knowledge—deepens and complicates the dominant vision of the private sector that prevails in conversations about the 'private' sector and the environmental dimensions of human rights.

There are many shades of 'private'. This point is often lost in the race to dismantle the wall separating the private and public. In quite rightly emphasizing that the public–private divide is both incoherent and often a guise for perpetuating various inequalities,[2] there is a risk of obscuring what a complex and multi-dimensional concept the 'private' really is. This chapter emerges from an awareness that the framing of the 'private sector' in environmental and human rights literature is often limited to a 'classic' vision of a large multinational corporation, such as Shell Oil, and its extraterritorial impacts on the environment and living conditions of a community such as the Ogoni people in Nigeria.[3] The spotlight shines on the transnational mega-corporations that are the subject of lawsuits under the Alien Tort Statute in the United States.[4] This is a partial vision. The 'private' sector extends far beyond the handfuls of multinationals that have achieved global name recognition. A project of 'greening' human rights can be deepened, and enriched, by looking beyond the headline-grabbing visions of saints and sinners, and of

[2] See A. Riles, *Collateral Knowledge: Legal Reasoning in Global Financial Markets* (2011), at 8.

[3] Shell Oil's impact on the people and environment in Ogoniland is framed as a 'classic example' of the intersection of business and human rights. See Chapter 7 in this volume. The *Ogoniland* case now stands as a high water mark in articulating environmental rights. See *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Case No. ACHPR/COMM/AO44/1 (27 October 2001) (the '*Ogoniland* case'). See F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41, at 51.

[4] For a discussion of environmental litigation targeting multinational corporations under the US *Alien Tort Statute*, see Anton and Shelton, *supra* note 1, at 936.

multi-billion dollar litigation, to gain an understanding of how environmental rights and wrongs are constructed through the mundane, and less examined, day-to-day activities of businesses and private organizations, small and large.

The chapter begins with a discussion of why the private sector cannot simply be 'added on' as a layer of inquiry. It turns to consider three separate dimensions of private sector engagement with environmental norms, each representative of a different set of perspectives or angles on this issue. The discussion first grapples with the multi-faced corporation, attempting to define some productive space for new thinking by encouraging cross-fertilization between the literature that focuses on corporate liability for human rights abuses and that which elucidates the contributions that corporations can make to social and environmental responsibility.

The focus then moves from actors to legal tools—and specifically the triumph of the contractual form. Private sector actors are striking deals to govern environmental protection and to address environmental impacts with communities, governments, and others. These deals are translated into contractual arrangements, narrowing the scope of legal focus from the public to the interests of 'contracting parties'. The contractualization of environmental governance reveals an entrenching of market mechanisms and a conception of the task of law as protecting private property rights and freedom of contract.

The production, circulation, and framing of environmental information through metrics and indicators are examined next. Vital to the very concept of environmental rights are techniques of measurement and comparison. The proliferation of quantifiable standards and metrics speaks to the demands of an 'audit' culture, and the ways in which business and accounting frameworks have infiltrated legal conceptions of appropriate business behaviour. The section reveals that many of the architects of the measuring devices that have come to dominate biodiversity protection were not contemplating the uses to which these indicators have now been put.

The conclusion draws together insights from these three sections to illuminate the corporatized and privatized frameworks and mandates within which environmental protection is increasingly depicted.

The development of 'rights discourses' in environmental jurisprudence is taking place in a world where markets loom large. This combination of shifting national and international architectures forces a greater attentiveness to private sector roles and their consequences for law. Law is dislodged from centre stage: it becomes 'simply one instrument among others in the environmental regulator's toolkit'.[5] This discussion of private actors thus situates

[5] N. Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures', 21 *Journal of Environmental Law* (2009) 179, at 179.

itself in theoretical terrain that is attentive to the changing nexus between state and law.[6] Market environmentalism casts a significant, if often under-appreciated, shadow over environmental rights and the strategies chosen to advance these rights. Animating this chapter is a concern that those legal scholars who write about rights and those scholars who write about markets are not talking to each other. Beyond the specific examples discussed here, the chapter intends to trouble our thinking about environmental rights and to illuminate a wider set of issues that can inform the nexus between environmental rights and the private sector. A deeper and more nuanced understanding of the intersection of environmental norms and the private sector may produce new possibilities for framing and advancing the environmental dimensions of human rights.

2. Accounting for the Private Sector—Beyond Add-Ons

Accounting for the private sector demands more of traditional theories, and methods, than legal scholars seem willing to concede. Few would argue that it is inappropriate to look beyond state actors in explicating environmental governance at the global level. Yet recognizing the need to move beyond state-centrism is easier to say than to achieve.

This problem is a pernicious one—leading international environmental textbooks now acknowledge the importance of non-state actors by adding chapters to earlier textbook versions, aptly titled 'non-state actors' or 'business' or 'non-governmental organizations'.[7] But the rest of the textbook is not necessarily re-thought to acknowledge the multiple roles of non-state actors and the fact that dominant theories do not accommodate these roles. Steven Ratner describes this as the challenge of breaking free of the 'doctrinal straitjacket' of international environmental law which continues to 'skew the analysis of international environmental regimes'.[8]

[6] See the discussion of how to confront the methodological pressure on law in an era of globalization in P. Zumbansen, 'Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation', 5 *German Law Journal* (2004) 1499, at 1500.

[7] D. Hunter, J. Salzman, and D. Zaelke, *International Environmental Law and Policy* (4th ed., 2011), (devoting a 16-page section to the 'The Role of Non-State Actors' which includes a discussion of non-governmental organizations (NGOs) and Business, at 255–271); P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd ed., 2009) (this edition adds a chapter on 'Non-state Actors: Environmental Rights, Liability and Crimes', at 268); P. Sands and J. Peel, *Principles of International Environmental Law* (3rd ed., 2012) (including a seven-page treatment of non-state actors, at 86–92); D. Bodansky, J. Brunnée, and E. Hey, *The Oxford Handbook of International Environmental Law* (2007) (containing free-standing chapters devoted to both 'NGOs and Civil Society' (at 770) and to 'Business' (at 807)).

[8] S. R. Ratner, 'Business', in Bodansky *et al.* (eds), *supra* note 7, 807, at 808.

The challenge of incorporating a serious engagement with the 'private' sector arises at many levels. Three dimensions of this challenge are immediately relevant to this chapter. The first of these involves asking what the 'private' sector really is. The choice to label something as public or private is political. It is used to justify certain outcomes. For example, non-profit organizations are generally included in a concept of the public.[9] But they may also be framed as non-state, *private*, actors.[10] The content and location of the public and private are far from fixed.

The second element of this engagement attends to the concern that acknowledging 'private sector' environmental governance may involve not just a shift in authority but also a shift in ideology. Robert Falkner puts it this way:

> [T]he growing reliance on private governance in global environmental management represents a privileging of a business-friendly, market-oriented approach to environmental politics over a more holistic and ecology-oriented understanding of the relationship between human activity and environmental destruction. The 'privatization' of global environmental politics is regarded as a process that undermines established, state-centric, models of democratic accountability in global governance and promotes a deregulatory agenda serving to weaken the transformative power of global environmentalism.[11]

A focus on private sector engagement with environmental norms risks privileging those environmental issues which are capable of easy reconciliation with economic growth opportunities. Accounting for the private sector in explaining environmental governance thus involves unpacking the intellectual underpinnings of an environmentalism that is tightly bound within a neo-liberal market model.

And, finally, a full engagement with private sector approaches risks destabilizing our understandings of law. This is a welcome development with the potential to deepen existing scholarship. The private environmental governance literature has emerged largely in the writings of international relations scholars. It is a literature that has developed alongside, rather than through, an engagement with public international law. Taking the private sector

[9] See P. Pattberg and J. Stripple, 'Beyond the Public/Private Divide: Remapping Global Climate Governance', 8 *International Environmental Agreements: Politics, Law and Economics* (2008) 367, at 371.

[10] See C. Scott, F. Cafaggi, and L. Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation', 38 *Journal of Law and Society* (2011) 1, at 3, defining the 'non-state (or private as we prefer) in the sense that key actors in such regimes include both civil society or non-governmental organizations (NGOs) and firms (both individually and in associations)'.

[11] R. Falkner, 'Private Environmental Governance and International Relations: Exploring the Links', 3 *Global Environmental Politics* (2003) 72, at 81.

seriously threatens the territorial borders not only of international environmental law, but also of law itself. This challenge nibbles away at a conception of law as a contained and state-based body of rules. That conception underlies the recent focused interest in transnational environmental law.[12] The examination of multi-level private sector engagement with environmental norms that follows below suggests that global regulation both *by* and *of* corporate actors will continue to pose challenges to fixed ideas of the concept of law.[13]

3. Accounting for the Private Sector: Three Illustrations

A. The Multi-faced Corporation

Business actors are much more diversified than many theoretical frameworks assume them to be. But even focusing on a single corporation, there are many different lenses through which a corporation's engagement with environmental norms can be approached. These include an assessment of corporate legal accountability under international environmental law,[14] efforts to map corporate social responsibility in the environmental field,[15] an assessment of the impact of corporations in environmental treaty-making processes,[16] a focus on corporations as instruments of financing environmental improvements,[17] and understanding the role of corporations in joint public/private environmental governance.[18]

[12] Transnational environmental law is a project of illuminating the dimensions of environmental law that cross borders and are not limited to state-based conceptions of law and governance. The contribution of non-state actors and an awareness of multilevel governance are key features. See the discussion of transnational environmental law in N. Affolder, 'Transnational Conservation Contracts', 25 *Leiden Journal of International Law* (2012) 443, at 446.

[13] For a thoughtful engagement with the question 'What is the concept of law that underlies the regulation of global corporate conduct?', see P. Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective', 38 *Journal of Law and Society* (2011) 50.

[14] See E. Morgera, *Corporate Accountability in International Environmental Law* (2009).

[15] See G. Auld *et al.*, 'The New Corporate Responsibility', 33 *Annual Review of Environment and Resources* (2008) 413.

[16] See S. Tully, *Corporations and International Lawmaking* (2007).

[17] This literature is developing in particular around business financing of climate change adaptation. See UN Global Compact and UN Environment Programme, *Business and Climate Change Adaptation: Toward Resilient Companies and Communities* (2012), available at <http://www.unglobalcompact.org/docs/issues_doc/Environment/climate/Business_and_Climate_Change_Adaptation.pdf> (last visited 29 September 2014).

[18] See P. H. Pattberg, *Private Institutions and Global Governance: The New Politics of Environmental Sustainability* (2007).

A major challenge in integrating an understanding of corporations within environmental law emerges from the fact that these legal issues are addressed discretely. The literature that exposes the role of corporations as environmental standard-setters has little to say about efforts to create legal accountability for corporate human rights abuses. These are typically separate conversations that occupy distinct parts of the legal imagination. The consequences of this doctrinal, and popular, separation of legal issues are missed opportunities for engaging with the multi-faced aspects of the corporation.

Developments in the field of corporate social responsibility provide a glimpse of some of the advances that can be gained from cross-fertilization between the study of the legal accountability of corporations and scholarship on incentivizing voluntary corporate commitments. For example, a growing emphasis is placed on corporate and securities law tools in operationalizing corporate social responsibility. This includes rules introduced by the Dodd–Frank Wall Street Reform and Consumer Protection Act in the United States to: (i) require companies to publicly disclose their use of conflict minerals[19] that originated in the Democratic Republic of the Congo or an adjoining country and (ii) to require companies registered with the Securities and Exchange Commission to publicly report how much they pay governments for access to oil, gas, and minerals.[20] These rules take an approach that a number of other countries are considering mimicking.

In terms of better understanding the nexus between legal accountability of corporations and corporate social and environmental practices, the Dodd–Frank Act approach raises a number of questions: Is the creation of industry-specific standards a helpful route for advancing environmental and human rights? Are holistic standards preferable? Will this create a situation where certain industries that are in the spotlight, such as the extractive industries, attract the bulk of new regulation, and other industries (such as clean technology companies) might fall through the gaps? Whose task is it to be the architects of due diligence collection practices and standards?[21] Multinational consulting firms are expanding the human rights, environmental,

[19] 'Conflict minerals' is a term that recognizes that the trade in certain natural resources in the context of conflict contributes to the commission of serious violations of human rights and international humanitarian law. Dodd–Frank Wall Street Reform and Consumer Protection Act (enacted 21 July 2010, Pub. L. No. 111–203, 124 Stat. 1376, HR 4173) (hereinafter Dodd–Frank Act) § 1502 defines 'conflict minerals' as cassiterite, columbite-tantalite, gold, and wolframite, as well as their derivatives and other minerals that the US Secretary of State may designate in the future.

[20] *Ibid.*, §§ 1502 and 1504.

[21] For a discussion of the use of securities regulation to advance human rights, see G. Sarfaty, 'Human Rights Meets Securities Regulation', 54 *Virginia Journal of International Law* (2013) 97.

and social responsibility arms of their practices to compete for this business.[22] Is this more appropriately a task for lawyers?[23] Is there room for incorporating other stakeholders in articulating what due diligence should be done and how it should be done?

These questions suggest that creating corporate legal accountability and liability standards is not solely about 'holding corporations to account' through legal processes that address company-driven human rights or environmental abuses after the fact. It is also about understanding how companies incorporate these standards at the front end—how they implement them through their operating practices and corporate governance. Corporate accountability is about changing behavioural norms where human rights and environmental rights problems are addressed by corporations 'on the fly' rather than with forethought and in accordance with robust legal standards. Environmental due diligence is an area that would benefit from discussions between those whose expertise lies in the governance *of* the corporate world and those who can offer an informed perspective of governance *within* the corporate world.

A research focus on environmental due diligence practices also seems well justified in light of the changes in corporate practices that have emerged from anti-bribery legislation. As a result of the Foreign Corrupt Practices Act 1977 in the United States and domestic legislation in other countries implementing the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention 1997, companies have implemented far-reaching due diligence programmes that apply throughout their worldwide operations. This legislation provides a model for thinking about operationalizing environmental rights.

A glimpse of the sort of boundary-crossing, far-reaching thinking contemplated here is found in a September 2012 issues brief authored by John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights. In the course of the *Kiobel* litigation before the United States Supreme Court, counsel for Royal Dutch Petroleum (Shell Oil) made certain representations concerning the reports of the Special Representative for Business and Human Rights. Professor Ruggie, along with Professor Philip

[22] Satori Consulting, for example, frames the Dodd–Frank Act as providing 'an opportunity for consulting firms'. Satori Consulting, *Dodd–Frank and the Opportunities for Consulting Firms*, available at <http://www.satoriconsulting.com/assets/files/Dodd%20Frank%20and%20the%20Opportunities%20for%20Consulting%20Firms.pdf> (last visited 29 September 2014).

[23] Law firms are equally establishing niche practices in Corporate Social Responsibility (CSR). See, e.g., the CSR practice group of US law firm Foley Hoag LLP which has its own practice group blog, *Corporate Social Responsibility and the Law*, available at <http://www.csrandthelaw.com/> (last visited 29 September 2014).

Alston, submitted an *amicus curiae* brief in the case to correct misinterpretations and misquotations of his reports.[24] The experience resulted in a potent issues brief highlighting the impossibility of separating a corporation's social responsibility initiatives and a corporation's actions as a defendant in litigation. Professor Ruggie thus asks:

> Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself? Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests? Or would the commitment to socially responsible conduct include an obligation by the company to instruct its attorneys to avoid such far-reaching consequences where that is possible?[25]

These comments powerfully force a conversation that unites litigation strategies and social responsibility.

The need to focus on the corporation as a whole, and to engage with the full impact of corporate power in the environmental realm, has not been lost on environmental non-governmental organizations (NGOs). NGOs are struggling to reconceptualize their roles and strategies to acknowledge the realities of corporate power and influence in shaping international environmental norms. The Environmental Defense Fund (EDF), a major environmental non-governmental organization, has established an office in Bentonville, Arkansas, the global headquarters of Walmart, with the express purpose of engaging Walmart and working to make 'America's largest goods purchaser greener'.[26] In practice, this has meant a focus on supply chain contracting as a mechanism for environmental improvement.

Purchasing patterns loom large in defining a corporation's environmental footprint. Walmart reportedly sources 70 per cent of its products from China. This places Walmart as China's sixth largest trading partner, just behind Germany.[27] Oil and gas giant ExxonMobil reported revenues of USD

[24] Brief Amici Curiae of Former UN Special Representative for Business and Human Rights, Professor John Ruggie; Professor Philip Alston; and The Global Justice Clinic at NYU School of Law In Support of Neither Party, *Esther Kiobel and others v. Royal Dutch Petroleum and others*, US Sup. Ct., No. 10-1491, 12 June 2012.

[25] J. G. Ruggie, 'Kiobel and Corporate Social Responsibility', Issues Brief for the Harvard Kennedy School (4 September 2012), available at <http://www.hks.harvard.edu/m-rcbg/CSRI/KIOBEL_AND_CORPORATE_SOCIAL_RESPONSIBILITY%20%283%29.pdf> (last visited 29 September 2014).

[26] Environmental Defense Fund, Bentonville, KS office, at <www.edf.org/offices/bentonville-arkansas> (last visited 29 September 2014).

[27] A. Chan, 'Introduction', in A. Chan (ed.), *Walmart in China* (2011) 1, at 4.

467 billion in 2011, a figure that exceeds the size of Norway's entire economy.[28] These economic realities are forcing global environmental NGOs to realign their strategies in an attempt to shape corporate practices, often engaging in unlikely alliances or 'partnerships' with the same corporations they have traditionally targeted through protest campaigns.[29] Legal scholars have been less willing to reconceptualize their doctrines to acknowledge the power and complexity of corporate influence on environmental norms.

The above discussion seeks to establish why isolating points of interaction between environmental law and corporations into contained boxes such as 'corporate citizenship' or 'corporate legal accountability' leads to an impoverished account of the private sector's engagement with environmental law. Corporate environmental responsibility still tends to be defined narrowly. It elicits a view of corporate giving unrelated to the core purposes of the company, such as the gift made by investment bank Goldman Sachs of a 680,000-hectare old-growth forest in southern Chile together with a USD 12 million donation to establish and maintain a nature reserve.[30] Defining corporate environmental responsibility in this narrow way fails to account for the broad range of internal corporate environmental management practices, activities, and impacts that can foster, or alternatively, undermine environmental protection. This vision also neglects the interaction between daily or mundane corporate practices and activities and questions of legal accountability.

David Vogel argues that there exist both an old and a new corporate social responsibility (CSR). The former points to corporate philanthropic activity, such as the Goldman Sachs example cited above, that is not directly linked to a firm's core business practices. The latter traces to the challenges of a corporation internalizing the externalities it creates and the ways in which

[28] C. Albin-Lackey, 'Without Rules: A Failed Approach to Corporate Accountability', Human Rights Watch Report (February 2013), available at <http://www.hrw.org/world-report/2013/essays/112459> (last visited 29 September 2014).

[29] See T. Berman, *This Crazy Time: Living Our Environmental Challenge* (2011) for a very personal view of the challenge of navigating these partnerships.

[30] This example is illuminating, as the initiative was not without its critics. In April 2006, a group of shareholders charged that Henry Paulson, President and CEO of Goldman Sachs, had no right to use company assets for this 'personal project'. This group of shareholders suggested that Paulson's commitment to environmental conservation constituted a conflict of interest, and requested that Paulson reimburse the company for 'any shareholder assets spent to advance his personal interests'. Goldman Sachs defended the company's actions as consistent with the firm's Environmental Policy. See G. Burt, 'US shareholders Criticize Goldman Sachs for Park Deal in Chile', *The Santiago Times* (17 April 2006), available at <http://en.mercopress.com/2006/04/17/u-s-shareholders-criticize-goldman-sachs-for-park-deal-in-chile> (last visited 29 September 2014).

it conceives of social and environmental responsibility as an aspect of its core business activities.[31] The goal under the new CSR is to 'direct and require particular environmentally and socially responsible behavior'.[32]

Businesses set environmental standards, finance or decline to finance projects with significant environmental impacts, impose environmental standards on other businesses through the provision of insurance or through supply chain contracting, and monitor business performance through contractual relationships. Businesses are litigants in a variety of fora with environmental significance—they bring litigation on environmental grounds, defend against claims themselves, and challenge environmental laws through, for example, North American Free Trade Agreement (NAFTA) arbitrations. Existing theories of business engagement with environmental law, and the tendency to contain this engagement within fixed and isolated categories, have not caught up with the empirical realities of corporate engagement with environmental norms.[33]

B. The Triumph of the Contractual Form

This section moves the discussion from an emphasis on private sector actors to a reflection on legal form, specifically the growing significance of contracts as a mechanism of environmental governance. Contractual provisions specify environmental requirements in agreements between private parties at both national and transnational levels.[34] Negotiated contracts between polluters and regulators have developed as a regulatory option in Europe and in a number of countries in other regions.[35] Climate contracts are advocated as a practical approach to address global warming.[36] Supply chain contracts increasingly govern transnational environmental standards and food safety.[37] Contracts are of particular interest to a discussion of the private sector

[31] D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (2005).

[32] Auld *et al.*, *supra* note 15, at 416.

[33] Witness the gulf between the literature on 'corporate environmental responsibility' and the literature exploring 'corporate accountability' for environmental harms. Contrast N. Gunningham, *Corporate Environmental Responsibility* (2009) with Morgera, *supra* note 14.

[34] On governance through contract as a dominant mode of transnational regulation, see Scott *et al.*, *supra* note 10, at 15.

[35] E. W. Orts and K. Deketelaere (eds), *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (2001).

[36] E. W. Orts, 'Climate Contracts', 29 *Virginia Environmental Law Journal* (2011) 197, at 205.

[37] F. Cafaggi, 'Private Regulation, Supply Chain, and Contractual Networks: The Case of Food Safety', *EUI Working Paper*, Robert Schuman Center for Advanced Studies Working Paper No. 2010/10 (February 2010), available at <http://cadmus.eui.eu/bitstream/handle/1814/13219/RSCAS_2010_10.pdf> (last visited 29 September 2014).

because they provide a mechanism for containing aspects of environmental governance within a private relationship of contractual rights.

The contractualization of environmental rights also fits within a larger marketization of environmental governance where carbon markets, biodiversity offsets, and payment for ecosystem services have all entered the lexicon of environmental governance. This may be simply one more aspect of the privatization of rulemaking, but it often eludes direct discussion because, unlike global private regulators such as the International Organization for Standardization or the International Accounting Standards Boards, contracts are diffuse.[38]

A consideration of contracting takes us beyond business as the sole 'private' actor. A diverse range of conservation contracts are being negotiated by conservation NGOs operating as market actors. These agreements include conservation concession agreements, conservation performance agreements, forest carbon agreements, private protected area and company reserve agreements, and debt for nature swaps.[39] Many of these agreements are transnational in nature. They speak to a strategy of transacting within a market for ecosystem services, with individual transactions being framed through contractual forms. Contracting instils, and normalizes, a privatized conception of trading environmental costs and benefits. It privatizes dispute resolution and privileges the 'contracting parties' of these agreements.

The turn to contracts has profound implications for human rights. Agreements for conservation performance payments, for example, which pay a community to conserve a resource such as a forest or watershed, may delink conservation from community development and deprive local communities of their own legitimate aspirations for land use. As agreements are private and confidential, it is often impossible to know what rights are traded away in contractual documents. This has been highlighted in recent scholarship and advocacy over 'land grabs', particularly in Africa. Only through some forensic work piecing together the texts of contracts does the scope of the potential erasing of rights through contractual mechanisms become clear.[40] Conservation contracts raise further questions of agenda setting. Does the foreigners' agenda for 'conservation' ultimately erase the agenda of the local community? The very framing of contracts as instruments of conservation can be problematic in a South–North context as these agreements risk promoting a view

[38] For a wider discussion of the privatization of global rule making, see T. Büthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (2011).

[39] For a more detailed examination of these categories of agreement, see Affolder, *supra* note 12.

[40] Of particular note is Lorenzo Cotula's work to uncover what is in the text of 'land grab' contracts. See L. Cotula, *Land Grabs in Africa: What's in the Contracts* (2011).

of environmental concerns as discrete issues, rather than as intricately linked with economic realities.

There is much work still to be done in disentangling the implications of governance both *by* and *of* contract in the context of environmental contracts. Thinking about the private sector's role in these contractual transactions means adjusting to roles where non-state actors are not just campaigners but are the principal architects of environmental agreements; where access to information is threatened by private agreements and closed door negotiating processes; where identifying sources of authority and channels of accountability becomes complicated. Concerns arise from a rescaling of environmental governance and the consequent impact of private contracts on constituencies which have little say in their negotiation.

Contracts are one-off, negotiated documents, so the above generalizations are only partially illuminating. The phenomenon of environmental contracting can perhaps best be understood by examining an example. The following paragraphs set out a case study on the effects of forest carbon contracts that can offer a fine-grained look at this phenomenon.

International policy discussions have long recognized that conserving and restoring forests is critical to any long-term solution to climate change. For some, the idea of harnessing private investors to protect forests which not only serve as carbon sinks, but offer biodiversity and community benefits, is the ultimate 'win–win'. For others, forest carbon contracts divert attention from the critical issue of reducing consumption in the developed world, providing governments and companies with 'an alluring financial and ecological sink':

> If you pay poor governments and/or poor people to reforest or not deforest, and you can get credit for the resulting saved carbon credit that you can use to offset your emissions, you can both sell your emissions reduction credits, and continue business as usual in the North.[41]

While debates on the desirability of adopting market approaches to address climate change continue to grow, and occasionally flare, a market for forest carbon has developed and is expanding. Forest carbon contracts can involve a number of diverse activities relating to forests, including: afforestation projects (planting trees on land that has not been forested in recent history), reforestation activities (re-growing forests), improved forest management projects involving activities to enhance carbon stocks on currently forested

[41] D. Takacs, 'Carbon into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law', 15 *Hastings West–Northwest Journal of Environmental Law & Policy* (2009) 39, at 59.

land, and avoided deforestation projects (also referred to as Reducing Emissions from Deforestation and Degradation or REDD projects.[42])

Traditional ways of conceptualizing and differentiating actors in climate change regimes—distinguishing state, firm, and civil society organizations[43]—may be of limited application in understanding contracting parties engaged in forest carbon contracting. The same roles—as investors, contractors, and standard setters—are occupied by NGOs, for-profit business organizations, foundations and trust funds, and public agencies. Moreover, individual contracts often form part of contractual webs, implicating a diversity of public and private actors in an individual forest carbon market transaction. These realities once again force a confrontation with traditional framings of the public and private.

The involvement of private actors in forest carbon contracting is deep-rooted, but constantly evolving. Early 'pioneers' of forest carbon transactions were largely NGOs and their special-purpose market-focused subsidiaries. For-profit companies are now entering the forest carbon marketplace to a greater extent, including major financial firms such as BNP Paribas and Gazprom.[44] The implications of this shift are yet to be fully realized. For example, certification under the Climate, Community & Biodiversity Standards requires a forest carbon project to deliver additional benefits (beyond carbon) to the community and to biodiversity. Project-level practice on this already varies significantly, and may vary even more as conservation organizations are replaced by financial institutions and companies.

Forest carbon contracting (particularly at sub-national levels) is premised on the development of private property rights and legal regimes that entrench freedom of contract. Forest carbon markets draw on a conception of environmental responsibility where private actors, rather than the state, take on responsibility for addressing climate change. This vision is far from universally shared. Some nations may not allow for private carbon ownership at all;[45] or, national governments may themselves claim exclusive ownership over carbon rights.[46]

[42] The domain of REDD now is expanded to include REDD+ (which includes the role of conservation, sustainable management of forests, and enhancement of forest stocks) and REDD++ (referencing an even broader suite of land uses including afforestation, agriculture, and peat management). See, generally, J. Costenbader (ed.), *Legal Frameworks for REDD: Design and Implementation at the National Level* (2009).

[43] See, e.g., K. W. Abbott, 'The Transnational Regime Complex for Climate Change', 30 *Environment and Planning C: Government and Policy* (2012) 571.

[44] D. Diaz, K. Hamilton, and E. Johnson, *State of the Forest Carbon Markets 2011: From Canopy to Currency* (2011), at iv.

[45] D. Takacs, *Forest Carbon: Law and Property Rights* (2009), at 17.

[46] The New Zealand Government announced in 2002 that all rights and obligations arising from specific carbon sequestration activities reside with the Government. This decision created significant

Critics are particularly alert to the ways in which new 'nature' markets, such as forest carbon markets, reinforce North–South inequality and hinder non-market responses to environmental degradation.[47] This inequality has a range of environmental rights dimensions that an emphasis on market creation and carbon trading can obscure.[48] Forest carbon contracts emerge out of a set of particular market and social realities. Institutionalizing a dependence on contracts to solve global environmental problems entrenches a reliance on markets, and market conceptions of law.

The legal literature on forest carbon contracts quite neatly divides into two: (i) a largely uncritical literature that conceives of forest carbon contracts as legal and commercial constructs and advances practical suggestions for resolving legal uncertainties through contractual provisions,[49] and (ii) a literature that addresses the phenomenon of contracting through a wider social and environmental justice lens, paying particular attention to the frameworks of REDD and issues of equity in international law.[50] Even though forest carbon contracts are closely linked with 'public' values, and contentious 'public' processes such as REDD, they are legally constructed as transnational commercial contracts. Both the terms and structure mimic other transnational sales agreements. As one drafting guide to Clean Development Mechanism (CDM) contracts observes: 'The sale of CERs [Certified Emission Reductions] from a CDM project is similar to the sale of any commodity from a project (such as electricity under a power purchase

political controversy, and the policy decision was reversed in 2007, allowing forest owners to claim credits for forest carbon as part of a new emissions trading system. But following the 2008 general election, the government put operation of this scheme of private ownership of forest carbon credits on hold. The New Zealand example reveals the opposition of various forest stewards to public ownership of forest carbon. K. Gould, M. Miller, and M. Wilder, 'Legislative Approaches to Forest Sinks in Australia and New Zealand: Working Models for Other Jurisdictions?', in C. Streck *et al.* (eds), *Climate Change and Forests: Emerging Policy and Market Opportunities* (2008) 253, at 267–268.

[47] P. Bond, 'Emissions Trading, New Enclosures and Eco-Social Contestation', 44 *Antipode* (2011) 684; Corson and MacDonald, 'Enclosing the Global Commons: The Convention on Biological Diversity and Green Grabbing', 12 *Journal of Peasant Studies* (2012) 263, at 264;

[48] See L. Lohman, 'Carbon Trading, Climate Justice and the Production of Ignorance: Ten Examples', 51 *Development* (2008) 359, at 364. ('. . . Carbon trading, as part of the "climate development" package that has become entrenched at national and international levels of the past ten years, is organized in ways that make it more difficult even to see what the central issues of climate justice are, much less to take action on them.').

[49] See, e.g., M. Wilder and P. Curnow, 'Trading Carbon as a Commodity: Sale and Purchase Agreements for Carbon Credits', 25 *Australian Mining and Petroleum Law Association Yearbook* (2005) 351; L. Fitz-Gerald, 'Carbon Contracting', in D. Freestone and C. Streck (eds), *Legal Aspects of Carbon Trading* (2009) 295.

[50] See, e.g., D. Takacs, 'Forest Carbon Offsets and International Law: A Deep Equity Legal Analysis', 22 *Georgetown International Environmental Law Review* (2010) 521.

agreement).'[51] In other words, the drafters of forest carbon contracts have done little to tailor the agreements to their new subject matter.

A major challenge for forest carbon contracts is that, while their legal form speaks to the demands of commercial contractual practices, their subject matter implicates legal issues that commercial contract law cannot resolve. Where are contractual disputes in forest carbon contracts being played out? Unfairness is denounced in blogs, in NGO news releases, and in scholarly writing, rather than being resolved in domestic courts applying domestic contract law.[52] Allegations that specific contracts are invalid as contrary to public policy are proliferating.[53] But these issues are not being adjudicated by national courts applying domestic contract law. For example, a USD 120 million contract between the Munduruku Peoples (of the State of Para, Brazil) and Irish-based company Celestial Green Ventures has been characterized as a nullity by FUNAI, the Brazilian government's indigenous affairs agency, on the grounds that the land is owned by the government, not the community.[54] A contractual clause barring the indigenous community from using the forest in traditional ways has also been challenged as contrary to public policy.[55]

This is not a unique situation. At least 30 contracts between indigenous communities and international companies in Brazil have been challenged by FUNAI on the grounds of unclear land tenure. It is not clear whether these claims (which involve a mixture of property and contractual issues) will ever reach domestic courts. NGOs such as Global Witness have taken on the role of watchdogs over transnational carbon contracts, mounting campaigns to protest and invalidate problematic agreements.[56] As is the case with other

[51] M. Wilder, M. Willis, and J. Carmody, *Legal Issues Guidebook to the Clean Development Mechanism* (2004), at 99.

[52] See, e.g., Bartlett, 'The Carbon Cowboy', *60 Minutes* (6 July 2012), available at <http://sixtyminutes.ninemsn.com.au/stories/8495029/the-carbon-cowboy> (last visited 29 September 2014); F. Carus, 'British Deal to Preserve Liberia's Forests "Could Have Bankrupted" Nation', *The Guardian* (23 July 2010), available at <http://www.theguardian.com/environment/2010/jul/23/uk-liberia-carbon-forest-bankrupt> (last visited 29 September 2014).

[53] See, e.g., K. Tienhaara, 'The Potential Perils of Forest Carbon Contracts for Developing Countries: Cases from Africa', 39 *The Journal for Peasant Studies* (2012) 551, at 567.

[54] Fundação Nacional do Índio (FUNAI), 'Esclarecimentos da Funai sobre atuação do mercado voluntário de REDD em Terras Indígenas' ['FUNAI, clarification on the role of voluntary market REDD on Indigenous Lands' (trans. ed.)] (3 March 2012), available at <http://pib.socioambiental.org/en/noticias?id=111116> (last visited 29 September 2014).

[55] This clause was reproduced in a report on a Brazilian investigative journalism website, *Pública*, and translated here: C. Lang, 'Celestial Green Ventures: 20 Million Hectares of REDD Carbon Offset Projects in Brazil', *REDD-Monitor* (13 March 2012), available at <http://www.redd-monitor.org/2012/03/13/celestial-green-ventures-20-million-hectares-of-redd-carbon-offset-projects-in-brazil/> (last visited 29 September 2014).

[56] Global Witness called attention to a fraudulent carbon agreement between a UK company and the Government of Liberia, leading to the arrest of the CEO of the carbon company. See Global

transnational contracts,[57] monitoring happens through third-party intervention, particularly through the activities of NGOs, the media, and certification and verification bodies.

To help transform law to accommodate forest carbon markets, various guides to 'supporting legal frameworks' are created,[58] model contracts are produced,[59] country-specific advice is given, and funding is directed to 'REDD-readiness' programmes (reforming laws to accommodate avoided deforestation and the recognition of carbon as a legal concept). These legal reforms are backed up with sophisticated publications, advice, toolkits, and reported success stories. The financial support for their forest carbon contract research and publications comes from a combination of private companies, law firms, NGOs, governments, and intergovernmental organizations.[60]

The message given in these 'legal initiative' and legal reform publications emerges from a market environmentalism premised on the assumption that environmental protection should proceed through pricing nature's services, protecting private property rights, and trading these rights within a global market.[61] This vision of market environmentalism risks advancing a limited and instrumentalist view of law in which law is conceived as a mechanism or tool that can either advance or impede the development of 'innovative' environmental marketplaces.[62] Implicit in this vision is the idea that private property rights and freedom of contract are universal values to be facilitated

Witness, 'Global Witness Investigation Leads to UK Arrest over Carbon Deal in Liberia', Press Release (4 June 2010), available at <http://www.globalwitness.org/library/global-witness-investigation-leads-uk-arrest-over-carbon-deal-liberia> (last visited 29 September 2014).

[57] A similar situation arises with transnational contracts governing food safety, see Cafaggi, *supra* note 37.

[58] See, e.g., Y. Agidee, *Forest Carbon in Ghana: Spotlight on Community Resource Management Areas* (2011), at 1. This report is from the Katoomba Group's Legal Initiative Country Study Series. Another report in the same series, on legal frameworks to recognize Payment for Ecosystem Services of mangroves in Vietnam, opens with a recognition of the need to send a 'price signal' on the value of standing mangroves. S. Hawkins *et al.*, *Roots in the Water: Legal Frameworks for Mangrove PES in Vietnam* (2010), at v.

[59] See, e.g., S. Hawkins *et al.*, *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement* (2010), at iv.

[60] These supporters include Wildlife Works, World Bank BioCarbon Fund, ERA Ecosystem Restoration Associates, Baker & Mackenzie, Det Norske Veritas, Ecotrust, Forest Carbon Group, Face the Future, USAID, the David and Lucelle Packard Foundation, the Gordon and Betty Moore Foundation, the John D. and Catherine T. Foundation, the Global Environmental Facility, the United Nations Development Programme, and the Norwegian Agency for Development Cooperation. Diaz *et al.*, *supra* note 44.

[61] D. Liverman, 'Who Governs, at What Scale and at What Price? Geography, Environmental Governance, and the Commodification of Nature', 94 *Annals of the Association of American Geographers* (2004) 734.

[62] For a critique of the conception of 'law as tools' in international investment agreements, see N. Affolder, 'Beyond Law As Tools—Foreign Investment Projects and the Contractualization of

through law. State ownership is seen as an 'impediment' to the spread of market approaches.[63] There is little room here for more plural conceptions of law and its functions, visions in which addressing climate change and protecting forests emerge from state responsibilities and legislation.

C. Measuring Environmental Knowledge

The third dimension of private sector engagement with environmental rights that this chapter explores is the issue of the construction of environmental knowledge through indicators and tools of measurement. Vital to the very concept of environmental rights are techniques of measurement: What constitutes clean air? Clean water? A protected area? An unacceptable level of emissions? A participatory right? Yet to date there has been a noticeable lack of systematic attention to those who create the yardsticks by which environmental rights are measured. Increasingly, corporate sector claims of environmental performance (and claims against corporations) are premised on a notion of comparison—companies are performing better or worse than their peers; or, better or worse than articulated standards which should bind them. Inherent in the very notion of comparison is the idea of some common basis—or metrics—upon which comparison can take place.

Scholars have noted the proliferation of quantifiable standards as an aspect of globalized commerce and as a technology of global governance.[64] This research has particularly focused on indicators—which are defined by Kevin Davis, Benedict Kingsbury, and Sally Engle Merry as follows:

> An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.[65]

Environmental Protection', in P.-M. Dupuy and J. Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (2012).

[63] The Katoomba Group's Report on Vietnam thus presents state ownership as an impediment to the realization of private mangrove payments for ecosystem services in Vietnam. Hawkins *et al.*, *supra* note 58, at v.

[64] See K. E. Davis *et al.* (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (2012).

[65] K. E. Davis, B. Kingsbury, and S. E. Merry, 'Indicators as a Technology of Global Governance', 46 *Law & Society Review* (2012) 71, at 73–74.

Sally Engle Merry suggests that the power of indicators traces to 'the magic of numbers and the appearance of certainty and objectivity that they convey'.[66]

The theory is that in an uncertain world, there is a need to translate complex ideas into simpler metrics—units that can be counted, measured, and compared. The ways in which indicators have been elaborated as a tool of global governance are described in case studies of human rights,[67] public health coverage,[68] and the quality of business laws.[69] This scholarship has yet to permeate environmental law and governance literature. But its significance for international environmental law is profound.

In the section that follows, I examine the rise of metrics to measure biodiversity, the institutionalization of these indicators, and some implications of this entrenchment of environmental metrics as a tool of governance. Many of these measuring tools, and the expertise they privilege, have been uncritically accepted in international legal instruments and approaches. While it is possible to acknowledge the growth in importance of metrics and indicators for measuring environmental protection and performance, the creators of these measuring devices are often obscured.

This discussion builds on the earlier treatment of corporations as multidimensional actors and on the critical role of contracts in environmental governance. The emergence of indicators and metrics for the measurement of environmental impacts speaks in part to the growing spread of accounting and corporate forms of thinking into broader social spheres.[70] Corporations (among others) require metrics to satisfy the demands of an 'audit culture'.[71] The corporatization of environmental governance brings with it the need to quantify environmental performance, environmental harm, and environmental improvements in measurable units. These business and accounting frameworks infiltrate legal conceptions of appropriate business behaviour, and the very standards upon which rights approaches may be articulated.

[66] S. E. Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance', 52 *Current Anthropology* (2011) S83, at S84.

[67] See, e.g., M. L. Satterthwaite, 'Rights-Based Humanitarian Indicators in Post-Earthquake Haiti', in Davis *et al.* (eds), *supra* note 64, 365.

[68] A. Fisher, 'Immunization Coverage Indicators: Technology of Public Health Governance', in Davis *et al.* (eds), *supra* note 64, 217.

[69] For a discussion of the World Bank Group's Doing Business Indicators, see Davis *et al.*, *supra* note 65, at 90.

[70] Merry, *supra* note 66, at S83.

[71] M. Power, *The Audit Society: Rituals of Verification* (1999).

1. Lists, metrics, categories, and indicators

What are some of the lists, metrics, categories, and indicators that have come to dominate biodiversity protection? The metrics in operation in this context may not be obvious. Examples of metrics and lists we see being adopted by both governments and corporations include the International Union for Conservation of Nature (IUCN) Red List and the Red List Index, the World Heritage List and the List of World Heritage in Danger, the IUCN Protected Areas categories, the Convention on Biological Diversity 'Aichi Targets', the Ocean Health Index, as well as approaches developed by NGOs such as the concept of 'Biodiversity Hotspots'. Many of the architects of these measuring devices or lists were not contemplating the broader uses to which these indicators have been put, not thinking about their significance for organizing corporate environmental strategies, or as tools of global governance. The 'discovery' of these legal yardsticks by others has propelled them into this role as normative benchmarks.

Scholars have noted how, in areas where regulation is under-developed, indicators can come to take up a significant regulatory function.[72] Once these indicators, or tools of measurement, are created, they take on a life of their own. Particularly in the biodiversity context, measurement tools can appear to be scientifically driven, and the social and political elements of their creation become obscured. Scholars are beginning to document how creating and using indicators is a social process. But legal scholarship has been largely quiet on the significance of using these statistics and accounting tools for governance. The experts who create these tools are not explicitly identified. This contrasts, of course, with the use of experts in litigation, where individual experts are identified, and their qualifications are scrutinized and open to challenge.

Both national and international environmental law relies on indicators to operationalize global norms and to measure environmental protection and treaty compliance. For example, the recently introduced Norwegian Nature Index was established to provide an overview of the state of biodiversity in major ecosystems of Norway and thereby measure progress towards the goal of halting the loss of biodiversity.[73] It incorporates the IUCN Red List (for measuring endangered species) and a Norwegian Black List (for measuring Alien Species).

[72] For an account of how this occurs in the field of social investing, see S. Dadush, 'Impact Investment Indicators: A Critical Assessment', in Davis *et al.* (eds), *supra* note 64, 392, at 414.

[73] See Norwegian Nature Index, available at <http://www.environment.no/Topics/Biological-diversity/The-Norwegian-Nature-Index-/> (last visited 29 September 2014).

In 2006, the Convention on Biological Diversity adopted a framework of 22 cross-disciplinary headline indicators which measure progress towards the target of reducing biodiversity loss. The exercise was repeated to articulate post-2010 indicators.[74] Countries are encouraged to use these indicators, as are regions.[75] But the development of these indicators remains very uneven. Some are quite fully developed, some not at all.[76] This is not surprising given that some concepts (such as participation or meaningful free, prior, and informed consent) fail to translate easily into numbers. Other concepts (such as greenhouse gas emissions) translate well. Moreover, some indicators are only weak proxies for biodiversity. Forest cover may say little about the quality or condition of forests. Protected areas, if measured only quantitatively in hectares, reveals little about the degree of protection.

A larger point that should not be lost here is that the individual limitations, or inadequacies, of indicators become blurred, or obscured as indicators become adopted by diverse audiences for purposes far removed from their initial creation. This is evident from a close look at the IUCN Red List, and the indicator it has spawned, the Red List Index.

2. Case Study—The IUCN Red List and Red List Index

The IUCN Red List of Threatened Species (the Red List) is a well-known metric in biodiversity circles. It provides information on the conservation status of over 71,500 plant and animal species—including all known mammals, amphibians, birds, conifers, and cycads.[77] Generally, the Red List separates species into one of eight categories, ranging from Extinct to Least Concern.

The Red List was developed by the International Union for Conservation of Nature—a self-described 'democratic membership union' with more than 1,200 member organizations including over 200 government and over 900

[74] Convention on Biological Diversity, Ad Hoc Technical Expert Group Meeting on Indicators for the Strategic Plan for Biodiversity 2011–2020, 'Indicators for the Strategic Plan for Biodiversity, 2011–2020' UN Doc. UNEP/CBD/AHTEG-SP-Ind/1/2 (20 May 2011), available at <http://www.cbd.int/doc/meetings/ind/ahteg-sp-ind-01/official/ahteg-sp-ind-01-02-en.pdf> (last visited 29 September 2014).

[75] See the Streamlining European Biodiversity Indicators Project 2010, available at <http://biodiversity.europa.eu/topics/sebi-indicators> (last visited 29 September 2014), the aim of which was 'to develop a European set of biodiversity indicators—based on those already existing, plus new indicators as necessary—to assess and inform about progress towards the 2010 targets'.

[76] See M. Walpole *et al.*, 'Tracking Progress toward the 2010 Biodiversity Target and Beyond', 325 *Science* (2009) 1503.

[77] The IUCN Red List of Threatened Species, 'Celebrating 50 Years of The IUCN Red List' (30 January 2014), available at <http://www.iucnredlist.org/news/celebrating-50-years-of-the-iucn-red-list> (last visited 29 September 2014).

non-government organizations, and almost 11,000 volunteer scientists spread over six expert Commissions drawn from more than 160 countries.[78] The Red List was first conceived in 1963, but initially used an ad hoc, subjective approach to assessing extinction risk. A more 'objective and scientific' assessment process was developed in 1994 and was used to create the 1996 Red List. The assessment process has been adjusted and refined over the years, leading to the current manifestation: IUCN Red List Categories and Criteria—Version 3.1.[79]

The IUCN Red List is the basis for many other indicators and systems of measuring biodiversity protection. Its data is used for measuring progress towards the Convention on Biological Diversity's 2010 and 2020 targets. The Millennium Development Goals reference the Red List as an indicator, as does the Global Reporting Initiative, which asks companies to report on the number of Red List species with habitats in areas affected by corporate operations.[80] The Red List permeates environmental assessment legislation, corporate environmental reporting forms, and international financial institution risk factor analysis.[81]

The Red List has spawned an indicator to track the conservation trajectory of sets of species—the IUCN's Red List Index. Where the Red List provides snapshots of the status of species, the Red List Index looks at how species have been classified on the Red List over time and extrapolates extinction rates from the trend.[82] The Red List Index uses a formula to calculate expected rate of species or sub-species loss. The main prerequisite, data-wise, is that the relevant species have undergone two Red List assessments. The two assessments are used to calculate two scores in the following manner:

> [T]he number of species in each Red List Category is multiplied by the Category weight (which ranges from 0 for Least Concern, 1 for Near Threatened, 2 for Vulnerable, 3 for Endangered, 4 for Critically Endangered and 5 for Extinct in the Wild and Extinct). These products are summed, divided by the maximum possible

[78] International Union for Conservation of Nature website, at <http://www.iucn.org/about/> (last visited 29 September 2014).

[79] IUCN Species Survival Commission, 'Guidelines for Using the IUCN RED List Categories and Criteria—Version 3.1' (IUCN, 2012), available at <http://www.iucnredlist.org/technical-documents/categories-and-criteria/2001-categories-criteria> (last visited 29 September 2014).

[80] Global Reporting Initiative, *Indicator Protocols Set—Environment* (2011), at EN15.

[81] The Environmental Assessment Guidelines for the Northern Territory in Australia, for example, draws on the Red List to establish its criteria for endangered and critically endangered species. See Northern Territory Government, *Environmental Assessment for the Northern Territory: Terrestrial Fauna Survey* (2011), at 23. The European Investment Bank is another example of an institution whose assessment of biodiversity relies on the Red List. See European Investment Bank, *The EIB Statement of Environmental and Social Principles and Standards* (2009), at para. 68.

[82] S. H. Butchart *et al.*, 'Improvements to the Red List Index', 2*PLoS ONE* (2007) e140.

product (the number of species multiplied by the maximum weight), and subtracted from one. This produces an index that ranges from 0 to 1.[83]

The scores from the assessments are then graphed, yielding an extinction trend that can be extrapolated. The Red List Index has been used to measure progress toward targets stemming from the Convention on Biological Diversity.[84] The Red List Index was also adopted by the United Nations General Assembly as an indicator for Millennium Development Goal 7 on reducing biodiversity loss.[85] The Red List Index has also been 'considered for adoption' by the Ramsar Convention and the Convention on Migratory Species.[86]

The international acceptance and growing frequency of use of this indicator risk obscuring the scientific critiques of the indicator itself. One identified problem is that Red List Index values are affected by the frequency of Red List assessments:

> [T]he RLI [Red List Index] value at a particular time point is dependent on the number of assessments since the baseline year. In other words, the frequency of assessments influences RLI values. This is because the RLI value is calculated in relation to the value for the previous assessment. . . . This presents great difficulties if RLIs are compared for two or more sets of species that are assessed with different frequencies.[87]

This scenario may well arise as major assessment initiatives 'involving thousands of scientists . . . [are] running on time-cycles determined by logistics and funding opportunities'.[88]

The larger point here is that the international transformation of this indicator into a policy target raises the question of whether its new role will threaten the validity of the indicator and the assessments on which it is based.[89] In the scientific literature, critiques of the Red List Index as a biodiversity indicator can be easily found.[90] But not so in the policy literature. Adrian Newton points out that growing use of the Red List Index as a policy or governance tool risks undermining its utility and accuracy as an indicator. National Red List Authorities, he suggests, might be discouraged

[83] P. J. Bubb *et al.*, *IUCN Red List Index—Guidance for National and Regional Use* (2009), at 7.

[84] Conference of the Parties to the Convention on Biological Diversity, *Revised and Updated Strategic Plan: Technical Rationale and Suggested Milestones and Indicators* (18–29 October 2010), at 5.

[85] IUCN Global Programme Team, 'Congress Paper CGR/2008/8—Annex 2', at 11.

[86] Butchart *et al.*, *supra* note 82. [87] *Ibid.* [88] *Ibid.*

[89] See A. C. Newton, 'Implications of Goodheart's Law for Monitoring Global Biodiversity Loss', 4 *Conservation Letters* (2011) 1.

[90] These criticisms trace to the uneven taxonomic coverage of species, the inconsistency of observational efforts, and the fact that changes reflect changes in knowledge more than changes in status of a species. *Ibid.*, at 2.

from conducting further Red List assessments on specific populations to avoid negative implications for scores.[91]

The Red List and Red List Index have been seized upon by policymakers in part because it is so difficult to find authoritative indicators. The appetite for indicators in both the corporate and policy worlds is significant, and growing.[92]

Why are these indicators, and their authors, relevant to a study of the 'private' dimensions of environmental rights? There are important lessons for a wider analysis of environmental rights here. What gets measured gets counted. What is not getting measured? What is not included in the definition of an 'environmental' right? Units of measurement, such as the Red List and Red List Index, come to form and to frame the dominant language and nomenclature within which environmental rights are articulated and environmental risks are calculated. They become an important currency whose legitimacy is strengthened by repeated use. More research is required to illuminate the private processes of knowledge creation and knowledge shaping that underlie the growing use of metrics, lists, and indicators for environmental governance.

4. Conclusions

In order to see new possibilities for conceiving and articulating the environmental dimensions of human rights, new ways of understanding the intersection between the private sector and environmental norms are required. This involves confronting fixed scripts, traditional separations between legal issues, and a limited vision of the subjects of interest to law.

This chapter draws on examples and methodologies unfamiliar to most collections on environmental human rights. The chapter's references are not to case law but to Walmart's market share and to the NGOs that are actively promoting carbon markets. The legal artefacts examined are not rights and

[91] *Ibid.*, at 3.

[92] The growing demand for indicators traces in part to the increasing requirements for social and environmental impact assessment across industries and activity areas. The reporting requirements of international environmental treaties also place increasing demands on governments to provide evidence of their implementation of environmental treaty obligations. The UN Commission on Sustainable Development, for example, asks governments to use indicators in their annual reports as a mechanism for measuring progress towards sustainable development. See United Nations, Department of Economic and Social Affairs, *Indicators of Sustainable Development: Guidelines and Methodologies* (3rd ed., 2007), available at <http://www.un.org/esa/sustdev/natlinfo/indicators/guidelines.pdf> (last visited 29 September 2014).

litigation strategies but private contracts, supply chain pressures, emerging environmental standards, metrics, and indicators. The central argument here is that private sector actors do not occupy a separate universe from that of states and their governments and key institutions. It is time to stop writing our accounts of law as though they do. This means making room for the private sector in our theories and conceptions of environmental law. And to do so does not mean that 'states fall out of the picture'.[93] Rather, the picture can become more all-encompassing, and thus more true to the realities.

This chapter has focused on excavating the less known and perhaps unglamorous aspects of private sector engagement with environmental rights—aspects of environmental governance that feature only rarely in legal scholarship. The intention here has been to show, through a close look at one private sector actor (business), one legal mechanism (contract), and one source of knowledge (metrics and indicators), the very messiness and complexity of private sector engagement with environmental norms.

Together, these seemingly discrete discussions of three aspects of private sector engagement with environmental norms reveal that market environmentalism is more than a separate field of play that co-exists, or even interacts, with the public spaces in which discussions of rights usually feature. Attending to human rights involves acknowledging the market-dominated frameworks that are so much a part of the global environmental policy agenda in the 21st century.

Developing and strengthening the environmental dimensions of human rights does not mean reconciling human rights approaches with the growing marketization or corporatization of sustainability. To recognize the complex interplay between private market behaviour and public environmental norms is not to become sanguine about the fate of critical environmental norms. This chapter is not about finding common ground, nor about fostering 'win–win' approaches for 'greening' human rights law. Rather, an awareness of the multiple levels of private engagement with environmental rights creates space for acknowledging the tension between rights-based approaches and market approaches. In the wake of the Rio+20 conference, the major outcome of which was an increased corporate commitment to sustainability reporting,[94] the time is ripe for greater engagement with the environmental dimensions of human rights. Indeed, human rights discourses may provide a rare opportunity for pushback against a global 'green economy' that is increasingly shaped by the dictates of markets and the demands of market actors.

[93] Ratner, *supra* note 8, at 827.

[94] P. Clark, 'Rio +20 to Push Sustainability Reporting', *The Financial Times* (17 June 2012); P. Clark, 'A Tipping Point on Sustainability Disclosure in Rio?', *Forbes* (19 June 2012).

2

Benefit-sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations

*Elisa Morgera**

1. Introduction

Environmental rights were late arrivals to the body of human rights law.[1] Conversely, the human rights dimension of corporate accountability[2] has been subject to a slower and less sophisticated development than the environmental dimension at the international level.[3] This may explain why conceptual and normative developments related to corporate environmental accountability in international law are increasingly deployed to further the human rights dimension of corporate accountability.[4] In particular, the legal concept of 'benefit-sharing', developed under the Convention on Biological

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[1] For an overview of the international debate in this regard, see *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox*, UN Doc. A/HRC/22/43 (24 December 2012). There, environmental rights are defined as 'rights understood to be related to environmental protection' (*ibid*., para. 7).

[2] For instance, a clause on human rights was only added to the *Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development* in 2011, available at <http://dx.doi.org/10.1787/9789264115415-en> (last visited 30 July 2014) (hereinafter 'OECD Guidelines'), although, since 2000, has included a sophisticated clause on environmental protection. Generally on human rights and corporate accountability, see M. K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999).

[3] E. Morgera, *Corporate Accountability in International Environmental Law* (2009).

[4] E. Morgera, 'From Corporate Social Responsibility to Accountability Mechanisms', in P. M. Dupuy and J. Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (2013) 32.

Diversity (CBD),[5] appears to be increasingly called upon to bridge the environmental and human rights dimensions of corporate accountability, insofar as indigenous peoples and local communities are concerned about the negative impacts of corporate conduct.[6] This chapter will investigate this little-studied phenomenon of cross-fertilization between international human rights and biodiversity law in relation to the accountability of multinational corporations.

Following an introductory discussion of key concepts in relation to corporate accountability in international law, the chapter analyses the tight linkages between human rights and environmental degradation due to substandard corporate conduct. It then proceeds to outline the development of international standards on corporate responsibility and accountability in relation to environmental protection, highlighting the significant level of detail and convergence of international standards for corporate environmental accountability. Against this background, the chapter then systematically examines instances in which conceptual and normative developments under international environmental law, and in particular under the Convention on Biological Diversity, have contributed to developing international standards on corporate responsibility to respect human rights. The chapter furthers the understanding of the key concept of benefit-sharing, teasing out its inter-state and intra-state implications, as well as its current and potential applications to private companies. It concludes with some future perspectives on the role of benefit-sharing in the context of the green economy vis-à-vis the environmental and human rights dimensions of corporate accountability.

2. Basic Concepts Related to Corporate Accountability in International Law

From a socio-legal perspective, multinational enterprises take advantage of the poor development of global institutions for the regulation of business to experiment in 'regulatory arbitrage', choosing to base their operations in countries with lax legal frameworks and limited or inefficient enforcement, and in 'creative compliance'.[7] The latter refers to private companies' practices

[5] E. Morgera and E. Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods', 20 *Review of European, Comparative & International Environmental Law* (*RECIEL*) (2010) 150.

[6] As discussed in Section 5 below, and initially identified by Morgera, *supra* note 4, at 336–337 and 349.

[7] The concepts of 'regulatory arbitrage' and 'creative compliance' are discussed by D. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law and For Law', in D. McBarnet,

of circumventing the law with the aim of 'fall[ing] outside the ambit of disadvantageous law and beyond the reach of legal control'.[8] In addition, multinational companies are notoriously able to influence the development and implementation of both national and international law through lobbying, negotiations, compromise, and weakening of controls.[9] Nonetheless, the law has increasingly been used in 'subtle, indirect and creative ways', notably also in the absence of government action,[10] to shift the corporate focus from profit-maximization to responsibility towards a broader range of stakeholders in relation to communal concerns.[11] This is ultimately seen as leading business to review its attitude to law and compliance, shifting from minimum compliance with the letter of the law to compliance with the spirit of the law.[12]

These perspectives are particularly significant in the context of an analysis of the role of international law in defining acceptable standards and monitoring corporate conduct. Multinational companies often escape the control of national law because of the inefficacy of regulation and enforcement processes by host states over a subsidiary and by home states over a parent company.[13] On the other hand, multinational companies are significantly protected by international investment law, while they are generally not subject to corresponding international obligations.[14] Multinational companies sometimes also benefit from the protection of international human rights law: human rights standards on access to justice have in fact been invoked by multinational companies against state parties in arbitrations based on bilateral investment treaties,[15] and breaches of bilateral investment treaties have been brought before human rights bodies on similar grounds.[16] In addition, multinational companies can profit from the gaps in international criminal

A. Voiculescu, and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 1.

[8] *Ibid.*, at 48. [9] *Ibid.*, at 48. [10] *Ibid.*, at 5.
[11] *Ibid.*, at 1. [12] *Ibid.*, at 61.

[13] See generally P. Muchlinski, *Multinational Enterprises and the Law* (2007).

[14] See generally M. Sornarajah, *The International Law on Foreign Investment* (2004) and S. Maljean-Dubois and V. Richard, 'The Applicability of International Environmental Law to Private Enterprises', in Dupuy and Viñuales (eds), *supra* note 4, 69.

[15] *Mondev International Ltd. v. USA*, ICSID Case No. ARB/(AF)/99/2, Award (11 October 2002), para. 144, as reported by A. Savaresi, 'The International Human Rights Implications of the Nagoya Protocol', in E. Morgera, M. Buck, and E. Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (2012) 53, at 72.

[16] L.E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration* (2009), cited in Savaresi, *supra* note 15, at 72.

and civil liability regimes with respect to environmentally damaging corporate conduct.[17]

The international community has debated the need for international regulation and oversight of multinational companies for some 40 years.[18] These discussions have been particularly prominent in the context of international environmental law, with the preamble to the 1972 Stockholm Declaration on the Human Environment making a broad reference to the environmental *responsibility* of enterprises.[19] In 1992, during the United Nations Conference on Environment and Development (UNCED), discussions took place with regard to the role of business in the global protection of the environment and on the necessity of integrating environmental concerns into corporate decision-making.[20] The resulting Agenda 21 dedicated an entire chapter to 'Strengthening the Role of Business and Industry', making reference to *responsible* entrepreneurship.[21] In 2002, the World Summit on Sustainable Development (WSSD) referred for the first time to two separate concepts—corporate *responsibility* and corporate *accountability*.[22]

Drawing a distinction between these two terms is a useful preliminary step for present purposes. The term 'corporate accountability', as endorsed by the

[17] P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd ed., 2009), at 326–329; Morgera, *supra* note 3, ch. 3.

[18] Early attempts were undertaken in the context of the UN Economic and Social Council (ECOSOC), which adopted a resolution in 1972 acknowledging the lack of an international regulatory framework for multinational corporations and the need to institutionalize international debate on that issue. See ECOSOC Res. 1721 (LIII) (28 July 1972).

[19] Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), (1972) 11 ILM 4116, para. 7 (hereinafter 'Stockholm Declaration').

[20] 'Business and the UNCED Process', in ECOSOC, *Report of the Secretary-General: Follow-up to the United Nations Conference on Environment and Development as related to Transnational Corporations*, UN Doc. E/C.10/1993/7 (4 March 1993). H. Gleckman, 'Transnational Corporations' Strategic Responses to "Sustainable Development" ', in H.O. Bergenses, G. Parmann, and Ø. B. Thommessen (eds), *Green Globe Yearbook of International Cooperation on Environment and Development* (1995) 95.

[21] 'Agenda 21', in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (12 August 1992), Vol. I, Annex II, ch. 30; ECOSOC, *Report of the Secretary-General*, *supra* note 20, at 35 n. 44.

[22] World Summit on Sustainable Development (WSSD), 'Resolution 1: Political Declaration', in *Report of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (26 August–4 September 2002), paras 27 and 29 (hereinafter 'WSSD Declaration'); and WSSD, 'Resolution 2: Plan of Implementation of the World Summit on Sustainable Development', in *Report of the WSSD*, paras 49 and 140(f). The most recent UN environmental summit and policy (the UN Conference on Sustainable Development or Rio+20, held in Rio de Janeiro on June 2012), did not shed any new light on these questions: see discussion in E. Morgera and A. Savaresi, 'A Conceptual and Legal Perspective on the Green Economy', 22 *RECIEL* (2013) 14, at 26–27.

international community at the WSSD, can be understood as a legitimate expectation that reasonable efforts will be put in place, according to international standards, by private companies[23] for the protection of a particular global interest or the attainment of a certain internationally agreed environmental objective.[24] This concept can be differentiated from corporate *responsibility*, which rather makes reference to the need for *substantive*, result-oriented standards for the conduct of private companies that go beyond what is required at the national level of the host state.[25] Thus, while corporate responsibility seeks to ensure corporate contributions to environmental protection and, more generally, to sustainable development, corporate accountability is concerned with *procedural* steps in that direction, in terms of transparency, disclosure of information to the public, impact assessments, consultations, and grievance mechanisms. Corporate accountability, therefore, focuses on the means for ensuring the environmentally sound conduct of multinational companies on the basis of public expectations arising from international goals and objectives.

The distinction also serves to stress that, so far, the international community has carefully and clearly refrained from using the term 'corporate *liability*'. This points to the underlying understanding that international environmental law as such is not binding on transnational corporations and consequently cannot lead to strictly legal consequences.[26] As a result, relevant international developments have focused not on issues of compensation for environmental damage, but rather on the *prevention* of multinational companies' negative impacts on environmental human rights in the country in which they are operating.

The UN General Assembly explicitly recognized the duality of corporate accountability and corporate responsibility when framing the mandate of the UN Special Representative on issues of Human Rights and Transnational Corporations in 2005.[27] Similarly to the distinction drawn above on the basis of key international documents on international environmental law, the Special Representative pointed to standards governing corporate 'responsibility'—understood as the *substantive* (legal, social or moral) obligations imposed on companies—and on corporate 'accountability'—understood as

[23] Increasingly, international practice related to corporate accountability avoids distinguishing multinational corporations from other business enterprises: Morgera, *supra* note 3, at 60; see also D. Weissbrodt and M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 97 *AJIL* (2003) 901, at 910.

[24] Morgera, *supra* note 3, at 19–22. [25] *Ibid.*, at 23. [26] *Ibid.*, at 22–24.

[27] Commission on Human Rights Res. 2005/69 (20 April 2005), para. 1(a) in terms of 'identify [ing] and clarify[ing] standards of corporate responsibility and accountability'.

the *mechanisms* to hold companies to their obligations.[28] Accordingly, the Special Representative preferred the term 'corporate responsibility' to respect human rights,[29] as a substantive standard to 'do no harm' against the framework of relevant international human rights instruments, and then significantly elaborated on the underlying procedural means based on the notion of 'due diligence'.[30] The latter is defined as the '*process* whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it', based on reasonable expectations.[31]

As in the context of international environmental law, the international community has moved beyond the rejection of the idea that there are international legal obligations upon companies under international human rights law. Instead, it has recognized the 'global standard of expected conduct for all business enterprises wherever they operate' independently of states' abilities and willingness to fulfil their international obligations.[32] These international standards are in 'the process of being socially constructed'[33] in the face of the 'fluid' applicability of international legal principles to companies' acts[34] through the growing international activities aimed at standard-setting and monitoring of multinational corporations on the basis of 'social

[28] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35 (19 February 2007), para. 6.

[29] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/14/27 (9 April 2010).

[30] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc. A/HRC/8/35 (7 April 2008), paras 25 and 58 (the Human Rights Council recognized the need to operationalize the framework through Res. 8/7 (18 June 2008), para. 2).

[31] *Ibid.*, para. 25 (emphasis added) and its footnote.

[32] *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, *John Ruggie: Guiding Principles on Business and Human Rights to Implement the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31 (21 March 2011), para. 11. (The Guiding Principles were endorsed by the Human Rights Council Res. 17/4 (6 July 2011), para. 1). For a critique of this instrument, see J.-M. Kamatali, 'The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is It Time for an ICJ Advisory Opinion?', 20 *Cardozo Journal of International and Comparative Law* (2011–2012) 437.

[33] Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc. E/CN.4/2006/97 (2006), para. 54.

[34] *Ibid.*, para. 64.

expectations by States and other actors'.[35] Overall, these international activities tend to 'blur the lines between the strictly voluntary and mandatory spheres'[36] in international law with respect to the accepted corporate conduct to ensure respect for human rights.

3. Factual and Normative Linkages between Corporate Environmental Damage and Human Rights

Both the day-to-day activities of multinational companies and major accidents or incidents due to corporate substandard practices contribute to environmental degradation. At the same time, the financial, technological, and managerial resources of private companies can make them influential and creative contributors to the protection of the environment and the sustainable use of natural resources. In that respect, they can significantly contribute to support states' efforts to comply with their international environmental obligations.[37] In addition, multinational corporations that depend on natural capital for their long-term operations ultimately have a vested interest in environmental protection.

Against this multifaceted background, the connection between the environment and human rights in relation to corporate accountability is first and foremost factual. A survey conducted by the UN Special Representative on Business and Human Rights indicated that nearly a third of cases of alleged environmental harm had corresponding impacts on human rights. The right to health, life, adequate food and housing, minority rights to culture, as well as the right to benefit from scientific progress, and environmental concerns were raised with respect to all business sectors.[38] Human rights violations have often been alleged before national courts when corporate environmental damage is the result of gross negligence or deliberate indifference and caused severe, long-lasting, and widespread harm to people.[39] This has been particularly the case

[35] *Ibid.*, paras 44–46. [36] *Ibid.*, paras 61–62.

[37] F. Francioni, 'The Private Sector and the Challenge of Implementation', in Dupuy and Viñuales (eds), *supra* note 4, 24, at 40.

[38] Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises—Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, UN Doc. A/HRC/8/5/Add.2 (23 March 2008), para. 27.

[39] A. Sinden, 'Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs', in McBarnet *et al.* (eds), *supra* note 7, 728, at 744. For an analysis of relevant case law, see H. M. Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights', 24 *Stanford Environmental Law Journal* (2005) 71; and also Morgera, *supra* note 3, at 119–141. Generally on the legal questions arising from corporate

of environmental degradation caused by multinational companies in areas traditionally occupied by indigenous peoples and local communities.[40]

From a conceptual viewpoint, the use of human rights law and approaches to address corporate environmental damage facilitates tackling the power imbalances between corporations, governments, and communities, which emerge when traditional legal remedies are not sufficient to redress the damage.[41] It has been argued, for instance, that when corporations exercise 'ultimate authority' on individuals, they should be treated as duty bearers under human rights law. This usually occurs when states fail to regulate private actors because of weak government and corruption; or when corporations have so much power over government that they essentially control state decision-making.[42] In addition, international human rights law allows international scrutiny of state behaviour in situations beyond the reach of international environmental law, which is when environmental damage is not transboundary or does not have global impacts on human rights.[43] Nonetheless, neither system has 'proposed a systematic structure for approaching environmental harm to humans'.[44]

While these conceptual linkages have been sufficiently addressed in the literature, little academic attention has yet been devoted to the usefulness of international environmental law in addressing human rights-related concerns about corporate conduct. Concepts and standards developed under international environmental law, and also re-elaborated in the context of international developments on corporate environmental accountability, have been increasingly taken up in the development of international standards for corporate responsibility to protect human rights. The UN Framework on Business and Human Rights, for instance, is built on a due diligence process, implying concepts and approaches[45] that have been developed and/or significantly experimented with in the environmental sphere, notably: (i) impact assessment; (ii) stakeholder involvement in decision-making; and (iii) life-cycle management.[46] As this chapter will discuss, recent international

environmental harm impacting on indigenous peoples, see G. K. Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights', 33 *Michigan Journal of International Law* (2011–2012) 627.

[40] Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), at 19–20.

[41] Sinden, *supra* note 39, at 731–732 and 734. [42] *Ibid.*, at 741.

[43] Osofsky, *supra* note 39, at 75–76. [44] *Ibid.*, at 76.

[45] Sinden, *supra* note 39, at 14.

[46] E. Morgera, 'Final Expert Report: Corporate Responsibility to Respect Human Rights in the Environmental Sphere', in *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union* (European Commission-funded project)

developments both in standard-setting and in monitoring of corporate conduct have further drawn on international environmental law, and particularly international biodiversity law, to flesh out the due diligence process under the UN Framework. Before turning to these, however, the chapter will discuss how standards for corporate environmental accountability can in themselves contribute to corporate respect for human rights.[47]

4. The Convergence of International Standards on Corporate Environmental Accountability and their Relevance from a Human Rights Perspective

While states have generally resisted the creation of an international legally binding instrument on corporate accountability, voluntary[48] and soft-law international instruments and initiatives of inter-governmental and multi-stakeholder origin have proliferated to support and encourage the environmentally sound conduct of multinational and other companies. The inadequacy of national and international law to tackle corporate environmental damage and related human rights violations[49] motivated these developments, which have served to 'translate'[50] or 'creatively adapt'[51] international obligations drafted for and targeted to states into benchmarks to assess the conduct of business against agreed international environmental goals, objectives, and principles.

A series of standard-setting exercises has been put in place by various international organizations at various points in time. In the context of the United Nations, these exercises include the ill-fated UN Draft Code of

(May 2010), at 12, available at <http://www2.law.ed.ac.uk/euenterpriseslf/documents/files/CSREnvironment.pdf> (last visited 30 September 2014).

[47] E. Morgera, 'Human Rights Dimensions of Corporate Environmental Accountability', in P.-M. Dupuy, U. Petersmann, and F. Francioni (eds), *Human Rights, Investment Law and Investor-State Arbitration* (2009) 511.

[48] This is notably the case of international public–private partnerships, which were endorsed as an official outcome of the World Summit on Sustainable Development in 2002. See C. Streck, 'The World Summit on Sustainable Development: Partnerships as the New Tool in Environmental Governance', 13 *YbIEL* (2003) 21; Morgera, *supra* note 3, ch. 12.

[49] Sinden, *supra* note 39, at 730.

[50] 'Because the main principles of international environmental law are written for public rather than private entities, they need to be "translated to the private sector" ': A. Nollkaemper, 'Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives', in G. Winter (ed.), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law* (2006) 179, at 185.

[51] With reference to human rights law in particular: Sinden, *supra* note 39, at 742.

Conduct for Transnational Corporations,[52] negotiations for which collapsed in the early 1990s,[53] and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[54] The latter were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights[55] (a body comprising independent human rights experts acting in their personal capacity) but not by the former UN Commission on Human Rights.[56] The UN Norms thus only enjoy a level of expert legitimacy, but no political endorsement.[57] While they may be considered superseded by the UN Framework on Business and Human Rights, the UN Norms still provide useful historical indications on the cross-fertilization of international human rights and environmental law in relation to corporate accountability.

Relevant instruments also include the inter-governmentally approved and highly influential Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD), the partnership-focused principles of the UN Global Compact[58] (an initiative of the UN Secretary-General with support from various UN bodies)[59] and

[52] ECOSOC, *Draft Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94 (12 June 1990) (hereinafter 'UN Draft Code').

[53] W. Sprote, 'Negotiations on a United Nations Code of Conduct on Transnational Corporations', 33 *German Yearbook of International Law* (1990) 331, at 339.

[54] ECOSOC, *Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003) (hereinafter 'Commentary UN Norms').

[55] ECOSOC, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

[56] The Commission did not adopt, but only *took note* of the 'Norms', stating that they had 'not been requested by the Commission and, as a draft proposal, ha[d] no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard'. Office of the High Commissioner for Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/DEC/2004/116 (20 April 2004), para. C.

[57] See S. Walker, Speech, in *Corporate Social Responsibility and Development: Towards a New Agenda: Summaries of Presentations Made at the UNRISD Conference* (Geneva, 17–18 November 2003) 83, at 85, available at <http://www.unrisd.org/80256B3C005BD6AB/(httpEvents)/3B9E23F717B84550C1256E23004DAB40?OpenDocument> (last visited 30 September 2014).

[58] See the Global Compact website, at <http://www.unglobalcompact.org/> (last visited 30 September 2014). See also *United Nations Guide to the Global Compact: A Practical Understanding of the Vision and the Nine Principles*, at 58, available at <http://people.plan.aau.dk/~henrik/er/guide-to-global-compact.PDF> (last visited 30 September 2014) (hereinafter '*Guide to the Global Compact*').

[59] In time, the Global Compact received an intergovernmental endorsement through UNGA Res. 62/211, 'Towards Global Partnership' (11 March 2008), para. 9, and UNGA Res. 64/223, 'Towards Global Partnership' (25 March 2010), para. 13. The question of the inter-governmentally agreed mandate of the Global Compact remains open, however. See the Joint Inspection Unit, United Nations Corporate Partnerships, *The Role and Functioning of the Global Compact*, UN Doc.

the Performance Standards of the International Finance Corporation within the World Bank Group (IFC).[60]

From earlier and successive international discussions, a series of common standards have emerged that have reached a significant level of detail and acceptance at the international level as directly applicable to private companies.[61] In the early 2010s, this trend accelerated. On the occasion of the 2011 parallel review of the OECD Guidelines and the IFC Performance Standards (motivated mostly by the need to take into account the adoption of the UN Framework on Business and Human Rights), further convergence has occurred in the procedural standards for corporate environmental accountability, including with the introduction of common substantive standards.[62]

For present purposes, it should be emphasized that the resulting international standards for corporate environmental accountability already imply certain human rights dimensions. For instance, this is the case of environmental impact self-assessment, namely on-going assessment, beyond legal requirements at the national level, of the possible environmental impacts of private companies' activities before and during their operations, on the basis of scientific evidence, as well as communication with likely-to-be-affected communities.[63] On the basis of such continuous assessment, private companies are further to elaborate environmental management systems to assist in controlling direct and indirect impacts on the environment and possibly to continually improve their environmental performance.[64] Through the assessment process, the human rights issues related to the conditions under which natural resources are acquired and processed can come into focus, although the full spectrum of relevant human rights issues (such as labour standards and working conditions) are less likely to be considered.[65] Stakeholder engagement and participation in the assessment—elements common to

JIU/REP/2010/9 (2010), paras 13–18 and recommendation 1; and 'A Response from the Global Compact Office' (24 March 2011), at 2 (on file with the author, no longer available online).

[60] International Finance Corporation (IFC), *IFC Performance Standards on Social and Environmental Sustainability* (1 January 2012), available at <http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards/#2012> (last visited 30 September 2012) (hereinafter '2012 IFC Performance Standards').

[61] This is the main finding of Morgera, *supra* note 3, at 200–201.

[62] Morgera, *supra* note 4.

[63] Commentary UN Norms, *supra* note 54, §§ (b) and (c); OECD Guidelines, *supra* note 2, ch. VI, para. 3; 2012 IFC Performance Standards, *supra* note 60, standard 1, paras 5–7.

[64] OECD Guidelines, *supra* note 2, ch. VI, para. 1 and Commentary on the Environment Chapter, ibid., para. 60; Commentary UN Norms, *supra* note 54, § (g); 2012 IFC Performance Standards, *supra* note 60, standard 1, paras 17 and 24.

[65] However, human rights questions related to natural resources appear to be more neglected in human rights-focused assessments: International Business Leaders Forum, International Finance

human rights assessments[66]—also significantly contribute to integrating human rights concerns, particularly those of local and indigenous communities, into the environmental self-assessments.[67]

Corporate environmental accountability standards also include prevention (whereby private companies are expected to take reasonably active steps, including the suspension of certain activities, to prevent or minimize environmental damage[68]) and the application of the precautionary principle (whereby, in the face of scientific uncertainty, private companies are further expected to embark on precautionary action by taking the most cost-effective early measure to prevent the occurrence of environmental harm, or by avoiding delays in minimizing such harm[69]). Both standards are alien to international human rights law, but may serve to prevent or contain environmental harm which would have human rights consequences.[70]

Disclosure of public information,[71] direct consultations with the public,[72] and the creation of a review or appeal process for communities to express their complaints[73] are complementary and mutually reinforcing procedural standards. These procedural standards have been significantly strengthened by the 2011 reviews of the OECD Guidelines and of the IFC Performance Standards, although discrepancies have emerged in relation to the right to free, prior and informed consent of indigenous peoples.[74] The OECD

Corporation, and UN Global Compact, *Guide to Human Rights Impact Assessment and Management Road-Testing Draft* (2007), at 29.

[66] O. Lenzen and M. d'Engelbronner, *Guide to Corporate Human Rights Impact Assessment Tools* (2009).

[67] International Business Leaders Forum *et al.*, *supra* note 65, at 4 and 16.

[68] OECD Guidelines, *supra* note 2, ch. VI, para 5; 2012 IFC Performance Standards, *supra* note 60, Standard 3; implicitly, Global Compact, *supra* note 58, Principle 10 (see also *Guide to the Global Compact*, *supra* note 58, at 64); Commentary UN Norms, *supra* note 54, §§ (e)–(g).

[69] Global Compact, *supra* note 60, Principle 7, and *Guide to the Global Compact*, *supra* note 58, at 54; OECD Guidelines, *supra* note 2, ch. VI, para. 4; Commentary UN Norms, *supra* note 54, § G.

[70] Precaution has recently been invoked in the context of the reflection by the UN Special Rapporteur on the Rights of Indigenous Peoples on corporate accountability: see Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/HRC/21/47 (6 July 2012), para. 52; and in UN Global Compact Office, *United Nations Declaration on the Rights of Indigenous Peoples: A Business Reference Guide*, Exposure Draft (10 December 2012), at 76, available at <http://www.unglobalcompact.org/docs/issues_doc/human_rights/UNDRIP_Business_Reference_Guide.pdf> (last visited 30 September 2014).

[71] UN Draft Code, *supra* note 52, para. 42; *Guide to the Global Compact*, *supra* note 58, at 58; Commentary UN Norms, *supra* note 54, §§ (b) and (c); 2012 IFC Performance Standards, *supra* note 60, standard 1, para. 29; OECD Guidelines, *supra* note 2, ch. VI, para. 2.

[72] *Guide to the Global Compact*, *supra* note 58, at 58; OECD Guidelines, *supra* note 2, ch. VI, para. 2; 2012 IFC Performance Standard, *supra* note 60, Standard 1, paras 30–33.

[73] 2012 IFC Performance Standards, *supra* note 60, Standard 1, para. 35.

[74] The lack of reference to free, prior and informed consent in the revised OECD Guidelines was criticised by OECD Watch, 'OECD Watch Statement on the Update of the OECD Guidelines for

Guidelines emphasize good faith consultations for planning and decision-making concerning projects or activities 'that may significantly impact local communities' such as those involving the intensive use of land and water, as well as disclosure of climate change and biodiversity-specific information.[75] On the other hand, the IFC significantly strengthened its approach to community consultations, linking the need for companies to conduct 'informed consultation' with a specific and express (albeit qualified) requirement for free, prior, and informed consent. Free, prior, and informed consent specifically needs to be obtained from IFC clients in three cases: potential relocation of indigenous peoples, impacts on lands and natural resources subject to traditional ownership or under customary use, and projects proposing to use cultural resources for commercial purposes.[76] The IFC has in this connection engaged in 'translating' the concept of free, prior, and informed consent for private companies: it is a good-faith negotiation with culturally appropriate institutions representing indigenous peoples' communities, with a view to reaching an agreement that is seen as legitimate by the majority within the community.[77]

The IFC Performance Standards further clarify explicitly that 'consent does not necessarily require unanimity and may be achieved even when individuals and sub-groups explicitly disagree'.[78] This appears to be in line with the understanding of free, prior, and informed consent proposed by the UN Special Rapporteur on indigenous peoples' rights. Free, prior, and informed consent does not provide indigenous people with a veto power when the state acts legitimately and faithfully in the public interest, but rather 'establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned'.[79] In addition, the IFC Performance Standards require, in qualified language

Multinational Enterprises: Improved Content and Scope, but Procedural Shortcomings Remain' (25 May 2011), available at <http://oecdwatch.org/publications-en/Publication_3675> (last visited 30 September 2014); and by Amnesty International, 'The 2010–11 Update of the OECD Guidelines for Multinational Enterprises Has Come to an End: The OECD Must Now Turn [in]to Effective Implementation' (23 May 2011), available at <http://www.amnesty.org/en/library/asset/IOR30/001/2011/en/601f0e2c-a8a3-4fbc-b090-c0abb3c51ab2/ior300012011en.pdf> (last visited 30 September 2014).

[75] OECD Council, 'OECD Guidelines for Multinational Enterprises: Update 2011—Note by the Secretary-General', OECD Doc. C(2011)59 (3 May 2011), Appendix II, para. II. A.14; OECD Council, 'OECD Guidelines for Multinational Enterprises: Update 2011—Commentaries', OECD Doc. C(2011) 59/ADD1 (3 May 2011), paras 25 and 33.

[76] 2012 IFC Performance Standards, *supra* note 60, Standard 1, para. 35.

[77] *Ibid.*, Standard 7, para. 12.

[78] *Ibid.*

[79] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (2009), *supra* note 40, paras 48 and 53.

'consider[ation] . . . where appropriate' of involving representatives of affected communities in monitoring the effectiveness of companies' environmental management programmes,[80] coupled with the creation of an 'external communications system' that will allow companies to screen, assess, and reply to communications from stakeholders with a view to continually improving their management system. The system is then subject to the requirement for a 'stakeholder engagement framework' in the event that the exact location of the project is unknown, but the project is nonetheless reasonably expected to have significant impacts on local communities. When communities may be affected by risks of adverse impacts of the project, the following information should be disseminated to these communities: purpose, nature, and scale of the project; duration of proposed project activities; risks and potential impacts on communities and relevant elements of the management programme; envisaged stakeholder engagement process; and the grievance and redress mechanism.[81]

These procedural standards equally target environmental protection and respect for human rights. What has been more difficult to determine, in the evolution of international standard-setting on corporate environmental accountability, is a substantive standard for corporate environmental responsibility. Only the IFC Performance Standards attempted to identify a standard such as sustainable natural resource management[82] and respect for internationally protected sites.[83] The 2011 reviews, however, introduced references to climate change, biodiversity, and resource efficiency as substantive standards of corporate environmental responsibility. The 2011 version of the OECD Guidelines did so in a more timid way, with a recommendation on 'exploring and assessing ways to improve environmental performance', with reference to emission reduction, efficient resource use, the management of toxic substances, and the conservation of biodiversity.[84] The 2011 version of the IFC Performance Standards, on the other hand, introduced very detailed

[80] 2012 IFC Performance Standards, *supra* note 60, Standard 1, para. 21.

[81] *Ibid.*, paras 26, 30–31, and 38.

[82] The earlier version of the IFC Performance Standards, *IFC Performance Standards on Social and Environmental Sustainability* (30 April 2006), Standard 1 n. 7 ('2006 IFC Performance Standards'), made reference to 'sustainable resource management' as 'the use, development and protection of resources in a way or at a rate that enables people and communities to provide for their present social, economic and cultural well-being while also sustaining the potential of those resources to meet the reasonably foreseeable needs of future generations'. Cf. 2012 IFC Performance Standards, *supra* note 60, Standard 6.

[83] *Ibid.*, Standard 6. For a more detailed discussion on these substantive standards, see Morgera, *supra* note 3, ch. 8.

[84] OECD Guidelines, *supra* note 2, ch. VI, para. 6.d.

standards on greenhouse gas emissions,[85] water consumption, and waste reduction,[86] and on the protection of natural habitats and ecosystem services.[87] These substantive standards of corporate environmental responsibility are particularly (albeit implicitly) relevant, as human rights violations or negative impacts have been increasingly discussed internationally in relation to waste[88] and climate change.[89] The standards related to biodiversity, in turn, provide specific procedural human rights dimensions: stakeholders' views need to be taken into account on the extent of conversion or degradation, and the identification and protection of 'set-aside areas'.[90] Furthermore, business entities are called upon to determine, with stakeholder participation, likely adverse impacts on ecosystem services, and systematically identify priority ecosystem services (either those in relation to which the project will have adverse impacts on affected communities or on which the project will be directly dependent for its operations). These exercises are aimed at avoiding or minimizing negative impacts, and implementing measures to increase the resource efficiency of the operation.[91]

Overall, international standards for corporate environmental accountability serve various functions. They enhance the process of project review by expanding the substantive criteria applicable to risk assessment and creating additional layers of corporate compliance beyond national law and possibly also beyond international treaties to which the host state is a party.[92] Further, they provide additional grounds for stakeholders' complaints and advocacy

[85] Such as 'technical and financially feasible and cost-effective options to reduce project-related greenhouse gas emissions during the design and operation of the project', as well as more specific obligations in case of projects expected or actually producing more than 25,000 tonnes of carbon-dioxide equivalent annually: 2012 IFC Performance Standards, *supra* note 60, Standard 3, paras 7–8.

[86] This includes checking whether contractors for the disposal of hazardous waste are reputable and legitimately licensed and their sites are operated in a manner consistent with acceptable standards. IFC clients must also consider whether they should develop their own recovery or disposal facilities at the project site. Further, they are subject to the prohibition to purchase, store, manufacture, use, or trade in products classified as extremely hazardous or highly hazardous by the World Health Organization: *ibid*., paras 9, 12, and 17.

[87] *Ibid*., Standard 6.

[88] See UN Office of High Commissioner for Human Rights, 'Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights', available at <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx> (last visited 30 September 2014).

[89] Human Rights Council, Resolutions on 'Human Rights and Climate Change': Res. 7/23 (28 March 2008); Res. 10/4 (25 March 2009); and Res. 18/22 (17 October 2011).

[90] 2012 IFC Performance Standards, *supra* note 60, Standard 6, para. 14 and para. 15 n. 10.

[91] *Ibid*., paras 24–25.

[92] A. Meyerstein, 'Global Adversarial Legalism: The Private Regulation of FDI as a Species of Global Administrative Law', in M. Audit & S. Schill (eds), *Transnational Law of Public Contracts* (forthcoming 2015).

campaigns that would not otherwise appear sound at the national or international level.[93] From the viewpoint of corporations, international standards have a significant and growing 'commercial relevance' in light of the increasing number of direct commitments of private companies to key provisions or goals of multilateral environmental agreements, and their direct involvement in international standard-setting on corporate environmental accountability.[94]

5. Cross-fertilization between Environmental and Human Rights-related Efforts in Ensuring Corporate Accountability

Increasingly, international standard-setting and monitoring activities related to corporate accountability have relied on conceptual and normative developments under international environmental law, and in particular under the Convention on Biological Diversity, to further develop and effectively apply human rights-related international standards to multinational enterprises. In particular, the CBD has provided normative standards as well as practical tools to 'translate' the concepts of sustainable use and the protection of indigenous peoples and local communities[95] into workable benchmarks for the private sector. This is, in particular, the case of socio-cultural and environmental impact assessments and of benefit-sharing.[96] The CBD guidelines are particularly

[93] *Ibid.*

[94] N. Affolder, 'The Market for Treaties', 11 *Chicago Journal of International Law* (2010) 159, at 186.

[95] See Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, entered into force 29 Dec. 1993) 1760 UNTS 79 (hereinafter 'CBD'). Although the soft law instruments developed under the Convention always refer to 'indigenous and local communities', the inappropriate use of this terminology to reflect international human rights developments related to indigenous peoples has already been pointed out by the UN Forum on Indigenous Issues (e.g., *Report of the Tenth Session of the UN Permanent Forum on Indigenous Issues*, UN Doc. E/2011/43-E/C.19/2011/14 (16–27 May 2011), paras 26–27) but CBD parties have struggled to reach consensus on adopting the term 'indigenous peoples and local communities'. The question was discussed most recently by the Convention Conference of the Parties (COP) in 2012 and eventually postponed for consideration in 2014, following consideration of 'all its implications for the Convention on Biological Diversity and its Parties' (*Recommendations to the Convention on Biological Diversity Arising from the Ninth and Tenth Sessions of the United Nations Permanent Forum on Indigenous Issues*, CBD Decision XI/14G (5 December 2012), para. 2).

[96] Although the concept of benefit-sharing has been enshrined in international law since the late 1950s (such as in the Interim Convention on Conservation of North Pacific Fur Seals (Washington, 9 February 1957, entered into force 14 October 1957) 314 UNTS 105), as argued by A. Proelß, 'Marine Mammals', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), para. 10, available at <http://opil.ouplaw.com/home/EPIL> (last visited 30 September 2014); United Nations Convention on the Law of the Sea (United Nations Convention on the Law of the Sea (Montego Bay, signed 10 December 1982, entered into force 16 November 1994)

noteworthy because they have been negotiated with the participation of stakeholders and representatives of indigenous and local communities[97] and approved inter-governmentally[98] by the CBD's virtually universal membership.[99] In that respect, the CBD has provided quite an effective and timely forum where inter-governmental consensus is reached on instruments that promote a rights-based approach to environmental policy, including in relation to corporate accountability.[100] The cross-fertilization between international biodiversity and human rights law can be seen as a significant contribution to ensuring substantive unity[101] across different areas of international law that may be negatively affected by the conduct of private operators.[102]

For instance, the 2012 Performance Standards of the International Finance Corporation relied on the CBD and the concept of benefit-sharing as a key link between the right to free, prior, and informed consent of indigenous peoples[103] and due diligence by private companies.[104] Private

1833 UNTS 3, Art. 140(2); UNGA Res. 41/128, Declaration on the Right to Development (4 December 1986), Art. 2(3); and the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991), 1659 UNTS 383, Art. 15(2)), it is in the context of the CBD that is has been more fully developed.

[97] Under the CBD Working Group on Art. 8(j) ('traditional knowledge'), in particular, the fullest possible participation of indigenous and local communities is ensured in all Working Group meetings, including in contact groups, by welcoming community representatives as Friends of the Co-Chairs, Friends of the Bureau, and Co-Chairs of contact groups. This is without prejudice to the applicable rules of procedure of the Conference of the Parties establishing that representatives duly nominated by parties are to conduct the business of CBD meetings in such a manner that any text proposal by indigenous and local communities' representatives must be supported by at least one party. See Conference of the Parties to the Convention on Biodiversity, *Report of the Seventh Meeting of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions*, UN Doc. UNEP/CBD/COP/11/7 (24 November 2011), para. 20.

[98] By the COP—the Convention currently counts 193 States as parties. On the legal significance of COP decisions generally, see J. Brunnée, 'COPing with Consent: Law-making under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* (2002) 1; and on the significance of CBD COP decisions, see E. Morgera, 'Far Away, So Close: A Legal Analysis of the Increasing Interactions between the Convention on Biological Diversity and Climate Change Law', 2 *Climate Law* (2011) 85.

[99] With the notable exception of the United States; see status of the CBD membership at: 'Parties', available at <http://www.cbd.int/information/parties.shtml> (last visited 30 September 2014).

[100] E. Morgera and E. Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity', 21 *YbIEL* (2011) 4.

[101] P. M. Dupuy, *L'unité de l'ordre juridique international* (2003).

[102] Morgera, *supra* note 4, at 322.

[103] UNGA Res. 61/295, 'UN Declaration on the Rights of Indigenous Peoples' (13 September 2007) (hereinafter 'UNDRIP').

[104] In the previous version of the IFC Performance Standards, the concept of benefit-sharing was only relied upon in the context of cultural heritage: 2006 IFC Performance Standards, *supra* note 82, Standard 8.

companies are called upon to put mitigation measures into place, such as compensation and benefit-sharing, taking into account indigenous peoples' laws, institutions, and customs. Benefits may include, according to the preferences of the relevant indigenous peoples, culturally appropriate improvement of their standard of living and livelihoods and the long-term sustainability of the natural resources on which they depend.[105] Benefit-sharing is further envisaged where the business entity 'intends to utilise natural resources that are central to the identity and livelihood of Indigenous People and their usage thereof exacerbates livelihood risk'.[106] With specific regard to involuntary resettlement, IFC clients are expected to implement measures to ensure, for communities with natural resource-based livelihoods, the continued access to affected resources or alternative resources with equivalent livelihood-earning potential and accessibility. In the alternative, IFC clients are to provide compensation and benefits associated with the natural resource use that 'may be collective in nature rather than directly oriented towards individuals and households', taking into account the ecological context.[107]

In parallel, the UN Rapporteur on Indigenous Peoples' Rights pointed to the need to complement the UN Framework on Business and Human Rights with an environmental dimension to ensure the protection of the rights of indigenous peoples.[108] To that end, he indicated that concepts such as benefit-sharing and socio-cultural and environmental impact assessments, as elaborated upon under the CBD,[109] can significantly contribute to fleshing out standards of due diligence according to the UN Framework on Business and Human Rights.[110] He also stressed that in addition to entitlement to compensation, indigenous peoples have a right to share in the benefits arising from business activities taking place on their traditional lands or in relation to their traditionally used natural resources.[111] And further, consensus-driven consultation processes should not only address measures to mitigate or

[105] 2012 IFC Performance Standards, *supra* note 60, Standard 7, paras 12–13.

[106] *Ibid.*, para. 18. [107] *Ibid.*, Standard 5, para. 26.

[108] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* (2009), *supra* note 40, § E.

[109] The socio-cultural and environmental impact assessments were elaborated upon through *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or Which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, CBD Decision VII/16F (13 April 2004) (hereinafter '*Akwé: Kon Voluntary Guidelines*').

[110] Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya*, UN Doc. A/HRC/15/37 (19 July 2010), paras 73–75.

[111] *Ibid.*, paras 76–80.

compensate for adverse impacts of projects, but also explore and arrive at means of equitable benefit-sharing in a spirit of true partnership.[112] Along similar lines, the Expert Mechanism on the Rights of Indigenous Peoples stressed the link between free, prior, and informed consent, benefit-sharing and mitigation measures in the context of large-scale natural resource extraction on indigenous peoples' territories, underscoring the importance of the CBD work programme on protected areas[113] and the Akwé: Kon Guidelines on socio-cultural and environmental impact assessments.[114]

With regard to monitoring activities, the implementation procedure of the OECD Guidelines for Multinational Enterprises has provided recent instances in which CBD concepts have been used to interpret the more general standards of corporate responsibility to respect human rights contained in the Guidelines. The UK National Contact Point used the Akwé: Kon Guidelines to interpret the OECD Guidelines provisions on consultations on environmental impacts, and determined on that basis that a mining company did not employ the local language or means of communication other than the written form for consultations with communities with very high rates of illiteracy.[115] Significantly, it further explicitly underlined that in carrying out a human rights impact assessment, as suggested by the UN Framework on Business and Human Rights, the Akwé: Kon Guidelines could be used as a point of reference, particularly for carrying out impact assessments on indigenous groups.[116] Confirmation of the relevance of the CBD Akwé: Kon Guidelines for the appropriate identification of and consultation with indigenous peoples has also emerged from other recommendations under the OECD Guidelines implementation procedure.[117]

Benefit-sharing and socio-cultural and environmental impact assessments, as developed under the CBD, have therefore served to tighten the link between

[112] *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* (2009), *supra* note 40, paras 48 and 53.

[113] 'Programme of Work on Protected Areas', in *Protected Areas (Arts 8 (a) to (e))*, CBD Decision VII/28 (13 April 2004) Annex.

[114] *Expert Mechanism on the Rights of Indigenous Peoples, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making*, UN Doc. A/HRC/15/35 (23 August 2010); and *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Its Third Session*, UN Doc. A/HRC/15/36 (23 August 2010).

[115] UK National Contact Point, *Final Statement on the Complaint from Survival International against Vedanta Resources plc* (25 September 2009), paras 44–46, available at <http://www.oecd.org/investment/mne/43884129.pdf> (last visited 30 September 2014)

[116] *Ibid.*, para. 79.

[117] Norwegian National Contact Point, *Final Statement: Complaint from* The Future in Our Hands *(FIOH) against* INTEX Resources ASA *and the Mindoro Nickel Project* (January 2012), at 48, available at <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/Norwegian%20NCP%20intex_final.pdf> (last visited 30 September 2014).

corporate environmental accountability and the human rights of indigenous peoples that can be negatively impacted by extractive industries. They provide flexible and detailed procedures to uphold the recognition of indigenous peoples' rights to self-determination and to permanent sovereignty over their lands and resources; and to operationalize their right to free, prior, and informed consent with regard to approval of the use by private industries of indigenous lands, territories, and resources. More uniform and detailed procedures in that regard appear particularly useful as 'national practice remains sporadic and inconsistent' in relation to indigenous peoples' right to free, prior, and informed consent.[118] At the same time, it has been recognized that culturally appropriate and effective consultations[119] and free, prior, and informed consent are necessary to define arrangements for sharing benefits arising from private investments so as to ensure accord with indigenous peoples' own understanding and preferences.[120]

Benefit-sharing and socio-cultural and environmental impact assessments thus appear as two of the interlinked procedural safeguards[121] that underpin corporate respect for the substantive rights of indigenous peoples potentially or actually impacted by extractive activities in or near their lands. These safeguards are considered essential means for corporate accountability vis-à-vis the exercise of indigenous peoples' substantive right to property, culture, religion, and non-discrimination, their right to health and physical well-being, as well as their right to set and pursue their own priorities for development, including the development of natural resources, as part of their right to self-determination.[122] In particular, socio-cultural environmental impact assessments constitute an indispensable precondition to the process of obtaining free, prior, and informed consent; whereas benefit-sharing represents the concrete outcome of that process. These safeguards are expected to apply to operations that take place within the officially recognized or customary land use areas of indigenous peoples, or to any extractive activity that has a direct bearing on areas of cultural significance, or on natural resources traditionally used by indigenous peoples, in ways that are

[118] Meyerstein, *supra* note 92.

[119] Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up Report on Indigenous Peoples and the Right to Participate in Decision-making with a Focus on Extractive Industries*, UN Doc. A/HRC/21/55 (16 August 2012).

[120] *Ibid.*, para. 43; see also *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc. A/67/301 (13 August 2012), para. 78.

[121] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2012), *supra* note 70, paras 49–53.

[122] The identification of substantive rights can be found in *ibid.*, para. 50.

important for their survival.[123] Under these safeguards, companies are expected to defer to indigenous decision-making processes on terms for compensation, mitigation measures, and benefit-sharing proportionate to the impact of the proposed development. This is expected to lead to new business models involving genuine partnership between private companies and indigenous peoples that are in keeping with indigenous peoples' rights and priorities for development.[124]

6. Benefit-sharing: The Need for Further Research

While socio-cultural environmental assessments and benefit-sharing have equally played a role in the cross-fertilization of international biodiversity law and human rights in relation to corporate accountability, it is the latter concept in particular that deserves further attention.[125] Benefit-sharing[126] is employed in a variety of international legal instruments in relation to the environment and to human rights[127] for the equitable distribution of economic and non-economic benefits among states, or between governments and indigenous peoples and local communities. This legal concept, however, is not yet well understood and is little implemented[128] as a regulatory approach to address environmental sustainability and equity concerns of developing countries and of indigenous peoples and local communities. In particular, benefit-sharing as a tool for corporate environmental accountability and corporate responsibility to respect human rights remains to be further and systematically explored. This section will discuss preliminary findings on the legal nature and practical significance of benefit-sharing in international environmental and human rights law with a view to identifying open questions related to corporate accountability.

Notwithstanding the presence of benefit-sharing in various other areas of international law, it has received the most attention under the CBD, where this notion has been significantly developed through soft and hard law

[123] *Ibid*., para. 65. [124] *Ibid*., para. 68.

[125] And indeed socio-cultural environmental assessments are a means to ensure benefit-sharing, notably: benefit-sharing is seen as the outcome of socio-cultural environmental impact assessments as compensation for possible negative impacts on indigenous peoples and local communities (*Akwé: Kon Voluntary Guidelines*, *supra* note 109, paras 46 and 56).

[126] I am grateful to Annalisa Savaresi and Elsa Tsioumani for their useful comments on this part of the chapter.

[127] See *supra* note 96.

[128] As documented, for instance, in 2009 in relation to protected areas, *In-depth Review of the Implementation of the Programme of Work on Protected Areas*, UN Doc. UNEP/CBD/SABSTTA/14/5 (14 January 2010), at 8–9.

instruments into a comprehensive notion related to access to genetic resources[129] as well as the creation and management of protected areas,[130] the sustainable use of forests,[131] mountain ecosystems,[132] and other natural resources.[133] In all these contexts, benefit-sharing seeks to ensure the equitable allocation among different stakeholders (state and non-state actors) of economic, socio-cultural, and environmental advantages arising from the use of natural resources or from resource-related regulation. By promoting environmental sustainability and equity at the same time, benefit-sharing aims to balance the need to reward and support 'nature stewards' as providers of global public goods, to account for the special needs of developing countries and of poor and marginalized communities, and to allow for diverse cultural systems as a basis for genuine dialogue and lasting cooperation.

As developed under the CBD, benefit-sharing entails two conceptually different dimensions: an inter-state one and an intra-state one—that is, benefit-sharing is understood both as a tool for ensuring equity in relations among states as such, as well as relations between states and indigenous peoples or local communities.[134] As to the former dimension, the text of the Convention already indicates that benefit-sharing can be implemented through technology transfer, funding, the sharing of research findings, and scientific collaboration among states that provide and obtain access to genetic resources.[135] Subsequent normative developments under the CBD taken as a whole indicate that benefit-sharing is seen more broadly as the basis for inter-

[129] CBD, *supra* note 95, Arts 1 and 15; and *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, CBD Decision VI/24 (27 May 2002) (hereinafter 'Bonn Guidelines'). See also *infra* note 137.

[130] 'Programme of Work on Protected Areas', *supra* note 113, programme element 2 ('Governance, Participation, Equity and Benefit-Sharing'), in particular, paras 2.1.3–2.1.5.

[131] *Expanded Programme of Work on Forest Biological Diversity*, CBD Decision VI/22 (7–19 April 2002), paras 13, 19(h), and 34, as well as Activities (b) and (f) under Objective 1.

[132] 'Work Programme on Mountain Biodiversity', in *Mountain Biological Diversity*, CBD Decision VII/27 (13 April 2004), Annex, paras 1.3.2–1.3.4, 1.3.7, and 219.

[133] 'Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity', in *Sustainable Use (Art. 10)*, CBD Decision VII/12 (13 April 2004), Annex II; *Operational Guidelines to Principle 4*; 'Principles of the Ecosystem Approach', in *Ecosystem Approach*, CBD Decision V/6 (22 June 2000), Annex B, Operational Guidance 2, para. 9; and 'Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation', in *Ecosystem Approach*, CBD Decision VII/11 (13 April 2004), Annex I, Principle 4 and paras 2.1.3–2.1.5.

[134] These two dimensions already emerge (albeit not very clearly) from the text of the Convention: compare the reference to benefit-sharing in CBD, *supra* note 95, Arts 1 and 15, on the one hand, and in Art. 8(j) on the other. This is discussed in more detail in Morgera and Tsioumani, *supra* note 5.

[135] CBD, *supra* note 95, Arts. 16, 19, and 20. This is discussed in more detail in Morgera and Tsioumani, *supra* note 5, at 153–154.

state cooperation not only at genetic level but also at ecosystem and species level.[136] This is significant because benefit-sharing appears capable of operating not only in situations of exchange (when states have a self-interest in obtaining access to other states' genetic resources),[137] but also when states pursue cooperation in delivering a global benefit arising from the protection or sustainable use of biological resources that remain within the third state (common concern of humankind).[138]

Furthermore, the normative developments under the CBD suggest that *within* states, benefit-sharing is seen by the international community not only as a reward for indigenous and local communities that share with governments or private entities traditional knowledge associated with genetic resource use.[139] It is also seen as a guarantee of the full and effective participation of communities and of respect for their substantive rights in decision-making regarding the conservation or sustainable use of biological resources. It further aims to compensate the negative impacts on community livelihoods of natural resource development, including where foreign direct investment is concerned.[140] To these ends, benefit-sharing may entail legal recognition of traditional ownership or access to lands, support for continued sustainable customary use, or opportunities for shared management of natural resources. It may also entail the provision of guidance (such as training or capacity-building) to

[136] Most of the academic literature has concentrated only on inter-State benefit-sharing in relation to access to genetic resources: see, e.g., R. Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity', 6 *Indiana Journal of Global Legal Studies* (1998) 59; E.C. Kamau and G. Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (2009). Non-legal scholars have analysed benefit-sharing as a form of redistribution politics (e.g., C. Hayden, 'Taking as Giving: Bioscience, Exchange, and the Politics of Benefit-Sharing', 37 *Social Studies of Science* (2007) 729), but this expansive approach has never been applied beyond access to genetic resources and has not been picked up by international environmental law research.

[137] On questions of good faith under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (adopted 29 October 2010, in force October 2014) (hereinafter 'CBD Nagoya Protocol'), see E. Morgera, E. Tsioumani, and M. Buck, *Unraveling the Nagoya Protocol: Commentary on the Nagoya Protocol on Access and Benefit-Sharing* (2014).

[138] J. Brunnée, 'Common Areas, Common Heritage and Common Concern', in D. Bodansky, J. Brunnée, and E. Hey (eds), *Oxford Handbook of International Environmental Law* (2007) 550.

[139] This dimension has been significantly developed through the adoption of the CBD Nagoya Protocol, *supra* note 137, which spells out the international obligations of States towards indigenous communities: Arts 5(1)–(2), 6(2), 7, 12, and 16. See, generally, A. Smagadi, 'Analysis of the Objectives of the Convention on Biological Diversity—Their Interrelation and Implementation Guidance for Access and Benefit Sharing', 31 *Columbia Journal of Environmental Law* (2006) 243, and Savaresi, *supra* note 15.

[140] Morgera and Tsioumani, *supra* note 5, at 159–165.

improve the environmental sustainability of community practices, and the proactive identification of opportunities for alternative livelihoods.[141]

While the distinction among/within states constitutes a useful starting point, it must be conceded that there are conceptual difficulties in detaching one dimension from the other. On the one hand, inter-state benefit-sharing may indirectly support indigenous peoples or local communities; this is the case of an international mechanism collecting payments globally and allocating funding to farmers in developing countries under the International Treaty on Plant Genetic Resources for Food and Agriculture.[142] On the other hand, intra-state benefit-sharing may involve inter-state relations in the form of development cooperation benefiting indigenous peoples and local communities.

Significantly for present purposes, the role of the private sector is relevant both in relations among and within states,[143] and indeed the various CBD guidelines that contributed to delineating the evolving notion of benefit-sharing are framed so as to also directly address private companies.[144] As to inter-state benefit-sharing, private operators are expected to share benefits including through technology transfer with developing countries.[145] As to intra-state benefit-sharing, private investors are expected to share returns with

[141] *Ibid.*

[142] International Treaty on Plant Genetic Resources for Food and Agriculture (signed 3 November 2001) 2400 UNTS 303 (hereinafter 'ITPGR'); and ITPGR Secretariat, 'Board of Plant Treaty Announces New Benefits for Farmers In 11 Developing Nations, as Efforts Heat Up To Protect Valuable Food Crops In Face Of Threatened Shortages, Climate Change', Press Release (undated), available at <ftp://ftp.fao.org/ag/agp/planttreaty/news/news0009_en.pdf> (last visited 30 September 2014). Morgera and Tsioumani, *supra* note 5, at 158–159.

[143] I am grateful to Dr James Harrison, University of Edinburgh School of Law, for drawing my attention to this point.

[144] Although they are directed to parties and governments, the *Akwé: Kon Voluntary Guidelines*, *supra* note 109, para. 1, are expected to provide a collaborative framework for governments, indigenous and local communities, decision makers, and managers of developments (*ibid.*, para. 3). 'Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity', *supra* note 133, para. 1 clarifies that 'the principles provide a framework for advising Governments, resource managers, indigenous and local communities, the private sector and other stakeholders about how they can ensure that their use of the components of biodiversity will not lead to the long-term decline of biological diversity'. 'International Guidelines for Activities Related to Sustainable Tourism Development in Vulnerable Terrestrial, Marine and Coastal Ecosystems and Habitats of Major Importance for Biological Diversity and Protected Areas, Including Fragile Riparian and Mountain Ecosystems', in *CBD Guidelines on Biological Diversity and Tourism*, CBD Decision VII/14 (13 April 2004), Annex, para. 2 clarifies that the Guidelines provide a framework for addressing what the proponent of new tourism investment or activities should do to seek approval, as well as technical guidance to managers with responsibility concerning tourism and biodiversity.

[145] Bonn Guidelines, *supra* note 129, para. 6(b).

indigenous and local communities, offer job opportunities to them or support co-management options.[146]

Notwithstanding these significant developments, the scope and implications of benefit-sharing remain surprisingly unclear both in policy and in academic debates. State parties to the CBD agreed to launch a study on benefit-sharing in 2012.[147] In the meantime, academics continue to discuss exactly what benefit-sharing entails, how it will apply and whether there is just one benefit-sharing concept or many.[148] This uncertainty may be regarded, on the one hand, as the result of the limited academic reflection on the overall scope of benefit-sharing and broad implications of its ubiquity within and across international environmental regimes, and on the other hand, as the result of the fragmentation of relevant international efforts.

It should thus be underlined that benefit-sharing is increasingly deployed in human rights case law,[149] UN official reports and agendas on human rights,[150] and human rights scholarship[151] in connection with the need to protect indigenous peoples from unsustainable forms of natural resource exploitation and from environmental protection measures that disregard human rights. However, human rights discourse on benefit-sharing still appears to be at an early stage of development both in relation to states' obligations to protect and promote human rights, and in relation to the responsibility of private companies to respect human rights. At best, human

[146] 'Refinement and Elaboration of the Ecosystem Approach, Based on Assessment of Experience of Parties in Implementation', in *Ecosystem Approach*, *supra* note 133, Annotations to Rationale to Principle 4; and 'International Guidelines for Activities Related to Sustainable Tourism Development', *supra* note 144, para. 23.

[147] CBD Decision XI/14 (5 December 2012) para C.2.

[148] B. De Jonge, 'What is Fair and Equitable Benefit-sharing?', 24 *Journal of Agricultural & Environmental Ethics* (2011) 127.

[149] Inter-American Court of Human Rights, *Saramaka People v Suriname*, Case No. 12,338 (28 November 2007); African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Community v. Kenya, Comm. No. 276/2003 (4 February 2010); ILO Committee of Experts on the Application of Conventions and Recommendations, Observations on Peru, CEACR 2009/80th Session, in *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILC.102/III(1A) (2013), at 841.

[150] Office of the UN High Commissioner for Human Rights, 'Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing and Dispute Resolution, UN Doc. A/HRC/EMRIP/2009/5, 3 July 2009; UN-Indigenous Peoples Partnership', *Strategic Framework 2011–2015* (undated), at 13, available at <http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_186285.pdf> (last visited 30 September 2014); *Report of the Special Rapporteur on Indigenous Peoples' Rights* (2010), *supra* note 110.

[151] D. L. Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon', 105 *AJIL* (2011) 60; G. Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', 22 *EJIL* (2011) 165.

rights bodies make reference to benefit-sharing guidelines elaborated in the framework of the CBD without much discussion. On the academic side, no in-depth study yet exists on the implications of the incipient cross-fertilization between the CBD and human rights law and on the merits of further convergence between these two branches of international law with respect to corporate accountability. This overlooked issue in the well-established debate on human rights and the environment[152] deserves to be further explored in order to fully understand the theoretical and practical implications of substantive and procedural synergies between these two bodies of international law for more effective human rights and environmental protection. This understanding seems particularly needed for the operationalization of the UN Framework on Business and Human Rights.

Among states, future research should assess whether, to what extent, and under which conditions benefit-sharing can help overcome impasses between developed and developing countries in current multilateral environmental negotiations by favouring solutions to environmental challenges that facilitate consensus on an equitable allocation of responsibilities that takes into account economic and non-economic benefits. Consequently, recourse to benefit-sharing can be made among states to address difficulties in equitably sharing responsibilities in the light of differentiated capabilities of developed and developing states vis-à-vis various environmental challenges. In that respect, benefit-sharing could be explored in the context of the implementation of common but differentiated responsibility,[153] which has emerged as the veritable bottleneck in the context of multilateral environmental (including climate) negotiations.[154] Such understanding should also take into account instances in which private companies are pivotal for the fulfilment of states' international environmental and human rights obligations, such as in the case of access to technologies.

Within states, future research should assess whether, to what extent, and under which conditions benefit-sharing can contribute to ensuring respect for

[152] See, e.g., A. Boyle and M. R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1998); F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; A. Boyle, 'Human Rights or Environmental Rights: A Reassessment?', 18 *Fordham Environmental Law Review* (2007) 471; S. Kravchenko and J. Bonine, *Human Rights and the Environment* (2008); D. K. Anton and D. Shelton, *Environmental Protection and Human Rights* (2012); Boyle, 'Human Rights and the Environment: Where Next?', 23 *EJIL* (2012) 613, and Chapter 7 in this volume.

[153] See, e.g., E. Hey, 'Common but Differentiated Responsibilities', in Wolfrum (ed.), *supra* note 96; L. Rajamani, *Differential Treatment in International Law* (2006); C. D. Stone, 'Common but Differentiated Responsibilities in International Law', 98 *AJIL* (2004) 276.

[154] T. Honkonen, 'The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations', 18 *RECIEL* (2009) 257.

the human rights of indigenous peoples and local communities in the conservation and sustainable use of natural resources by governments. This understanding would be necessary to better frame the responsibility of private companies in respecting the rights of indigenous peoples and local communities in carrying out extractive and other natural resource-based development activities.

While further research should focus on international law developments on benefit-sharing vis-à-vis the duties of governments, attention should also be turned to a burgeoning transnational practice that has emerged on benefit-sharing in connection with the use of 'biocultural community protocols'.[155] These are documents in which indigenous peoples and local communities articulate their values, traditional practices, and customary law concerning environmental stewardship, based upon the protection afforded to them by international environmental and human rights law.[156] Crucially, through such instruments, communities express their understanding of the most culturally and biologically appropriate form of benefit-sharing in a specific context, as a basis for cooperation with governments and private companies. This practice developed in parallel with international negotiations on benefit-sharing related to access to genetic resources under the CBD and eventually affected these negotiations. It provides a fascinating example of mutual interactions between different levels of environmental regulation. First, community protocols operate through the interaction of international law, national law, and the customary law of indigenous and local communities. Second, these protocols are promoted by transnational networks of legal advisors, including from intergovernmental organizations, non-governmental organizations (NGOs), and bilateral development partners supporting local communities in developing countries.[157] Third, community protocols have, in a remarkably short period of time, received formal recognition in international law in the context of a legally binding instrument that addresses both inter-state and intra-state benefit-sharing.[158]

[155] See, e.g., United Nations Environment Programme (UNEP), *Community Protocols for ABS* (undated), available at <http://www.unep.org/communityprotocols/index.asp> (last visited 30 September 2014); H. Jonas, K. Bavikatte, and H. Shrumm, 'Community Protocols and Access and Benefit Sharing', 12 *Asian Biotechnology and Development Review* (2010) 49; and a series of publications by Natural Justice, available at <http://naturaljustice.org/library/our-publications> (last visited 30 September 2014).

[156] Morgera and Tsioumani, *supra* note 5, at 157–158.

[157] See the UNEP website on community protocols case studies, available at: <http://www.unep.org/communityprotocols/casestudies.asp> (last visited 30 September 2014); and the website of a coalition of different actors on community protocols, available at <http://www.community-protocols.org/> (last visited 30 September 2014).

[158] CBD Nagoya Protocol, *supra* note 137, Arts 12 and 21.

A more thorough academic investigation of community protocols could help elucidate the interactions of the customary laws of indigenous peoples and local communities with international and national law on the environment and on human rights. The study of the role of customary laws of indigenous peoples and local communities to contribute to sustainability is still in its infancy, although customary laws are considered 'a resource capable of inspiring innovation and legitimizing practical activities in the process of administering living resources and adapting to changing circumstances in a changing world'.[159] Critically for present purposes, community protocols are also being used to ensure corporate accountability.[160] They may represent a constructive and possibly cost-effective tool for private companies to factor in the linkages between environmental protection and human rights law in a specific context, as understood and agreed upon by the relevant indigenous peoples or local communities.

Ultimately, future research needs to ascertain whether the translation of international legal obligations on biodiversity into corporate environmental accountability standards, and their cross-fertilization with instruments and processes related to corporate responsibility to respect human rights, effectively contribute to advancing either or both agendas,[161] or whether there are significant risks of diluting or weakening international obligations in the process.[162] Equally, it remains to be ascertained whether the much more developed and consolidated adjudicatory systems under international and regional human rights instruments can contribute to better implementation of international environmental law. This may be done through cases on environmental degradation which amount to human rights violations and through cases which concern the positive obligations of states to prevent or remedy corporate environmental harm.[163]

[159] P. Ørebech *et al.*, *The Role of Customary Law in Sustainable Development* (2006).

[160] More generally on corporate accountability and the Nagoya Protocol, see M. J. Oliva, 'The Implications of the Nagoya Protocol for the Ethical Sourcing of Biodiversity', in Morgera *et al.* (eds), *supra* note 15, 371.

[161] Note, for instance, the positive appraisal of the *IFC Performance Standards* from a human rights perspective by the Special Rapporteur on the Rights of Indigenous Peoples: *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* (2010), *supra* note 110, para. 41.

[162] The 2006 IFC Performance Standards, *supra* note 82, have been seen as weakening international biodiversity law by Affolder, *supra* note 94, at 190.

[163] F. Francioni, 'The Private Sector and the Challenge of Implementation', in P. M. Dupuy and J. Viñuales (eds), *supra* note 4, 24, at 36–37.

7. Corporate Accountability and the Green Economy

Conceptual and normative international legal developments related to corporate environmental accountability are increasingly deployed to better define and operationalize the corporate responsibility to respect human rights. In particular, the legal concept of 'benefit-sharing', as developed under the Convention on Biological Diversity, appears to be increasingly called upon to bridge the environmental and human rights dimension of corporate accountability, particularly in relation to indigenous peoples and local communities.[164] Several questions, however, remain to be explored in that regard.

The concept of benefit-sharing is also rapidly emerging in other areas of international environmental regulation, although its implications for the interaction between environmental protection, human rights law and corporate accountability are still to be teased out. For example, benefit-sharing has been discussed in the context of transboundary natural resources,[165] especially international watercourses.[166] In addition, a benefit-sharing mechanism may emerge under the law of the sea, from current negotiations on marine genetic resources beyond areas of national jurisdiction.[167] Benefit-sharing has also recently received some attention in the fight against climate change. In that regard, attention has predominantly focused on the establishment of a mechanism to reduce emissions from deforestation and

[164] Morgera and Tsioumani, *supra* note 5, at 165–167. The normative developments under the CBD (in the form of decisions of its COP) have therefore provided the sufficiently precise guidance that is needed for corporate accountability: *contra*, Affolder, *supra* note 94, at 181, who asserts that the Convention 'is not easily translated into performance standards or specific project requirements'.

[165] N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (2008).

[166] P. Wouters and R. Moynihan, 'Benefit-sharing in International Water Law', in A. Rieu-Clarke and F. Loures (eds), *The UN Watercourses Convention in Force—Strengthening International Law for Transboundary Water Management* (2013).

[167] *Recommendations of the UN General Assembly's Ad Hoc Open-ended Informal Working Group on Marine Biodiversity*, Annex to UN Doc. A/66/119 (30 June 2011), para. 1(b), endorsed by UNGA Res. 66/231 (24 December 2011), para. 167. See, e.g., L. A. de la Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction', 24 *International Journal of Marine and Coastal Law* (2009) 221; P. Drankier *et al.*, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing', 27 *International Journal of Marine and Coastal Law* (2012) 375; and T. Greiber, *Access and Benefit Sharing in Relation to Marine Genetic Resources from Areas Beyond National Jurisdiction: A Possible Way Forward—Study in Preparation of the Informal Workshop on Conservation of Biodiversity Beyond National Jurisdiction* (2011), available at <http://www.bfn.de/fileadmin/MDB/documents/service/Skript_301.pdf> (last visited 30 September 2014).

degradation (so-called REDD+) and the need to avoid the further marginalization of vulnerable forest communities.[168] Other contributions have addressed benefit-sharing in connection with the Clean Development Mechanism, adaptation, and agriculture and land uses,[169] offering some general considerations on improved equity in market-based mechanisms to curb climate change.[170]

No academic study to date, however, has attempted to develop a comprehensive and systematic interpretation of benefit-sharing across different international environmental regimes—let alone of its relevance for corporate accountability and human rights. There is therefore a need for scholarly attention to be directed to the potential of benefit-sharing as a comprehensive and flexible regulatory approach to operationalize equity *across* international environmental regimes, in particular, intra-generational equity[171]—equity among stakeholders of the same generation on the basis of self-determination, cultural diversity, and maintenance of ecological integrity.[172] The recourse to equity in an intra-generational context is more novel than in an inter-generational context and remains debatable in international law.[173] In this respect, benefit-sharing can be explored as a cross-cutting tool for empowerment, participation, and partnership among states, local and indigenous communities, and the private sector.

Finally, it would appear useful to place future research on benefit-sharing within the policy discourse on the green economy, which emphasizes opportunities for business development, job creation, and public-sector savings

[168] S. Baez, 'The "Right" REDD Framework: National Laws that Best Protect Indigenous Rights in a Global REDD Regime', 80 *Fordham Law Review* (2011) 821; M. Greenleaf, 'Using Carbon Rights to Curb Deforestation and Empower Forest Communities', 18 *New York University Environmental Law Journal* (2011) 507; and L. Peskett, *Benefit-Sharing in REDD+: Exploring the Implications for Poor and Vulnerable People* (2012), available at <http://documents.worldbank.org/curated/en/2010/10/15525465/benefit-sharing-redd-exploring-implications-poor-vulnerable-people> (last visited 30 September 2014).

[169] C. Voigt, 'Is the Clean Development Mechanism Sustainable: Some Critical Aspects', 8 *Sustainable Development Law & Policy* (2007) 15; D. B. Hunter, 'The Confluence of Human Rights and the Environment: Human Rights Implications for Climate Change Negotiations', 11 *Oregon Review of International Law* (2009) 331; C. Streck, 'Towards Policies for Climate Change Mitigation: Incentives and Benefits for Smallholder Farmers', Climate Change Agriculture and Food Security Report No. 7 (2012), available at <http://cgspace.cgiar.org/bitstream/handle/10568/21114/ccafsreport7-smallholder_farmer_finance.pdf> (last visited 30 September 2014).

[170] Concerns in this regard are raised by F. Francioni, 'Realism, Utopia and the Future of International Environmental Law', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 442.

[171] D. B. Magraw and L. Hawke, 'Sustainable Development', in Bodansky et al. (eds), *supra* note 138, 613, at 630.

[172] F. Francioni, 'Equity in International Law', in Wolfrum (ed.), *supra* note 96.

[173] Birnie *et al.*, *supra* note 17, at 123.

arising from environmental management.[174] Among other things, the idea of the green economy also calls for a synergetic approach to tackling climate, biodiversity, and energy crises.[175] In that respect, research will determine whether benefit-sharing can work as a 'bridge' between different international regimes that tend to develop and operate without due consideration of other international agreements,[176] with a view also to developing an understandable and workable benchmark for private companies.

At the UN Conference on Sustainable Development (Rio+20) in June 2012, the international community encouraged a transition to a green economy.[177] The details of a transition to a green economy, however, remain controversial. Fears of the imposition of a profit-driven and high-tech agenda for environmental management[178] have fuelled criticism that the promotion of a green economy may not be fair to developing countries that lack the necessary funding and technology. Equally, the green economy agenda has given rise to human rights concerns about the further marginalization of indigenous peoples and local communities that contribute to environmental conservation and management in ways that are difficult to capture in purely economic terms.[179] With respect to corporate accountability, the Rio+20 outcome document[180] has been generally considered 'disappointing' from the viewpoint of the protection of the rights of indigenous peoples, particularly insofar as it neglected to draw attention to the negative impacts of extractive industries.[181] Notably, the Rio+20 Summit also missed the opportunity of tightly linking the UN Framework on Business and Human Rights with relevant global environmental standards and the emerging notion of the green economy.[182] The Summit, however, succeeded in embedding in the concept of a green economy the need to take into account human rights and the specific contributions of indigenous peoples and local communities to environmental management as a strategy towards achieving sustainable

[174] S. Larcom and T. Swanson, 'Economics of Green Economies: Investment in Green Growth and How it Works' in Dupuy and Viñuales (eds), *supra* note 4, 97.

[175] A. Steiner, 'Focusing on the Good or the Bad: What Can International Environmental Law Do To Accelerate the Transition Towards a Green Economy?', 103 *American Society of International Law Proceedings* (2009) 3.

[176] Francioni, *supra* note 172.

[177] UNGA Res. 66/288, 'The Future We Want' (11 September 2012), Annex, paras 56 and 62.

[178] P. Doran, 'Care of the Self, Care of the Earth: A New Conversation for Rio+20?', 21 *RECIEL* (2012) 31.

[179] D. L. Shelton, 'Commentary on Achim Steiner's 2009 Grotius Lecture', 25 *American University International Law Review* (2010) 877.

[180] UNGA Res. 66/288, *supra* note 177, para. 228.

[181] *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2012), supra note 70, para 68.

[182] Morgera and Savaresi, *supra* note 22, at 26–27.

development.[183] It also clearly pointed to the role of the Convention on Biological Diversity to bring forward economic valuation as a tool for more effective environmental integration, treaty implementation, and involvement of the private sector.[184] Thus further normative developments under the CBD on the notion of economic valuation of ecosystem services should be carefully studied to determine whether benefit-sharing can serve to systematically implement the green economy as an opportunity to mainstream equity across different international environmental regimes, by combining a focus on economic benefits with due attention to non-economic (social, cultural, and environmental) ones. These future developments may well further contribute to corporate environmental accountability and corporate respect for human rights.

[183] UNGA Res. 66/288, *supra* note 177, para. 58(j).
[184] *Ibid.*, para. 201.

3

Environmental Jurisprudence of the European and Inter-American Courts of Human Rights

Comparative Insights

Riccardo Pavoni

1. Introduction

This chapter discusses several critical aspects of the environmental jurisprudence which has emerged in the European and Inter-American human rights systems.[1] Despite the quantitative and qualitative differences between the systems, the chapter aims to determine whether the doctrines developed by the regional courts overseeing the systems in question militate in favour of a future broad convergence of the respective case law relevant to environmental protection.

The jurisprudence of the European Court of Human Rights (ECtHR) in the field of the environment is burgeoning, extremely varied and rather sophisticated. Its growing volume and diversification is so substantial as to appear hardly amenable to an exhaustive mapping exercise. At the same time,

[1] The chapter does not examine the relevant practice under the African human rights system, which does not lend itself to a wide-ranging comparative analysis with its European and Inter-American counterparts. Unlike the latter, the African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, entered into force 21 October 1986) 1520 UNTS 128, Art. 24, envisages a self-standing and enforceable right of all peoples to 'a satisfactory environment favourable to their development'. In addition, the environmentally relevant practice of the African Commission on Human and Peoples' Rights (ACommHPR) is essentially represented by two decisions only, albeit very significant ones: *Social and Economic Rights Action Centre and Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (27 October 2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. No. 276/2003 (25 November 2009).

a review of certain recent key decisions makes it clear that this jurisprudence, far from being well-settled, is characterized by a number of significant uncertainties, for instance with respect to the appropriate place and scope of procedural environmental rights within the European Convention on Human Rights and Fundamental Freedoms (ECHR).[2] This state of affairs is certainly favoured by the absence of an explicit right to a healthy environment in the ECHR, but—arguably and more fundamentally—has also to do with the Court's awareness of the tremendous impact that an overly benign attitude towards environmental claims may produce on its overburdened docket.

On the other hand, the environmental practice of the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACommHR)—fairly limited in size so far but exponentially growing[3]—is particularly significant. At the judicial level, similarly to the ECHR system, it has largely arisen from an evolutionary and dynamic interpretation[4] of rights guaranteed by the American Convention on Human Rights (ACHR)[5] that are vulnerable to violation due to environmental damage, such as the right to life and the right to property. Although Article 11(1) of the San Salvador Protocol to the ACHR[6] proclaims a self-standing right to a healthy environment, the latter cannot be a basis for individual petitions before the IACommHR and IACtHR.[7]

A key feature of the pertinent decisions is that they show the resolve of the Inter-American organs to attach special value to the observance of participatory environmental rights. Unsurprisingly, this is most visible in cases involving indigenous peoples' claims, but, as we shall see, it equally applies to certain decisions that are unrelated to those situations. In this context, the IACommHR's activities have been a crucial determinant for the emergence of an environmental jurisprudence in the Inter-American system. Its early

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 November 1953) 213 UNTS 222.

[3] IACommHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, Doc. OEA/Ser.L/V/II, Doc. 56/09 (30 December 2009), para. 207.

[4] This interpretive approach shared by the two regional courts in question is relevant to their practice at large, see L. Caflisch and A.A. Cançado Trindade, 'Les Conventions américaine et européenne des droits de l'homme et le droit international général', 108 *Revue générale de droit international public* (2004) 5, at 13–22.

[5] American Convention on Human Rights (San Jose, 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.

[6] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988, entered into force 16 November 1999) (1988) OASTS 69, (1989) 28 ILM 156 (hereinafter 'San Salvador Protocol'). Moreover, Art. 11(2) of the Protocol imposes upon the states parties an obligation to 'promote the protection, preservation, and improvement of the environment'.

[7] See San Salvador Protocol, Art. 19(6).

decision in the case of the *Yanomami People*,[8] finding inter alia breaches of the rights to life, personal security, and health triggered by the construction of a highway through indigenous lands, has proven quite influential for the ensuing Inter-American practice. The same goes for the numerous recommendations in the field of environmental protection included in various IACommHR country reports,[9] the relevance of which goes well beyond the indigenous peoples' issues that usually represent the immediate focus of the Commission's attention.

The chapter first assesses the Inter-American case law relating to participatory environmental rights (Section 2). In addition to the procedural rights to environmental information, participation, and access to justice, this notion is broadly understood as encompassing the fundamental freedoms of thought, expression, and association that protect the work of environmental activists and advocacy groups. Indeed, the main lessons to be learnt by the European system from its Inter-American counterpart arise in the area of participatory environmental rights. To illustrate this point, an in-depth review of the development, purpose, and scope of procedural environmental rights under the ECtHR case law follows (Sections 3 and 4). Next, the chapter explains why, despite certain ambiguities emerging from relevant practice, the Inter-American system is decidedly more prone to public interest environmental litigation than its European equivalent (Section 5). The purpose is to set the stage for the ensuing appraisal of certain environmental landmarks that characterize the Inter-American jurisprudence in relation to indigenous peoples (Section 6). Section 7 elaborates some concluding remarks.

[8] *Yanomami People (Brazil)*, Case No. 7.615, Resolution No. 12/85 of 5 March 1985.

[9] See, especially, *The Situation of Human Rights in Cuba — Seventh Report*, OEA/Ser.L/V/II.61, Doc. 29 rev. 1 (4 October 1983), paras 1, 2, 41, and 60–61; *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (24 April 1997), chs VIII and IX; *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, Doc. 29 rev. 1 (29 September 1997), ch. VI; *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (26 February 1999), ch. X, paras 28–35 and recommendations 4 and 5; *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev. (2 June 2000), ch. X; *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110, Doc. 52 (9 March 2001), ch. V, para. 48 and ch. IX; *Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser.L/V/II, Doc. 34 (28 June 2007), paras 245–256 and 297; *Follow-up Report—Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia*, OEA/Ser/L/V/II.135, Doc. 40 (7 August 2009), paras 157–165; *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II, Doc. 54 (30 December 2009), paras 1058 and 1137.

2. Lessons from the Inter-American System in the Field of Participatory Environmental Rights: The *Kawas-Fernández* and *Claude Reyes* Judgments

'Procedural environmental rights' is a broad expression. It chiefly refers to citizens' rights to information, participation in decision-making, and access to justice in environmental matters. While the precise conceptualization of the latter entitlements in terms of existing rights may be open to discussion, allowing public participation in the area of the environment certainly implies application of the well-entrenched fundamental freedoms of expression, thought, assembly, and association. In particular, the right to create organizations in order to carry out common activities aimed at the protection of the environment and to exercise such activities effectively plays a crucial role in this area. It is instrumental to a meaningful defence of the environment and human rights, as it empowers people to channel their individual claims into collective processes in pursuit of the general interest. It is therefore unsurprising that the recently appointed UN Human Rights Council Independent Expert on environmental rights has selected the prevention of attacks or threats against the life and personal integrity of environmental human rights defenders as one of the priority issues of his work.[10]

The *Kawas-Fernández* judgment of the IACtHR dealt with a claim involving the murder of an environmental activist who, together with the foundation of which she was president, regularly fought against development projects affecting a national park and protected area in Honduras. From an environmental perspective, this decision is noteworthy because, in addition to, inter alia, the right to life, the Court found that the defendant state had breached the right to freedom of association under Article 16 ACHR. In order to reach this conclusion, the Court first recalled that, in relation to human rights associations or non-governmental organizations (NGOs), and given their 'important role . . . in democratic societies',[11] states are under a

[10] *Preliminary Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/22/43 (24 December 2012), paras 28 and 61 (recalling *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, UN Doc. A/HRC/19/55 (21 December 2011), paras 60–92 and 123–126).

[11] *Kawas-Fernández v. Honduras*, IACtHR, Judgment of 3 April 2009, para. 146. See L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (2011), at 346 and 518; L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 *EJIL* (2010) 585, at 596.

positive obligation to 'create the legal and factual conditions for them to be able to freely perform their task'.[12] That the murdered activist was working in the area of ecological preservation made no difference; indeed, the defence of human rights, given their indivisibility and interdependence, 'is not limited to civil and political rights, but necessarily involves economic, social and cultural rights monitoring, reporting and education'.[13] To buttress its considerations, the Court held:

> Furthermore, in accordance with the case law of this Court and the European Court of Human Rights, there is an undeniable link between the protection of the environment and the enjoyment of other human rights. The ways in which the environmental degradation and the adverse effects of the climate change have impaired the effective enjoyment of human rights in the continent has been the subject of discussion by the General Assembly of the Organization of American States and the United Nations. It should also be noted that a considerable number of States Parties to the American Convention have adopted constitutional provisions which expressly recognize the right to a healthy environment. These advances towards the development of human rights in the continent have been incorporated into the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights . . . .[14]

The Court next stated that 'the impairment of the right to life or to humane treatment . . . may, in turn, give rise to a violation of Article 16(1) of the Convention when such violation arises from the victim's legitimate exercise of the right to freedom of association'.[15] Since this was undoubtedly the situation of Ms Kawas-Fernández, Honduras was responsible for breaching her right to freedom of association.[16] This decision duly took into account both the individual and collective dimensions of the right to freely associate for environmental protection purposes. Clearly, faced with a consistent pattern of assaults and murders of environmental activists in Honduras following Kawas-Fernández's death,[17] and in view of the seriousness of these events in a democratic society, the Court was eager to urge the defendant state to take all appropriate measures to resolve this systemic human rights problem by guaranteeing the security of all people representing environmental associations. Accordingly, as a remedy for the ascertained violations, Honduras was ordered:

[12] *Kawas-Fernández v. Honduras*, *supra* note 11, at para. 146. [13] *Ibid*., para. 147.
[14] *Ibid*., para. 148. [15] *Ibid*., para. 150. [16] *Ibid*., paras 152 and 155.
[17] *Ibid*., paras 149 and 153–154. The climate of violence against environmental activists in Central and South America is a persistent problem: see, e.g., *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Addendum, Mission to Honduras*, UN Doc. A/HRC/22/47/Add.1 (13 December 2012), paras 73–75 and 82–86.

> . . . to adopt legislative, administrative and judicial measures, or to fulfill those already in place, guaranteeing the free performance of environmental advocacy activities; the instant protection of environmental activists facing danger or threats as a result of their work; and the instant, responsible and effective investigation of any acts endangering the life or integrity of environmentalists on account of their work . . . [as well as] to carry out a national campaign to create awareness and sensitivity regarding the importance of environmentalists' work in Honduras and their contribution to the protection of human rights, targeting security officials, agents of the justice system and the general population.[18]

The *Kawas-Fernández* decision is also noteworthy for its hitherto unique reference by the IACtHR to the environmental jurisprudence of the ECtHR. The IACtHR affirmed that recognizing the 'undeniable link'[19] between human rights and environmental protection is 'in accordance with the case law of . . . the European Court of Human Rights',[20] and cited[21] the *López Ostra*,[22] *Guerra*[23] and *Fadeyeva*[24] judgments of that Court.

Evidently, the purpose of these references was not to recall precedents factually similar to the *Kawas-Fernández* case (those three judgments concerned industrial pollution and the right to private life), but simply to pay tribute to the long-standing jurisprudence of the ECtHR in environmental matters. Thus, on a general level, the *Kawas-Fernández* judgment is a promising example of dialogue and cross-fertilization between the European and Inter-American courts in this area. A critical feature of such an emerging dialogue is that, with respect to procedural environmental rights, the IACtHR is bound to play a forerunner role, given its expansive conception of these guarantees vis-à-vis the more problematic approach of the ECtHR.[25] It is therefore up to the Strasbourg Court to catch up with the progressive orientation of the Inter-American jurisprudence in the field of procedural rights.

This is most starkly demonstrated by the *Claude Reyes* case.[26] The IACtHR examined a petition brought by several individuals against the Chilean Foreign

[18] *Kawas-Fernández*, *supra* note 11, paras 213–214. The stringent and creative approach of the Court to the issue of reparations is also demonstrated by its further order addressed to Honduras 'to construct a memorial monument for the victim as well as to mount signs at the national park named after her . . . [which] signs shall note the fact that the victim was killed defending the environment and, in particular, such national park', *ibid*., para. 206.

[19] *Ibid*., para. 148. [20] *Ibid*. [21] *Ibid*., note 193.

[22] *López Ostra v. Spain*, Appl. No. 16798/90, ECtHR, Judgment of 9 December 1994.

[23] *Guerra and Others v. Italy*, Appl. No. 14967/89, ECtHR, Judgment of 19 February 1998.

[24] *Fadeyeva v. Russia*, Appl. No. 55723/00, ECtHR, Judgment of 9 June 2005.

[25] See *infra* Sections 3 and 4.

[26] *Claude Reyes and Others v. Chile*, IACtHR, Judgment of 19 September 2006. See Burgorgue-Larsen and Úbeda de Torres, *supra* note 11, at 529–537 and 543–547; D.K. Anton and D.L. Shelton, *Environmental Protection and Human Rights* (2011), at 356–359 and 369–380.

Investment Committee for its refusal to release, upon their request, certain information concerning a project for the exploitation of forests in the extreme southern region of Chile with significant repercussions for the sustainable development of the country (the so-called 'Río Cóndor Project'). The individuals were particularly concerned with the 'soundness and suitability'[27] of the foreign investor company involved in the project and had sought background—especially financial—information on it, as well as on the related review carried out by the Committee. In addition, they had requested documents showing how the company was fulfilling the obligations arising from the investment contract, chiefly vis-à-vis the duty to perform an environmental impact assessment (EIA).[28] The petitioners invoked the right to seek and receive information, which is an integral part of the right to freedom of expression under Article 13 ACHR.

With a ground-breaking decision, the IACtHR established that a general right of access to state-held public interest information is a fundamental element of the right to freedom of expression and found that, on the facts of the case, Chile had violated that right by unjustifiably withholding documents relating to the Río Cóndor Project.[29] The key holding in this respect is particularly instructive concerning the Court's view of the right to public interest information as a basic guarantee fulfilling interdependent individual and social purposes:

> Article 13 of the Convention protects the right of all individuals to request access to State-held information. . . . Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided *without the need to prove direct interest or personal*

[27] *Claude Reyes and Others v. Chile*, *supra* note 26, para. 57(13).

[28] *Ibid.*, para. 60.

[29] *Ibid.*, para. 103. The fact that, at the time of the petitioners' request, Chile had not enacted legislation laying down the grounds for denying access to state-held information, and that the refusal to provide the information was not contained in a reasoned decision, were fatal to Chile's reliance on admissible restrictions to the right to freedom of expression (*ibid.*, paras. 94–95). Chile's invocation of the confidentiality of the requested information or reasons of general interest were to no avail, because the above circumstances created 'fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, and [gave] rise to legal uncertainty concerning the exercise of th[e] right [to information] and the State's powers to limit it' (*ibid.*, para. 98). As a measure of reparation, the Court ordered Chile to 'provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard' (*ibid.*, operative para. 5); this notwithstanding the fact that the project at stake was ultimately cancelled (*ibid.*, paras. 157–158).

involvement in order to obtain it. . . . The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the *two dimensions*, *individual and social*, of th[at] right . . . that must be guaranteed simultaneously by the State.[30]

The Court further remarked on the importance of the right to information as an essential prerequisite for effective democracy and transparency of state activities, by stating that '[a]ccess to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access'.[31] In short, '[b]y permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society'.[32]

Although the Court did not specifically focus on the vital importance that the principle of public participation has attained in environmental cases, it did reference certain environmental law instruments that have been crucial for the emergence of that principle. In addition to various Organization of American States, European Union, and Council of Europe documents concerning access to public information generally considered,[33] the Court relied on Principle 10 of the Rio Declaration on Environment and Development and, for the first and hitherto sole time, on the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[34]

The *Claude Reyes* decision thus constitutes a key precedent which will certainly shape the steadily emerging environmental jurisprudence of the Inter-American system. In particular, it paves the way for a significant form of public interest environmental litigation, namely litigation arising from grievances held by *any* person regarding unjustified refusals by state authorities to grant access to information about impacts on the environment as a matter of common good. Most importantly, the decision is bound to acquire global relevance insofar as it will be upheld by other courts, especially outside the Americas and particularly in Europe, in order to develop their case law in the field of access to environmental information and participation in environmental decision-making.

[30] *Ibid.*, para. 77 (emphasis added). [31] *Ibid.*, para. 86.
[32] *Ibid.*, para. 87. [33] *Ibid.*, paras 78–81 and 84.
[34] *Ibid.*, para. 81. See UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, entered in force 30 October 2001) 2161 UNTS 447 (hereinafter 'Aarhus Convention'); Rio Declaration on Environment and Development (13 June 1992) 31 ILM 874 (hereinafter 'Rio Declaration').

3. Is There a Right to Environmental Information under the ECHR?

In order to understand the relevance of the preceding Inter-American practice on procedural environmental rights for the European human rights system, it is necessary to focus on two aspects, namely: (i) the extent to which the right to freedom of expression and information has been used by the ECtHR in reviewing environmental cases; and (ii) the scope and purpose of procedural requirements in the ECtHR environmental jurisprudence concerning breaches of the rights to life and to private life. I will deal in turn with these two issues in the present and following sections.

Although cases with factual circumstances similar to the IACtHR *Kawas-Fernández* decision have never been adjudicated by the ECtHR,[35] the latter has duly acknowledged the important role and function of environmental activists and associations through the lens of the right to freedom of expression under Article 10 ECHR. It has done so when reviewing the proportionality of sanctions imposed in defamation proceedings against journalists who had drawn the public's attention to instances of mismanagement of natural resources.[36] Here, the findings of inconsistency with Article 10 were facilitated by the high level of protection afforded to the press by the Court, which implies a narrow margin of appreciation on the part of state authorities in determining whether 'a pressing social need'[37] dictates restrictions based on the grounds set forth in paragraph 2 of that provision. But crucially, the same principle has been retained when defamation proceedings have targeted environmental activists and NGOs.

[35] For pertinent decisions focusing on Art. 11 ECHR, see, however, *Zeleni Balkani v. Bulgaria*, Appl. No. 63778/00, ECtHR, Judgment of 12 April 2007 (violation of the right to peaceful assembly on account of the prohibition of a public rally organized by an environmental NGO against the authorities' clearing of the banks and riverbed of a local river); *Koretskyy and Others v. Ukraine*, Appl. No. 40269/02, ECtHR, Judgment of 3 April 2008 (violation of the right to form an association resulting from failure to register and grant legal entity status to an environmental NGO). Unlike the decisions under Art. 10 reviewed in the text, the judgments referred to here do not contain statements acknowledging the specific role and importance of environmental NGOs as compared to any other types of association.

[36] *Bladet Tromsø and Stensaas v. Norway*, Appl. No. 21980/93, ECtHR, Judgment of 20 May 1999; *Thoma v. Luxembourg*, Appl. No. 38432/97, ECtHR, Judgment of 29 March 2001. See Anton and Shelton, *supra* note 26, at 359–369.

[37] See, e.g., *Stoll v. Switzerland*, Appl. No. 69698/01, ECtHR, Judgment of 10 December 2007, para. 101 (including a recapitulation of the principles emerging from the ECtHR case law relating to freedom of expression); see also *ibid*., paras 105–106.

Thus, in *Vides Aizsardzības Klubs*, a case involving the public denunciation by a local association of the actions of an official relating to certain development projects adversely affecting the ecological preservation of a coastal area in Latvia, with an ensuing award of damages against the association for harm to reputation, the ECtHR emphasized that, under the circumstances, the applicant had simply performed its role as a 'public watchdog'[38] in the field of environmental protection. This role was found to be as essential in a democratic society as that of the press, with resulting enhanced protection against state interference with the environmental associations' right to information. Thus, in order to fulfil its functions properly, such an association 'doit pouvoir divulguer des faits de nature à intéresser le public, à leur donner une appréciation et contribuer ainsi à la transparence des activités des autorités publiques'.[39] The Court found that the civil sanctions imposed against the association translated into a disproportionate restriction on its right to freedom of expression.[40] A few months later, the ECtHR reiterated this approach in a case challenging, inter alia under Article 10, an award of damages in favour of McDonald's following a libel action against two environmental activists affiliated with London Greenpeace. The applicants had distributed a leaflet containing serious allegations against McDonald's, including deforestation and unsustainable farming practices. The Court rejected the respondent government's objection to affording the activists a high level of protection akin to that of journalists:

> The Court considers . . . that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.[41]

And indeed, in addition to the competing individual interests involved in these types of cases,

[38] *Vides Aizsardzības Klubs v. Latvia*, Appl. No. 57829/00, ECtHR, Judgment of 27 May 2004, para. 42.

[39] *Ibid.* ('must disclose facts likely to be of interest to the public, to give them an appreciation of them and contribute to the transparency of public authorities' (trans. ed.)).

[40] *Ibid.*, para. 49.

[41] *Steel and Morris v. the United Kingdom*, Appl. No. 68416/01, ECtHR, Judgment of 15 February 2005, para. 89. The Court found that the respondent state had disproportionately interfered with the right to freedom of expression, because the applicants had not been secured equality of arms in the domestic proceedings and the award of damages against them had been excessive, *ibid.*, para. 98.

[t]he more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion.[42]

As the above rulings make clear, the Strasbourg Court—similarly to the IACtHR—recognizes the vital importance of protecting the right to information of environmental defenders and associations for the pursuit of the general interest of society. It is prepared to uphold restrictions on this right only in exceptional circumstances, such as those underlying the recent decision in *Animal Defenders International*, where a slim majority of the Grand Chamber (nine votes to eight) controversially found that the United Kingdom's ban on the broadcasting of paid 'political' advertisements (i.e., advertisements concerning public interest matters) was in line with Article 10 ECHR.[43]

Traditionally, however, under Article 10 ECHR, environmental associations, and individuals in general, are basically entitled to generate information and passively receive information voluntarily disseminated by others (such as journalists) without interference by state authorities. They are *not* protected as active seekers of public interest information which the authorities are under an obligation to release, save well-defined grounds for refusal. In short, the ECHR does not contemplate a general right of access to state-held information as part of the right to freedom of expression. This approach is rooted in the omission of the verb 'seek' in Article 10[44] and has frequently been reiterated in the

[42] *Ibid*., para. 95.

[43] *Animal Defenders International v. the United Kingdom*, Appl. No. 48876/08, ECtHR, Judgment of 22 April 2013, paras 113–125. Clearly, this decision may represent a setback for the protection of the right to information of environmental associations and activists. Compare *ibid*., diss. op. Judge Tulkens, joined by Judges Spielmann and Laffranque:

> [The ban] has an exceptionally wide scope. Any paid advertising is prohibited if it concerns 'political' subjects or is issued by a body whose objects are 'wholly or mainly of a political nature', irrespective of the identity or function of that body, and whatever the subject matter in question. The term 'political' is construed so widely that it applies to the majority of matters of public interest. (*Ibid*., para. 12.)
>
> Further, the ban is applied indiscriminately. In practice, this is a ban which concerns the most protected form of expression (discussion on matters of public interest) by one of the most important categories of actors in the democratic process (an NGO) and a form of media which remains influential (radio and/or television), without the least exception. (*Ibid*., para. 13.)

[44] Unlike the International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 19(2) (hereinafter 'ICCPR'): 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice', and Art. 13(1) ACHR, *supra* note 5: 'Everyone has the

Strasbourg Court case law.[45] The latter is thus at variance with the *Claude Reyes* jurisprudence of the IACtHR and other pertinent international practice, especially the latest pronouncements of the Human Rights Committee (UN HR Committee).[46]

It is true that only rarely have environmental complaints been brought before the ECtHR on the basis of Article 10. This is probably a legacy of the *Guerra* judgment, where the Court refused to characterize the Italian authorities' failure to notify the affected population of the sanitary and environmental dangers arising from the toxic emissions of a chemical plant as an interference with the right to information. The Court, reversing the findings of the European Commission of Human Rights, ruled out the applicability of Article 10, since 'freedom [to receive information] 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*'.[47] It is true that, at least in the environmental context, this right to be informed in the absence of prior ad hoc requests is not to be confused with the public's general right of access to information.[48] However, here too, the practice of the Strasbourg Court is inconsistent with that of the UN HR Committee, which recently posited that, '[t]o give effect to the right of access to information [under Article 19(2) of the ICCPR], States parties should proactively put in the public domain Government information of public interest'.[49]

Admittedly, in recent times, the ECtHR case law relating to the right to information seems to be advancing, as the Court itself acknowledged, 'towards a broader interpretation of the notion of "freedom to receive

right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.'

[45] See, e.g., *Loiseau v. France*, Appl. No. 46809/99, ECtHR, Decision of 18 November 2003 ('it is difficult to derive from the Convention a general right of access to administrative data and documents'); compare A. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 471, at 490–491.

[46] UN HR Committee, *General Comment No. 34 (Article 19: Freedoms of Opinion and Expression)*, UN Doc. CCPR/C/GC/34 (12 September 2011), para. 18: 'Article 19, paragraph 2 [of the ICCPR] embraces a right of access to information held by public bodies.' For insights, see M. O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34', 12 *Human Rights Law Review* (2012) 627, at 638–639 and 651.

[47] *Guerra and Others v. Italy*, *supra* note 23, para. 53 (emphasis added).

[48] See *infra* text accompanying notes 83–85.

[49] *General Comment No. 34*, *supra* note 46, para. 19. It is safe to assume that this practice is also inconsistent with the IACtHR *Claude Reyes* jurisprudence.

information" . . . and thereby towards the recognition of a right of access to information'.[50] It is telling that this innovative trend was first inaugurated in a case raising environmental and health concerns. In *Sdružení Jihočeské Matky*, an environmental association brought a complaint, inter alia under Article 10, against the state authorities' failure to allow its informed participation in the decision-making process involving various technological adjustments to the Temelín nuclear power plant in the Czech Republic.[51] The association argued that the authorities' refusal to afford access to a series of documents relating to the operation of the plant constituted a violation of its right to information. The Court unexpectedly stated that, under the circumstances, the state's conduct indeed amounted to an interference with such right.[52] It then offered various reasons why this interference could not be regarded as arbitrary or disproportionate to the aim pursued, including the security and confidential aspects attached to the information, and concluded that the complaint was manifestly ill-founded.[53] Regardless of this, it seems safe to assume that Article 10 was found to be applicable when the right of access to information held by public authorities is at stake. Moreover, the following observation by the Court cannot be overlooked:

> [L]'article 10 de la Convention ne saurait être interprété comme garantissant le droit absolu d'accéder à tous les détails techniques relatifs à la construction d'une centrale [nucléaire], car, *à la différence des informations concernant l'impact environnemental de celle-ci*, de telles données ne sauraient relever de l'intérêt général.[54]

Accordingly, had the NGO's request involved documents concerning the EIA undertaken in respect of the plant, a less hesitant attitude and a less deferential review of the authorities' conduct on the part of the Court might have resulted, because such information was by definition a public-interest issue.

It is probably too early[55] to observe that we are witnessing a significant *revirement*, or shift, in the Court's jurisprudence to the effect that the right to

[50] *Társaság a Szabadságjogokért v. Hungary*, Appl. No. 37374/05, ECtHR, Judgment of 14 April 2009, para. 35. Compare, most recently, *Youth Initiative for Human Rights v. Serbia*, Appl. No. 48135/06, ECtHR, Judgment of 25 June 2013, where a Chamber of the Court for the first time unequivocally stated that the notion of freedom to receive information in Art. 10 ECHR 'embraces a right of access to information', *ibid*., para. 20.

[51] *Sdružení Jihočeské Matky v. Czech Republic*, Appl. No. 19101/03, ECtHR, Decision of 10 July 2006.

[52] *Ibid*., para. 1.1 (*En droit*). [53] *Ibid*.

[54] *Ibid*. (emphasis added) ('Article 10 of the Convention shall not be construed as guaranteeing the absolute right of access to all the technical details relating to the construction of a [nuclear] facility because, *unlike information on the environmental impact thereof*, such data do not involve the general interest' (trans. ed.)).

[55] The Court's hesitation in this context is evidenced by its attempt to rephrase issues of access to information in terms of state interferences with the right to freedom of expression, thereby finding

(environmental) information is an integral part of the right to freedom of expression. The stakes are high. This *revirement* would probably imply the opening of the European system to a form of public interest litigation which would be in tension with the victim requirement and the associated prohibition of *actio popularis* under the ECHR, as these notions are traditionally understood.[56] A flood of potentially well-founded complaints lodged by members of the public deprived of environmental information would predictably emerge.

What is clear is that the Inter-American practice has played, and will continue to play, a pivotal role in the ECtHR's attempts at rethinking the issue of participatory environmental rights. It is no coincidence that the *Claude Reyes* judgment stands out as an infrequent example of express reference to the Inter-American jurisprudence in the case law of the Strasbourg Court.[57]

Before drawing general conclusions on the state of the ECtHR jurisprudence in this area, it is necessary to clarify why the addition of significant procedural safeguards to the rights that are typically invoked in environmental cases under the ECHR is unsatisfactory from the perspective of environmental law and policy.

4. Participatory Environmental Requirements as a Dimension of ECHR Rights

A. Emergence and Development of the Procedural Dimension of Environmental Cases under the ECHR

The ECtHR jurisprudence is well known for endorsing a two-tier review of environmental cases. Most visibly, when the invoked ECHR provision is the right to life (Article 2) or the right to private life and to a home (Article 8),

refuge in the traditional realm of negative duties of abstention as opposed to positive obligations to ensure protection, see *Társaság a Szabadságjogokért*, *supra* note 50, para. 36:

> [The Court] considers that the present case essentially concerns an interference—by virtue of the censorial power of an information monopoly—with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents.

[56] See *infra* Section 5.

[57] See *Stoll v. Switzerland*, *supra* note 37, paras 43 and 111. A recent Council of Europe report shows that, up to August 2012, the IACtHR decisions or the ACHR have been cited in 25 cases dealt with by the ECtHR: see *References to the Inter-American Court of Human Rights in the Case-law of the European Court of Human Rights* (2012), available at <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> (last visited 2 October 2014).

the Court inquires into the fulfilment of both substantive and procedural obligations. While the former relate to the state duties to prevent and/or refrain from environmentally noxious activities affecting the personal sphere of the applicants, the latter concern the requirements of access to information, public participation and access to justice in environmental matters, i.e., core participatory environmental rights.

The die was cast in the aforementioned *Guerra* judgment, where the Court's finding of a violation of the right to private life was essentially motivated by the Italian authorities' failure to communicate information on the risks and emergency measures associated with the operation of a chemical factory to the affected population.[58] By this strategic move, the Court was able to accommodate the right of access to environmental information within the ECHR, notwithstanding its previous holding that this right was not a component of freedom of expression.[59]

In the subsequent jurisprudence, the procedural dimension of the rights to life and private life has gained increasing importance. Starting from the *Hatton* judgment,[60] which involved noise pollution resulting from night flights at Heathrow Airport in London, the Court has made clear that a fair and transparent decision-making process marked by respect for the public's rights to information, participation and effective remedies is a critical factor for the observance of the ECHR in environmental cases. Likewise, the Court's significant emphasis on the requirement of a prior EIA when risky activities are at stake, epitomized especially by cases such as *Tătar v. Romania*,[61] may be directly traced to its awareness that a key feature of the EIA process is the duty to inform and allow meaningful participation of the public concerned in the final decisions about those activities. A similar attitude may be identified in the jurisprudence concerning the preventive and remedial measures which states are bound to take as part of their positive obligation to protect the right to life against dangerous human activities, such as waste disposal,[62] or natural disasters, such as mudslides affecting areas

[58] *Guerra and Others v. Italy*, *supra* note 23, para. 60.

[59] See *supra* text accompanying note 47.

[60] *Hatton and Others v. United Kingdom*, Appl. No. 36022/97, ECtHR, Judgment of 8 July 2003, paras 98, 104, and 128; see also *Taşkin and Others v. Turkey*, Appl. No. 46117/99, ECtHR, Judgment of 10 November 2004, paras 118–125.

[61] *Tătar v. Romania*, Appl. No. 67021/01, ECtHR, Judgment of 27 January 2009, especially paras 101, 113–119, and 121–125, on which see the case report by D. L. Shelton, '*Tătar c. Roumanie*. European Court of Human Rights Decision on Protections against Environmental Harms and on Proof of Causation and Damages', 104 *AJIL* (2010) 247; see also *Giacomelli v. Italy*, Appl. No. 59909/00, ECtHR, Judgment of 2 November 2006, paras 86–98.

[62] *Öneryildiz v. Turkey*, Appl. No. 48939/99, ECtHR, Judgment of 30 November 2004, paras 90, 93–96, and 108.

prone to these calamities.[63] The public's rights to information and to effective remedies are chief elements of the state's duties in these contexts.

Further evidence of the ECtHR's exacting approach to the procedural aspect of environmental disputes comes from its recent decision in *Hardy and Maile*, a case involving the alleged inadequacy of the EIA performed in respect of the operation of two liquefied natural gas terminals at Milford Haven harbour in the United Kingdom. In this decision, the Court even carried out a double check on compliance with procedural requirements in order to determine whether Article 8 ECHR had been violated. Thus, it first noted with approval the 'coherent and comprehensive'[64] state legislation and allocation of responsibilities regarding the authorization and risk assessment of major development projects such as that at stake. In particular, on the facts of the case, that legal framework had secured the publication of significant documents relating to the project and empowered members of the public to make comments thereon. It had also allowed the applicants to bring a judicial challenge against the authorities' decisions.[65] The Court next reviewed, as an apparently distinct and separate issue, the applicants' allegation concerning the lack of disclosure of certain information on the EIA process.[66] After recalling the importance of access to essential information that enables members of the public to identify and assess the risks to which they are exposed, the Court concluded that, in the circumstances, the applicants had not demonstrated the state's failure to release 'any substantive document'.[67] Moreover, they could have pursued an 'effective and accessible procedure'[68] under the pertinent legislation in order to seek any further information they wished the authorities to disclose.

Over the years, the Court's insistence on the cardinal relevance of the procedural dimension of environmental cases has gone so far as to give the impression that its power to review such cases from the substantive standpoint—i.e., in terms of substantive duties of prevention and precaution—would be practically non-existent. Indeed, the proceduralization of environmental litigation would be no more than an astute manoeuvre set in

[63] *Budayeva and Others v. Russia*, Appl. Nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, ECtHR, Judgment of 20 March 2008, paras 131–132, 138–144, 152–155, and 163–165. For the sake of precision, it should be pointed out that, in this case as well as in *Öneryildiz*, the public's right to information was subsumed within the substantive dimension of the right to life, i.e., it was considered as an integral aspect of the regulatory framework which national authorities must put in place in order to protect that right.

[64] *Hardy and Maile v. the United Kingdom*, Appl. No. 31965/07, ECtHR, Judgment of 14 February 2012, para. 231.

[65] *Ibid*., para. 230.

[66] *Ibid*., paras 233–249.

[67] *Ibid*., para. 249.

[68] *Ibid*.

motion by the Court to refrain from fully scrutinizing domestic controversial decisions about environmental matters. Under this perspective, once determined that a participatory and transparent process was undertaken at the national level, the substantive merits of the disputed conduct would fundamentally go unchallenged. In short, the procedural dimension of environmental cases would swallow and trivialize their substantive aspects.[69]

This is a legitimate concern. In its influential decision in *Fadeyeva*, the Court observed that its power to review the substantive merits of the impugned state conduct is exceptional, i.e. essentially confined to manifest errors of appreciation 'in striking a fair balance between the competing interests of different private actors'[70] in the environmental sphere. In other words, restrictions on ECHR rights stemming from environmental deterioration may frequently be found to be justified for reasons of general interest (e.g., the economic well-being of a country), because they are not amenable to a stringent proportionality test, especially when they arise from the states' failure to fulfil their positive obligations under the right to private life and a home.[71] According to the Court, a combination of elements militates in favour of such an approach to environmental complaints, including the wide margin of appreciation afforded to states, the complexity of the issues in question and its primarily subsidiary role in this field.[72] Hence, in environmental cases,

> [t]he Court must first examine whether the decision-making process was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 . . . , and *only in exceptional* circumstances may it go beyond this line and revise the *material conclusions* of the domestic authorities . . . .[73]

However, subsequent decisions show that the foregoing methodological premises have not necessarily prevented the ECtHR from declaring violations of the substantive component of the right to private life. Most glaringly, in *Di Sarno*, the Court found Italy in breach of Article 8 for not having taken

[69] For a fierce critique along these lines, see E. Lambert Abdelgawad, 'La proportionnalité dans le système de la Convention européenne des droits de l'homme', in H. Ruiz Fabri and L. Gradoni (eds), *La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation* (2009) 427, at 460–462.

[70] *Fadeyeva v. Russia*, *supra* note 24, para. 105.

[71] *Ibid.*, paras 94–98.

[72] *Ibid.*, paras 103–105.

[73] *Ibid.*, para. 105 (emphasis added). The *Giacomelli* judgment is basically consistent with this line of jurisprudence. In that case, the Court confirmed that the possibility of justifying state measures adversely affecting the environment is essentially conditional on the fulfilment of procedural guarantees: 'In determining the scope of the margin of appreciation allowed to the respondent State, the Court must therefore examine whether due weight was given to the applicant's interests and whether sufficient procedural safeguards were available to her' (*Giacomelli v. Italy*, *supra* note 61, para. 84).

adequate measures to protect the applicants (and the concerned population in general) against the environmental and health risks flowing from the 'waste crisis' that had severely hit various areas of the Campania region during the past decade.[74] By contrast, the Court briskly ruled out a violation of the procedural component of Article 8, simply by affirming that the Italian authorities had made public two studies on the risks arising from the waste crisis.[75]

In essence, contemporary environmental jurisprudence under the ECHR demonstrates that the Court has not turned a blind eye to the state's substantive duties in the area of environmental protection. Various decisions reveal a balanced approach, according to which only a meaningful review of both substantive and procedural aspects permits an overall appraisal of the legality of state conduct allegedly affecting nature and human health.

B. The Procedural Dimension of ECHR Rights versus Procedural Environmental Rights

By contrast, a fundamental concern is whether procedural environmental requirements themselves have satisfactorily been applied by the ECtHR jurisprudence at issue. The statement that this jurisprudence has meant a *de facto* incorporation of both Principle 10 of the Rio Declaration and the Aarhus Convention's entitlements into the ECHR system needs qualification.[76] It is true that, by virtue of these decisions, the ECtHR offered a further, exceptional testimony of its dynamic, evolutionary, and liberal method of interpretation of the ECHR, including by taking into account international legal instruments external to the Council of Europe framework. Thus, the Aarhus Convention has increasingly been quoted and relied on by the Court in an explicit manner, even in (and starting from) *Taşkin*,[77] where

[74] *Di Sarno and Others v. Italy*, Appl. No. 30765/08, ECtHR, Judgment of 10 January 2012, para. 112. For a further example along these lines, albeit concerning industrial pollution, see *Băcilă v. Romania*, Appl. No. 19234/04, ECtHR, Judgment of 30 March 2010, paras 65–73.

[75] *Di Sarno and Others v. Italy*, *supra* note 74, para. 113. However, the Court also found a violation of the right to an effective remedy under Art. 13 ECHR, since no adequate means was available to the applicants to claim compensation for damage sustained as a result of the authorities' glaring mismanagement of the system for the collection and disposal of waste, *ibid.*, para. 118.

[76] Boyle, *supra* note 45, at 499, 503, and 510. For qualifications, see *ibid.*, at 490–491, 498–500, and 505.

[77] *Taşkin and Others v. Turkey*, *supra* note 60, para. 99. However, as the Court has candidly observed in its decision in *Demir and Baykara* (which can be regarded as a veritable manifesto of the Court's liberal interpretive approach), the fact that a given treaty has not been ratified by all the states parties to the ECHR, including respondent states, is not fatal to their interpretative value for

the respondent state, Turkey, was not (and is still not) a party thereto.[78] At the same time, one may safely assume that instances of reliance on the Aarhus Convention by the ECtHR will grow exponentially, thereby bolstering the legal status of the Convention at the regional level and possibly beyond. However, we should never lose sight of the principal purpose of the Court's implicit or explicit references to the Aarhus Convention. This has always been to provide a normative backbone to the procedural facet of certain ECHR rights, chiefly the right to private life, and not to elevate the Convention's entitlements to self-standing rights encompassed within one or more of the ECHR guarantees.

Hence, a key question is whether alleging a breach of the relevant ECHR provisions in their procedural dimension may, by itself, secure the admissibility of environmental claims and trigger the applicability of those provisions. In other words, can a failure to allow the informed and meaningful participation of the public in environmental decision-making *per se* form the basis of a viable ECHR complaint, particularly under the right to private life in Article 8?

There indeed exists a fundamental limit to the examination of the merits of individual applications raising environmental concerns pursuant to the European system. The absence of an explicit 'right to nature preservation'[79] in the

the ECHR evolving standards of protection, *Demir and Baykara v. Turkey*, Appl. No. 34503/97, ECtHR, Judgment of 12 November 2008, paras 65–86:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. (*Ibid*., para. 85.)
>
> In this context, *it is not necessary for the respondent State to have ratified* the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a *continuous evolution in the norms and principles* applied in international law or in the domestic law of the *majority* of member States of the Council of Europe and show, in a precise area, that there is *common ground in modern societies* . . . (*Ibid*., para. 86, emphasis added).

[78] For further references to the Aarhus Convention in the ECtHR case law, see, e.g., *Collectif national d'information et d'opposition à l'usine Melox—Collectif Stop Melox et Mox v. France*, Appl. No. 75218/01, ECtHR, Decision of 28 March 2006, para. 4; *Tătar v. Romania*, *supra* note 61, at 23 *sub* (c) and para. 118; *Di Sarno and Others v. Italy*, *supra* note 74, paras 76 and 107; *Grimkovskaya v. Ukraine*, Appl. No. 38182/03, ECtHR, Judgment of 21 July 2011, paras 39, 69, and 72. In the latter four cases, the respondent states were and are all parties to the Aarhus Convention. It is interesting that in *Fadeyeva v. Russia*, *supra* note 24, a case involving a state (Russia) not party to the Convention, the latter was not quoted. This was probably deliberate, since the same approach as in *Taşkin* to the procedural dimension of environmental cases was reiterated by the Court.

[79] *Fadeyeva v. Russia*, *supra* note 24, para. 68.

ECHR implies that individuals are entitled to complain of environmental deterioration 'only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life'.[80] Such direct and immediate effect of the contested environmental harm on the applicant's rights thus acts as a threshold for the applicability of the pertinent ECHR provisions, while being hardly distinguishable from the traditional victim requirement and associated prohibition of *actio popularis* under the ECHR.[81] Would a complaint asserting a denial of procedural environmental rights be sufficient to regard the applicant as a victim of an ECHR violation and to hold the invoked ECHR provision applicable?

The ECtHR case law appears unsettled in this respect. Two significant decisions dealing with the protection of human health in the context of nuclear- and chemical-weapons tests may lend themselves to an interpretation pursuant to which the lack of disclosure of information *per se* engages the right to private life under Article 8. In the Court's view:

> [T]he issue of access to information which could either have allayed the applicants' fears . . . , or enabled them to assess the danger *to which they had been exposed*, was sufficiently *closely linked* to their private and family lives within the meaning of Article 8 as to raise an issue under that provision.[82]

However, in the subsequent *Atanasov* judgment, the Court explicitly refused to consider Article 8 as applicable on the sole ground that the state authorities had not completed an EIA about a reclamation scheme for the tailings pond of a former copper mine involving toxic substances, and had thereby failed to adequately inform and allow the participation of the concerned population. According to the Court, 'in the absence of proof of any direct impact of the impugned pollution on the applicant or his family',[83] Article 8 could not be brought into play by pointing to the procedural deficiencies in question. On the other hand, *McGinley* and *Roche* had to be distinguished as cases where the lack of disclosure of information was capable of engaging Article 8 *only* because the applicants were *directly* exposed to the disputed noxious activities.[84]

[80] *Atanasov v. Bulgaria*, Appl. No. 12853/03, ECtHR, Judgment of 2 December 2010, para. 66 (emphasis added). This Court's holding builds upon previous decisions, especially *Kyrtatos v. Greece*, Appl. No. 41666/98, ECtHR, Judgment of 22 May 2003, paras 52–53; *Hatton and Others v. United Kingdom*, *supra* note 60, para. 96; *Fadeyeva v. Russia*, *supra* note 24, paras 68–70.

[81] See further Section 5.

[82] *McGinley and Egan v. the United Kingdom*, Appl. Nos. 21825/93 and 23414/94, ECtHR, Judgment of 9 June 1998, para. 97 (emphasis added); and, *mutatis mutandis*, *Roche v. the United Kingdom*, Appl. No. 32555/96, ECtHR, Judgment of 19 October 2005, para. 155; compare A. Saccucci, 'La protezione dell'ambiente nella giurisprudenza della Corte europea dei diritti umani', in A. Caligiuri, G. Cataldi, and N. Napoletano (eds), *La tutela dei diritti umani in Europa* (2010) 493, at 527–528.

[83] *Atanasov v. Bulgaria*, *supra* note 80, para. 78.

[84] *Ibid*.

Thus, the *Atanasov* judgment took the view that it is the applicant's personal and direct exposure to the source of pollution or other environmental problem that sets into motion the control machinery of the ECHR, and not claims merely adducing a state failure to meaningfully involve the applicant herself/himself in the decision-making process. This approach attests to the imperfect and unsatisfactory incorporation of the Aarhus Convention's procedural rights into the ECHR. Confining such rights to a dimension of certain ECHR provisions implies that they come into play only when the victim and applicability requirements of the ECHR system have been fulfilled. To put it differently, the procedural rights' dimension belongs to the merits of environmental cases, whereas it is *per se* irrelevant when reviewing admissibility and applicability issues.

The Court's attitude emerging from the *Atanasov* judgment may arguably be traced to its willingness to prevent a form of public interest environmental litigation from entering the European system through the backdoor of the Aarhus Convention. Accordingly, complaints merely alleging a denial of environmental information or participatory rights should be dismissed summarily, insofar as the applicant is unable to demonstrate that she/he is personally and directly affected by the environmental harm or threat in question. The contrast with the Aarhus Convention's purpose and scheme is glaring. Consistently with its public interest rationale, the *ratione personae* scope of the Convention's rights is decidedly broader. At one extreme, the Convention foresees the public in general as holder of the right of access to environmental information and enables the same to request such information '[w]ithout an interest having to be stated';[85] at the other extreme, in the event of any 'imminent threat to human health or the environment'[86] (the circumstance prevailing in the *Guerra* case), the state duty to collect and disseminate all relevant information *motu proprio* is owed only to 'members of the public who may be affected'.[87] In between, various middle-ground situations are envisaged: for instance, the right to participate in decision-making processes about specific activities (energy sector, industrial plants, waste management, etc.) is most significantly secured to the 'public concerned',[88] that is to the 'public affected or likely to be affected by, *or having an interest in,* the environmental decision-making';[89] in turn, the right of access to justice

[85] Aarhus Convention, *supra* note 34, Art. 4(1)(a). 'The public' is defined by Art. 2(4) of the Convention as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups'.

[86] *Ibid.*, Art. 5(1)(c). [87] *Ibid.*

[88] *Ibid.*, Art. 6(2) and (6). But see Art. 6(7).

[89] *Ibid.*, Art. 2(5) (emphasis added). Notably, environmental NGOs 'meeting any requirements under national law shall be deemed to have an interest', *ibid.*

in order to challenge the decisions adopted in respect of those activities is granted only to members of the public concerned having a 'sufficient interest'[90] or asserting 'impairment of a right'.[91]

Obviously, the different picture emerging from the ECtHR environmental jurisprudence relating to the right to private life is just a consequence of the *individualistic* logic of the Court's interpretation of the ECHR guarantees, which is epitomized by key notions such as the victim requirement, the ban on *actio popularis* and the restricted capacity of NGOs to lodge petitions (more or less directly) addressing issues of general interest. These notions may represent formidable obstacles to the viability of the ECtHR as a forum to vindicate the collective interests underlying environmental damage.[92] But it is not here a question of arguing in favour of an unrealistic, wholesale transplantation of the public interest approach of the Aarhus Convention into the ECHR system.

Instead, what seems problematic is continuing to regard procedural environmental requirements solely as a dimension of the rights to life and private life,[93] rather than discrete, integral guarantees of other pertinent ECHR provisions, chiefly those protecting the fundamental freedoms of thought, expression, assembly, and association (Articles 9–11). These freedoms, which are denoted by a marked collective and societal component alongside the protection of individual interests, might well be valorized so as to subsume pertinent aspects of participatory rights within their reach.

As we know,[94] this innovative jurisprudence could, first and foremost, recognize the right of access to environmental information as part of the right to freedom of expression in Article 10, thus following the path undertaken by

[90] *Ibid.*, Art. 9(2).

[91] *Ibid*. This is one of the most controversial provisions in the Aarhus Convention, also because it substantially leaves the definition of the notions at hand to domestic law.

[92] See F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; C. Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?', 20 *Journal of Environmental Law* (2008) 417; R. Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight', in F. Lenzerini and A. F. Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (2014) 331.

[93] It is important to note that these rights are among those in respect of which the ECtHR applies its individualistic method in a quite inflexible manner. Particularly, applications filed on the basis of these rights by NGOs are bound to fail for want of the victim requirement, because the alleged violations most likely arise from nuisances liable to affect natural persons only: *Asselbourg and Others v. Luxembourg*, Appl. No. 29121/95, ECtHR, Decision of 29 June 1999, para. 1 (*The Law*) (the location of Greenpeace-Luxembourg's headquarters in the vicinity of the disputed source of pollution did not make the NGO a victim of a violation of the right to a home); *Sdružení Jihočeské Matky v. Czech Republic*, *supra* note 51, para. 2.1 (*En droit*).

[94] See Section 3.

the IACtHR with its *Claude Reyes* judgment. Currently, if a claim similar to that underlying the *Claude Reyes* case—i.e., failure to release information about a major forest exploitation project to individuals living thousands of kilometres away from the concerned area—were advanced before the ECtHR under the right to private life, the Court would in all probability dismiss it summarily. The applicants would not be regarded as directly and immediately affected by or exposed to the environmental problem at hand and the issue of the procedural dimension of Article 8 would not even arise.[95] By contrast, were this claim to be brought under Article 10, the Court would be at pains to reiterate the same approach and accordingly rule that an individual is a victim of a refusal to release information only if the latter directly relates to her/his personal sphere.[96] Consistently with its conception of the ECHR as a living instrument liable to adaptation to evolving rules, the Court would be best advised to acknowledge that, in line with modern environmental human rights law, individuals and competent associations are entitled to environmental information regardless of any showing of (actual or potential) strictly personal injury or interest.

This would be a first step by the ECtHR towards fully recognizing the cardinal, growing significance of procedural environmental rights. It would also be a means of partially redressing, *rebus sic stantibus*, the conspicuous absence of the right to take part in the conduct of public affairs from the catalogue of rights protected under the ECHR. Participatory entitlements, including in the field of environmental protection, are rooted in that right,[97]

[95] Compare, however, *Okyay and Others v. Turkey*, ECtHR, Appl. No. 36220/97, Judgment of 12 July 2005. This case involved a fair-trial complaint against the authorities' refusal to shut down three thermal power plants in the Aegean region of Turkey, in defiance of prior court decisions which had ordered the closure of the plants. The Court found in favour of the complainants, even though they were living at about 250 kilometres from the site of the disputed plants. This judgment is quite isolated in the Court's case law and has been (implicitly) overruled by more recent decisions, compare *Sdružení Jihočeské Matky v. Czech Republic*, *supra* note 51, para. 2.1 (*En droit*); *Atanasov v. Bulgaria*, *supra* note 80, paras 92 and 95–96; *Association Greenpeace France v. France*, Appl. No. 55243/10, ECtHR, Decision of 13 December 2011. Moreover, the *Okyay* case concerned the right to a fair trial under Art. 6 ECHR, whose applicability to environmental claims raises specific issues which are not considered in the present study.

[96] As a matter of fact, in the cases of *Sdružení Jihočeské Matky v. Czech Republic*, *supra* note 51, and *Youth Initiative for Human Rights v. Serbia, supra* note 50, there is no trace of this type of reasoning.

[97] See Commission on Human Rights, *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and Its Application in the Context of Globalization*, UN Doc. E/CN.4/2005/41 (23 December 2004); IACommHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, *supra* note 3, paras 274 and 289; J. Ebbesson, 'Public Participation', in D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007) 681, at 686–687.

which is uniformly envisaged by the most important universal and regional human rights treaties.[98]

5. The Victim Requirement and Collective Claims in the Inter-American System

In the preceding sections, several references were made to the principal doctrines developed under the European human rights system with respect to the admissibility and standard of review of environmental complaints. There is no doubt that the European system poses severe obstacles to the pursuit of public interest environmental litigation before the ECtHR and that even those claims which are deemed admissible do not result in a stringent review of the disputed national measures.

To sum up some major points: in order to have her/his complaint comprehensively examined by the Court, an applicant must show that the environmental problem at hand affects her/his personal position in a direct way and that therefore she/he is not merely acting on behalf of the common good (victim requirement and associated prohibition of *actio popularis*, plus test on the applicability of the invoked ECHR provision). Moreover, the environmental deterioration complained of must be 'serious'[99] and, in turn, severely affect the applicant's sphere.[100] Thus, a claim concerning personal injury which is '*negligible* in comparison to the environmental hazards inherent to life in every modern city'[101] falls outside the scope of the Court's

[98] ICCPR, *supra* note 44, Art. 25(a); ACHR, *supra* note 44, Art 23(1)(a), and African Charter on Human and Peoples' Rights, Art. 13(1). In the IACtHR jurisprudence, see *YATAMA v. Nicaragua*, IACtHR, Judgment of 23 June 2005, paras 194–229, especially paras 196 and 225. In the *Claude Reyes* judgment, *supra* note 26, the IACtHR seemed to accept that the right to participate in government was engaged by reason of the lack of disclosure of information at issue; it just decided to exercise judicial economy vis-à-vis the arguments put forward by the applicants in that respect, para. 107. Compare UN HR Committee, *Brun v. France*, Comm. No. 1453/2006, UN Doc. CCPR/C/88/D/1453/2006, decision of 18 October 2006, para. 6.4 (claim under Art. 25 (a) ICCPR relating to inadequate participation in decisions about the cultivation of genetically modified organisms held inadmissible, because the applicant had had various means to voice his concerns in public).

[99] *López Ostra v. Spain*, *supra* note 20, para. 51.

[100] *Fadeyeva v. Russia*, *supra* note 24, para. 69. For a telling application of this principle, see *Fägerskiöld v. Sweden*, Appl. No. 37664/04, ECtHR, Decision of 26 February 2008, para. 1 (noise pollution caused by wind turbines close to the applicants' property 'not so serious as to reach the *high threshold* established in cases dealing with environmental issues', emphasis added).

[101] *Fadeyeva v. Russia*, *supra* note 24, para. 69 (emphasis added). The reference to 'life in every modern city' is misleading. Indeed, the *de minimis* threshold at stake also applies to non-urban, non-industrial contexts, see *Kyrtatos v. Greece*, *supra* note 80, para. 54; *Atanasov v. Bulgaria*, *supra* note 80, paras. 71 and 75–76. What is worth noting is that the admissibility criterion of the 'significant

jurisdiction. Given the absence of a right to a healthy environment in the ECHR, environmental cases are normally characterized by a rigorous review of these requirements, while, as observed in the foregoing sub-section, procedural environmental rights become relevant only if and when an application is assessed on the merits.

In a recent study, I explored at length the implications stemming from several of the doctrines applied to environmental cases by the ECtHR.[102] My starting assumption was that a systematic, summary rejection by the Court of any such cases as soon as they disclose traits of public interest litigation would be misconceived, out of tune with the increasing emergence of human rights-related environmental concerns, and in tension with various precedents where the Court itself has duly examined complaints about environmentally harmful activities affecting entire geographic areas or groups of people.

In the present context, the question is whether similar concepts and attitudes may be detected in the relevant practice of the Inter-American human rights bodies. Apparently, the ACHR does not set out a victim requirement as a condition on the admissibility of individual claims. Article 44 ACHR empowers '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States]' to file petitions with the IACommHR concerning complaints of violation of the Convention. Thus, unlike (as a matter of principle) the ECHR, petitioner and victim need not necessarily be the same person. This is a key feature of the Inter-American system: in addition to friends and relatives of victims (or whoever else for that matter), it especially allows NGOs to take up human rights cases and bring them to the IACommHR (and, via the latter, to the IACtHR). Obviously, such a broadly recognized *locus standi* of NGOs may fulfil a pivotal function in all cases raising issues of general interest, including in the field of environmental protection. This is unparalleled in the European system.

However, the liberal standing under the ACHR does not mean that the identification of victims of the alleged violations is unnecessary,[103] nor

disadvantage' for the applicant, as newly introduced into Art. 35(3)(b) ECHR, by Protocol No. 14, does not seem to have any role to play in environmental cases. The *de minimis* threshold is a built-in requirement in such cases. In fact, no environmental complaints have so far been rejected on the basis of the 'no significant disadvantage' criterion, see *The New Admissibility Criterion under Article 35 § 3 (b) of the Convention: Case-Law Principles Two Years On* (2012), available at <http://www.echr.coe.int/Documents/Research_report_admissibility_criterion_ENG.pdf> (last visited 2 October 2014) (Council of Europe research report covering case law from 1 June 2010 until 31 May 2012).

[102] Pavoni, *supra* note 92.

[103] Obviously, the identification of victims or injured parties has always been necessary for the purposes of reparations under ACHR, Art. 63(1).

therefore that a petition may take the form of an *actio popularis*.[104] As a matter of fact, an *implicit* victim requirement has emerged in the Inter-American jurisprudence, starting with a 1994 Advisory Opinion, where the IACtHR considered it 'essential'[105] for an individual petition before the IACommHR to assert 'a concrete violation of the human rights of a specific individual';[106] indeed, '[t]he contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions'.[107]

While frequently reiterated, the requirement at issue has not had a significant impact on the subsequent practice of the IACommHR about the admissibility of individual complaints. Yet, as noted by several analysts,[108] it has led the Commission to dismiss *in limine* an environmental case involving the construction of a roadway through a nature reserve in Panama City.[109] In *Metropolitan Nature Reserve*, an individual alleged that that project violated various ACHR rights of all the citizens of Panama, including their right to property (Article 21 ACHR) in the protected area at stake and their right to participate in governmental decision-making (Article 23(1)(a) ACHR) about environmental affairs. After recalling that petitions under Article 44 ACHR must refer to 'specific, individual and identifiable victims',[110] the IACommHR declared the complaint inadmissible, since it concerned 'abstract victims represented in an *actio popularis* rather than specifically identified and defined individuals'.[111] In substance, according to the Commission, it was impossible to regard the human rights of all the citizens of a modern city as indistinguishably affected by a major infrastructural project. The petitioner tried to argue that those most seriously harmed by the state actions in question were a number of environmental and scientific associations statutorily endowed with rights and prerogatives relating to the management of the country's protected areas. This argument was briskly refuted by the IACommHR,[112] on the grounds that ACHR rights

[104] For opposite observations, see O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2010), at 930; Burgorgue-Larsen and Úbeda de Torres, *supra* note 11, at 111. For the correct position, see D. L. Shelton, *Regional Protection of Human Rights* (2008), at 596, 599–605.

[105] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 (9 December 1994), para. 45.

[106] *Ibid.* [107] *Ibid.*, para. 49.

[108] Boyle, *supra* note 45, at 506; Schall, *supra* note 92, at 422–423 and 429–430.

[109] *Metropolitan Nature Reserve (Panama)*, Case No. 11.533, IACommHR, Report No. 88/03 of 22 October 2003. See Anton and Shelton, *supra* note 26, at 512–515.

[110] *Ibid.*, para. 28. [111] *Ibid.*, para. 34. [112] *Ibid.*, paras 33–34.

must be ensured for natural persons, not for legal entities,[113] and that, accordingly, only the former may be victims of violations.

Metropolitan Nature Reserve cannot be taken as a particularly instructive and representative precedent from the Inter-American human rights practice, or as an inflexible indication of the Inter-American bodies' negative attitude towards collective claims and public interest litigation in the environmental sphere. The case was not argued persuasively. On a minor note, the petitioner could have pointed to the associations' members as the real victims of the impugned state conduct, rather than to the associations themselves. Most importantly, and probably under the influence of the Inter-American decisions about indigenous peoples' rights, the bulk of the petitioner's allegations revolved around an unrealistic, purportedly exclusive property right of all the inhabitants of Panama City over its natural parks. Under the circumstances, it would have been more appropriate to insist on the alleged denial of participatory rights pursuant to the relevant ACHR provisions, and to put forward a reasonable criterion for identifying the persons most concerned with the project and therefore entitled to exercise those rights.

Most visibly,[114] *Metropolitan Nature Reserve* is in tension with the Inter-American practice relating to the rights of indigenous and local communities over their traditional lands, including the natural resources found there. The Inter-American bodies' resolve to review indigenous peoples' cases regardless of the large number of victims and breadth of the geographic areas involved, and to do so in a strictly collective and communitarian fashion, is well known. This methodology has gone so far as to lead the Court, in the *Saramaka* case, to find a violation of the right to juridical personality under Article 3 ACHR as a result of the respondent state's failure to recognize juridical personality of the Saramaka people itself, i.e., of a collective entity.[115] The aforementioned limitation to natural persons only of the protection guaranteed by the ACHR was no obstacle to that conclusion.

[113] According to ACHR, Art. 1(2), for the purposes of the Convention, '"person" means every human being'. For a contribution criticizing the interpretation of this provision by the Inter-American bodies as unduly 'formalistic', see P. Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights', in P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009) 246, at 255–259.

[114] For further insights, see Burgorgue-Larsen and Úbeda de Torres, *supra* note 11, at 117–122.

[115] *Saramaka People v. Suriname*, IACtHR, Judgment of 28 November 2007, paras 159–175. The Court was not crystal clear about how it was possible to reconcile the finding in question with ACHR, Art. 1(2). It is safe to assume that that finding was the result of the method of effective and evolutionary interpretation of the ACHR traditionally pursued by the IACtHR. See also *Saramaka People v. Suriname (Interpretation)*, IACtHR, Judgment of 12 August 2008, paras 58–65.

Another prominent application of the same methodology concerns the issue of reparations to be accorded in indigenous peoples' cases, which, in the IACtHR's view, must be crafted so as to reflect their eminently collective nature. For instance, in the *Saramaka* case, 'given the size and geographic diversity of the Saramaka people',[116] the Court found it unnecessary to identify the specific names of the community's members entitled to reparations, and then proceeded—inter alia—to order the creation of a development fund to which the state authorities had to disburse the sums of money awarded as compensatory damages to the benefit of the Saramaka people.[117]

In *Metropolitan Nature Reserve*, the IACommHR had in mind precisely the then existing case law on indigenous groups when it specified:

> That petitions filed as actions for the common good are deemed inadmissible does not imply that the petitioner must always be able to identify with particularity each and every victim on whose behalf the petition is brought. Indeed, it should be noted that the Commission has considered admissible certain petitions submitted on behalf of groups of victims *when the group itself was specifically defined*, and when the respective rights of *identifiable* individual members were directly impaired by the situation giving rise to a stated complaint. Such is the case of members of a specific community.[118]

For instance, in *Community of San Mateo de Huanchor*, the Commission had no doubt regarding the admissibility *ratione personae* of a complaint lodged on behalf of all the inhabitants of a Peruvian town—some 5,600 persons, most of whom were indigenous—severely affected by the pollution stemming from a field of toxic waste sludge.[119]

[116] *Saramaka People v. Suriname*, *supra* note 115, para. 188.

[117] *Ibid.*, paras 201–202. The apotheosis of this jurisprudence is now represented by the decision in *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, Judgment of 27 June 2012:

> On previous occasions . . . the Court has declared violations to the detriment of *members* of indigenous or tribal communities and peoples. However, international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals. Given that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the *legal considerations* expressed or issued in this Judgment should be understood from that collective perspective. (*Ibid.*, para. 231, emphasis added.)

See also *ibid.*, para. 284.

[118] *Metropolitan Nature Reserve (Panama)*, *supra* note 109, para. 32 (emphases added).

[119] *Community of San Mateo de Huanchor and Its Members (Peru)*, Case No. 504/03, IACommHR, Report No. 69/04 of 15 October 2004, paras 15 and 42. This quintessentially environmental case is still awaiting a merits report by the IACommHR, see <http://www.ciel.org/HR_Envir/HRE_SanMateo.html> (last visited 2 October 2014).

Hence, there is certainly room for flexibility in respect of the ACHR's victim requirement and prohibition of *actio popularis*, including in the area of environmental protection. Crucially, the Inter-American practice on group and collective rights is replete with egregious examples of environmental destruction or mismanagement occurring in the territories inhabited by entire communities of people. And such territories are often of cardinal importance for the maintenance of a sustainable global ecological balance. The environmentally related findings of the Inter-American indigenous peoples' jurisprudence cannot be regarded as a merely incidental aspect thereof. They are at once an integral and discrete key component of that jurisprudence. Most importantly, the collective perspective firmly embraced by the Inter-American organs in this context indirectly benefits environmentally related claims. The upshot of this is that, to a considerable extent, the adjudication of such claims may be viewed as a matter of general interest.

6. After *Saramaka* and *Sarayaku*: Environmental Landmarks in the Indigenous Peoples' Jurisprudence under the Inter-American Human Rights System

In terms of comparative analysis, a key aspect of the Inter-American indigenous peoples' jurisprudence is its far-reaching use of the right to property (Article 21 ACHR) as a sword for fighting against environmentally harmful activities, rather than a shield for countering expropriations or other interferences with one's possessions aimed at serving the general interest in the preservation of the environment.[120] By contrast, it is mostly under this second perspective that the relationship between the right to property and ecological protection has emerged in the European system. Accordingly, the public interest in the defence of the environment is a legitimate ground for restricting property rights and the resulting state measures are likely to be found justified in view of the importance of that objective and the wide margin of appreciation of national authorities in selecting the best means for its realization.[121] In short, pursuant to this perspective, the right to property is antagonistic to the protection of nature.

[120] See, recently, C. Pitea, 'Right to Property, Investments and Environmental Protection: The Perspectives of the European and Inter-American Courts of Human Rights', in T. Treves, F. Seatzu, and S. Trevisanut (eds), *Foreign Investment, International Law and Common Concerns* (2013) 257.

[121] The European case law in this area is massive: for early decisions, see *Fredin v. Sweden (No. 1)*, Appl. No. 12033/86, ECtHR, Judgment of 18 February 1991, paras 48–56; *Pine Valley Developments Ltd and Others v. Ireland*, Appl. No. 12742/87, ECtHR, Judgment of 29 November 1991,

Conversely, the main lesson arising from the indigenous peoples' jurisprudence under Article 21 ACHR is that the imperative to secure the collective right of indigenous communities to use and enjoy their traditional lands entails the illegality of any activity which results in unsustainable exploitation of natural resources situated on those lands, at least insofar as they are undertaken in the absence of prior consent from or lack of consultation with the community concerned.[122] Thus, the right to property and its corollaries translate into an effective tool to channel environmental rights and principles in the litigation process before the Inter-American organs.

At the same time, the particular nature of indigenous peoples' human rights issues should be taken into account. For one thing, the same environmentally friendly use of the right to property is not viable when ordinary (non-indigenous) claims are at stake. Suffice it here to recall the *Metropolitan Nature Reserve* case where the purported property rights of all the citizens of Panama City over a protected area were flatly rejected on admissibility grounds by the IACommHR.[123] The broad protection afforded to indigenous peoples' communal property of their ancestral lands may lead to diametrically opposed conclusions. Not only has the IACtHR alluded to the priority of the indigenous right to property over competing third party property rights or interests,[124] including those arising under bilateral investment treaties.[125] Crucially, it has also affirmed that the vindication of the indigenous peoples' right to own and recover their ancestral lands cannot be hindered by the establishment of areas of ecological protection encompassing those lands.

paras 57–60; see L. Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights', 75 *British Year Book of International Law* (2004) 249, at 259–261. Tellingly, the same approach has been endorsed by the IACtHR in *Salvador Chiriboga v. Ecuador*, IACtHR, Judgment of 6 May 2008, paras 67–76 and 116–118 (expropriation carried out in order to build the Metropolitan Park in the City of Quito pursued a legitimate aim of public utility, but was ultimately unlawful for failure to pay just compensation).

[122] For well-known, early pronouncements to this effect, see *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment of 31 August 2001, paras 153 and 164 (logging concessions); *Maya Indigenous Communities of the Toledo District (Belize)*, Case No. 12.053, IACommHR, Report No. 40/04 of 12 October 2004, paras 136–153 (logging and oil concessions).

[123] *Metropolitan Nature Reserve (Panama)*, *supra* note 109. Similar considerations apply to the ECHR cases where the individual right to property under ECHR, Art. 1 of Protocol No. 1, is invoked against allegedly environmentally harmful activities. A finding of violation of that right is unlikely in these cases, also because the starting assumption of the ECtHR is that 'Article 1 of Protocol No. 1 does not guarantee the right to enjoy one's possessions in a pleasant environment', *Atanasov v. Bulgaria*, *supra* note 80, para. 83 (with further references).

[124] *Yakye Axa Indigenous Community v. Paraguay*, IACtHR, Judgment of 17 June 2005, paras 143–149.

[125] *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, Judgment of 29 March 2006, para. 140.

In the *Xákmok Kásek* case,[126] the respondent state's argument that it was unable to return the claimed lands to the indigenous community in question, because part of those lands had been declared a protected wooded area under private ownership, was categorically dismissed by the IACtHR. That declaration occurred with no consultation with the community and without taking its land claim into account. Therefore, the state was ordered to take all the measures necessary to ensure that the legislation containing the declaration 'will not be an obstacle for the return of the traditional lands'.[127] The Court explicitly endorsed the views expressed in this context by Rodolfo Stavenhagen, former UN Special Rapporteur on indigenous people and expert witness in the case at hand, who strongly criticized the resort to proclamations of nature reserves as a new and sophisticated means 'to obstruct the land claims of the original peoples . . . using legal mechanisms *and even invoking purposes as virtuous as the conservation of the environment*'.[128] In other words, the right to indigenous communal property can even go as far as to trump environmental protection measures, especially when they are not the result of a participatory process, but rather of decisions taken in bad faith in order to thwart legitimate indigenous claims. Most interestingly, in the same period of time, an analogous ruling was made by the ACommHPR when, in the *Endorois* case, it rejected the creation of game reserves and conservation zones in the Lake Bogoria area in Kenya as a valid justification for evicting the concerned indigenous community from its ancestral lands and eventually failing to return those lands to them.[129]

The relationship between state regulatory measures aimed at environmental protection and maintaining indigenous peoples' rights is certainly an emerging challenge. It requires different appraisals according to the specific facts of each particular case. For the time being, the preceding jurisprudence cannot be simplistically interpreted to the effect that indigenous property rights have become, in certain circumstances, inimical to the conservation of the environment. Instead, such jurisprudence shows the mindfulness, on the part of human rights courts and bodies, of the compatibility of indigenous

[126] *Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR, Judgment of 24 August 2010, paras 80–84 and 155–170.

[127] *Ibid*., operative para. 26. [128] *Ibid*., para. 169 (emphasis added).

[129] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *supra* note 1, paras 173, 212, 214–215, 235, and 249 (in addition to the right to property, the purported environmental objectives could not either excuse a violation of the rights to freedom of religion and to culture of the Endorois People). See D. Shelton, 'Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?', in E. de Wet and J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (2012) 206, at 215–220.

peoples' traditional lifestyles with respect for the environment and the rational utilization of natural resources. Thus, far from being a consequence of their nature, the illegality of environmental protection measures affecting indigenous lands flows from the lack of participation of the concerned communities in the relevant decision-making processes.

Moreover, it is clear that, according to the Inter-American organs, environmental deterioration occurring in indigenous territory becomes an issue only if and when it impinges upon indigenous peoples' rights. It cannot be said that an autonomous right to a healthy environment, geared to safeguarding nature as such, has emerged in the Inter-American system within the context of indigenous affairs. As the Court put it in the *Saramaka* case, the protection of natural resources located in indigenous peoples' lands allows their continuing traditional use by the communities concerned and is therefore *functional* for their 'very physical and cultural survival',[130] not an end in itself. At any rate, it is inappropriate to understand the environmentally relevant Inter-American jurisprudence on indigenous peoples in purely functional terms. Such an indirect or functional approach to environmental issues is a common feature of all the practice arising from human rights treaties which do not foresee an explicit and enforceable right to a healthy environment. However, a conspicuous difference exists between the (at least on paper) strictly individualistic stance to environmental cases emerging from the European system and the inherently collective approach to the rights of indigenous peoples, including their environmental aspects, firmly supported by the Inter-American organs. By benefiting communities of people at large as well as entire ecosystems, this collective approach is definitely more likely to take due account of the public interest dimension of environmental problems. This is further demonstrated by the objective fact that the pertinent decisions frequently deal with the conservation of natural resources and habitats of *global* importance, as opposed to regional or national importance, especially in terms of biodiversity and climate stability, as well as by the close link existing between the rights of indigenous peoples and certain basic principles and rules in the field of environmental law.

The landmark decisions in the *Saramaka* and *Sarayaku* cases provide compelling illustrations of the latter points. At issue in *Saramaka* were

[130] *Saramaka People v. Suriname*, *supra* note 115, para. 121. The Court further observed:

> [T]he aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States. (*Ibid.*)

See also *Maya Indigenous Communities of the Toledo District (Belize)*, *supra* note 122, paras 147–148.

various logging and gold mining concessions granted by the respondent state in the Upper Suriname River lands traditionally occupied by the community in question, which—as a result—had been left 'with a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems'.[131] On the other hand, *Sarayaku* marked the judicial apex of decades of environmental devastation brought about in the Amazon region of Ecuador by activities for the exploration and exploitation of oil resources. As duly recalled by the IACtHR, the local environment affected by the oil concessions at stake and inhabited by the Sarayakus 'is one of the most biologically diverse in the world',[132] while the Sarayakus themselves had proclaimed their lands as 'Sacred Territory and Heritage Site of Biodiversity and of the Ancestral Culture of the Kichwa Nation'.[133] Mischief resulting from the activities of the private concessionaire included the alteration of landscapes, indiscriminate felling of trees, extensive pollution of water resources, displacement of rare species of fauna, and the failure to remove hazardous material from the lands affected by those activities.[134]

In *Saramaka*, the Court conceptualized state authorizations of activities concerning the exploitation of natural resources found on ancestral lands in terms of a *restriction* on the right of indigenous peoples to communal property.[135] In addition to the ordinary tests for the justifiability of any restriction on property rights (legitimacy, necessity, and proportionality), it then affirmed that 'another crucial factor'[136] pertinent in cases involving natural resources on indigenous lands 'is whether the restriction amounts to a denial of [the community's] traditions and customs in a way that endangers the very survival of the group and of its members'.[137] In turn, the avoidance of the latter situation was found to be conditional on compliance with three essential safeguards, which the Court described in a key holding as follows:

> First, 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. Second, the State must guarantee that the Saramakas will receive a *reasonable benefit* from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically

[131] *Saramaka People v. Suriname*, *supra* note 113, para. 153.
[132] *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, para. 52.
[133] *Ibid*., para. 287. [134] *Ibid*., para. 218.
[135] *Saramaka People v. Suriname*, *supra* note 113, para. 127.
[136] *Ibid*., para. 128. [137] *Ibid*.

capable entities, with the State's supervision, perform a *prior environmental and social impact assessment*.[138]

Despite the Court's efforts to locate this ruling within well-known human rights doctrines, its innovative nature is undeniable. As a matter of fact, in subordinating the legality of exploitation activities involving natural resources on indigenous peoples' lands to the triple conditions of effective participation, benefit-sharing, and environmental and social impact assessment, the Court has created, or at least fleshed out, a strong link between the rights of indigenous peoples and crucial tenets of modern environmental law.

The *Saramaka* judgment confirms that indigenous peoples' participatory environmental rights are particularly extensive as compared to those prevailing in non-indigenous human rights cases. They translate into a state duty to consult with the communities concerned, with a view to reaching agreement, before implementing any development or investment plan affecting their lands. In addition, when major or large-scale projects are at stake, that duty becomes one of obtaining the free, prior, and informed *consent* of the communities.[139] In the *Sarayaku* case, the Court discussed at length the significance and various elements of this duty of consultation, which was even held to constitute 'a general principle of International Law'.[140]

The safeguard of a prior environmental and social impact assessment (ESIA) should also be seen in that context. An ESIA is not merely a one-sided scientific exercise for identifying and evaluating the likely environmental, cultural, and social consequences flowing from a given project. It is a process which requires the state to involve the communities concerned in decision-making, in the first place by informing them of any possible risks, 'including environmental and health risks',[141] arising from the proposed activity, so that the latter 'is accepted knowingly and voluntarily'.[142] The *Sarayaku* judgment shows why indigenous peoples' participatory rights are chiefly important when projects impacting upon their territories are envisaged. The Court recalled the inextricable and holistic bond of culture and nature according to the beliefs of indigenous groups.[143] In other words, the

[138] *Ibid.*, para. 129, emphases added. Given Suriname's non-compliance with any of the three safeguards when granting the disputed concessions, the Court declared a violation of the right to property, *ibid.*, para. 158. See also *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, para. 157.

[139] *Saramaka People v. Suriname*, *supra* note 113, para. 137.

[140] *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, para. 164.

[141] *Saramaka People v. Suriname*, *supra* note 113, para. 133. See also *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, paras 206, 208.

[142] *Saramaka People v. Suriname*, *supra* note 113, para. 133.

[143] *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, para. 219.

environment where indigenous peoples live is part of their cultural heritage. Hence, the failure to consult with the communities concerned before carrying out any activity entailing environmental impacts translates into a violation of their right to cultural identity,[144] which the Court regarded as a fundamental collective right of indigenous peoples[145] emerging from the Pandora's Box of the right to property in Article 21 ACHR.

With respect to the third safeguard of benefit-sharing, the Court, in *Saramaka*, stated that the right of indigenous peoples to participate in the benefits arising from the exploitation of resources found on their territory had to be regarded as just another form of compensation for the deprivation or restriction of property rights, in this case the indigenous communities' right to own and enjoy their lands and associated natural resources.[146] Such compensation ought to be reasonable and equitable.[147]

What is surprising in the Court's extensive review of pertinent legal materials and practice thought to corroborate the application of the foregoing safeguards is the near-absolute lack of references to international environmental law instruments and processes.[148] Regarding ESIAs, the Court has however clarified that they 'must conform to the relevant international standards and best practices'[149] and, in this context, it cited[150] the Akwé: Kon Guidelines adopted in 2004 by the Conference of the Parties to the

[144] *Ibid*., para. 220:

[T]he failure to consult the Sarayaku People affected their cultural identity, since there is no doubt that the . . . destruction of their cultural heritage implied a grave lack of respect for their social and cultural identity, their customs, traditions, worldview and way of life, which naturally caused great anguish, sadness and suffering among them.

In another part of the decision which is extremely relevant from an environmental viewpoint, Suriname was found in violation of the rights to life and personal integrity for its failure to remove undetonated explosives from the community's territory (some 1,400 kg of pentolite). Such explosives, meant to be used for oil prospecting purposes, were eventually left behind by the private concessionaire when 'fleeing' the sites concerned in the aftermath of the cancellation of the project, *ibid*., paras 244–249.

[145] *Ibid*., para. 217.

[146] *Saramaka People v. Suriname*, *supra* note 113, paras 138–139.

[147] *Ibid*., para. 140.

[148] In its discussion of the right to cultural identity, the *Sarayaku* judgment does include a reference to Principle 22 of the Rio Declaration, according to which:

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development (see *Kichwa Indigenous People of Sarayaku v. Ecuador*, *supra* note 115, para. 214).

[149] *Saramaka People (Interpretation)*, *supra* note 113, para. 41.

[150] *Ibid*., note 23. See also IACommHR, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, *supra* note 2, paras 245–267.

Convention on Biological Diversity (CBD).[151] By contrast, the CBD has never been mentioned in relation to the issues of access to genetic resources and associated indigenous traditional knowledge and the sharing of the benefits flowing from the utilization of such resources and knowledge. Of course, bio-prospecting activities involving animal and plant species located in indigenous territories and traditionally used by indigenous peoples represent a prominent example of development or exploration projects which bring to the fore the principles and safeguards endorsed by the IACtHR's jurisprudence.

Certainly, at the time of the *Saramaka* judgments, the only existing 'hard' law was a weak provision in the CBD calling upon state parties, 'as far possible and as appropriate',[152] to respect indigenous communities' traditional knowledge and promote its wider application with the 'approval and involvement'[153] of such communities, as well as to 'encourage'[154] the equitable sharing of the benefits arising from the use of such knowledge. Access and benefit-sharing in respect of genetic resources is now comprehensively addressed by the 2010 Nagoya Protocol to the CBD.[155] A comparison between the Nagoya Protocol's treatment of indigenous peoples' issues and the Inter-American jurisprudence is very interesting. It witnesses the far-reaching nature of that jurisprudence. The latter offers a decidedly higher degree of protection of indigenous communities' environmental human rights vis-à-vis a most relevant environmental legal instrument.[156] In this context, the IACtHR even makes use of notions, such as benefit-sharing, which are key to the biodiversity and other environmental regimes. It is sufficient here to recall that the Nagoya Protocol's provisions relating to

[151] COP-7, Kuala Lumpur, 9–20 February 2004, Decision VII/16, Annex. The full title of the soft law instrument in question is *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, available at <http://www.cbd.int/traditional/guidelines.shtml> (last visited 2 October 2014).

[152] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Art. 8(j).

[153] *Ibid.* [154] *Ibid.*

[155] Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya 29 October 2010, entered into force 12 October 2014), UN Doc. UNEP/CBD/COP/DEC/X/1.

[156] A more nuanced position is taken by A. Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol', in E. Morgera, M. Buck, and E. Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (2013) 53. See also International Law Association, Committee on the Rights of Indigenous Peoples, 'Final Report (2012)' at 22–23, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited 21 November 2014).

indigenous communities are never framed as unconditional or clear-cut obligations. Their operationalization is basically left to the state parties, and a host of savings clauses for domestic laws is envisaged. For instance, the duty of state parties to take all appropriate measures for ensuring that benefits flowing from the use of genetic resources that are held by indigenous communities are equitably shared with the latter only applies 'in accordance with domestic legislation regarding the established rights of these . . . communities over these genetic resources'.[157] Similarly, prior informed consent from indigenous communities for access to genetic resources is only required 'where they have the established right to grant access to such resources'.[158] More protective of indigenous claims and rights are the provisions about traditional knowledge, but even here, the key obligations imposing duties and mechanisms to track compliance by companies and users in general with the basic principles of the Protocol exclusively cover genetic resources as such.[159] The preceding shortcomings are only partially averted by a recital in the Protocol's preamble, according to which nothing in the Protocol itself 'shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities'.[160] On the one hand, it is safe to assume that the state parties to the ACHR will not be able to successfully rely on the Protocol's provisions in order to disapply the IACtHR *Saramaka* jurisprudence in the area of genetic resources and associated indigenous traditional knowledge. On the other hand, for states that are not parties to the ACHR or other treaties relevant to indigenous peoples' rights, the Protocol's regime constitutes a very prudent—if not regressive—message from the perspective of the evolution of customary law in the area of indigenous claims to natural resources.

7. Conclusion

At a time when environmentally related individual complaints filed before human rights courts and bodies are proliferating, increasing convergence in the pertinent jurisprudence of the two most significant regional courts is certainly desirable and in line with what has already occurred in respect of many other rights issues.

Two key factors appear particularly suited to perform a pivotal role in this context. The first is the willingness of the European and Inter-American courts

[157] Nagoya Protocol, *supra* note 153, Art. 5(2). [158] *Ibid.*, Art. 6(2).
[159] *Ibid.*, Art. 17. [160] *Ibid.*, preambular para. 27; see also *ibid.*, Art. 4.

to establish constant dialogues by examining and quoting the respective decisions, either endorsing them or explaining why the same solution cannot be applied in the system in question. So far, dialogues in this area have been exceptional, as the preceding analysis has made clear. A problematic point here is that the European Court is faced with an expanding Inter-American jurisprudence that vigorously upholds a collective/public interest-oriented approach to the adjudication of environmental complaints. Whereas the decisions about indigenous peoples' environmental rights might largely be regarded as an Inter-American peculiarity, the same cannot be said of the *Claude Reyes* case law, which firmly connects the right of the public to environmental information with the right to freedom of expression. To maintain credibility and consistency with modern environmental human rights law, the European Court would be better advised to follow the lead of its Inter-American sister.

The second, related factor likely to promote convergence is the evolution of the Aarhus Convention into an instrument which, despite its essentially regional pedigree, is increasingly regarded as setting standards of global relevance and, arguably, of an incipient customary nature. The on-going negotiations for a Latin American and Caribbean convention inspired by Principle 10 of the Rio Declaration and the Aarhus precedent point precisely in that direction.[161] The same applies to the several references to the Aarhus Convention contained in the case law of the European Court, as well as to the Inter-American Court's reliance on the Convention in the *Claude Reyes* case. However, while the latter decision is perfectly in line with the rationale and provisions of the Aarhus Convention, the European Court's quotations cannot conceal the fact that, in various crucial respects, the same Convention, despite having been ratified by almost all of the state parties to the ECHR, has not been reflected in its jurisprudence. Under this perspective, the procedural dimension of environmentally relevant ECHR rights is just a palliative for the Court's refusal to bolster the status of participatory rights enjoyed by the victims of environmental damage, including NGOs.

[161] See Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, Annex to the *note verbale* dated 27 June 2012 from the Permanent Mission of Chile to the United Nations addressed to the Secretary-General of the United Nations Conference on Sustainable Development, UN Doc. A/CONF.216/13 (25 July 2012).

4

The EU Courts and Access to Environmental Justice

Ludwig Krämer

1. Introduction

Access to the European Court of Justice (ECJ) in environmental matters is regulated by Article 263 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU),[1] which states that persons other than the addressee of an act may only bring an action when they are directly and individually concerned by the measure. The ECJ itself has given a very restrictive interpretation to this provision, with the consequence that individuals and non-governmental organizations (NGOs) rarely have access to the Court for environmental matters. The Court has not accepted that the defence of the *general* interest 'environment' might need some specific considerations, and has argued that any change in its jurisprudence would require a prior amendment of the EU Treaties.

This chapter traces the evolution of the Court's jurisprudence with regard to access to justice from 1963. It argues that the Court reinterpreted Article 263 TFEU in the past in order to expand access to the Court. This reveals that the Court's argumentation is based less on legal considerations, and more on political grounds.

The problem has recently become more acute because the EU has adhered to the Aarhus Convention on Access to Justice, Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention'). The Convention binds all EU institutions, including the Court of Justice of the European Union (CJEU). The Aarhus Convention Compliance Committee has found that the CJEU's interpretation of Article 263

[1] See Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115/47 (hereinafter 'TFEU').

TFEU, if it continues, is in breach of the EU's obligations under the Aarhus Convention. The CJEU will thus have to reconsider its interpretation of Article 263 TFEU.

2. The European Parliament's Right of Standing

The European Union was set up as the European Economic Community (EEC) in 1957. The primary objective of the Treaty Establishing the European Economic Community ('EEC Treaty') of 1957 was to ensure the realization, within the EEC, of the four freedoms—free circulation of goods, services, capital, and labour. It also provided for rules on access to the European Court of Justice for the EEC institutions[2] and the member states. With regard to the rights of private persons, Article 173 of the EEC Treaty[3] stated:

> The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Commission and the Council. For this purpose, it shall be competent to give judgments on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form or infringement of this Treaty or of any legal provision relating to its application or of abuse of power.
>
> Any natural or legal person may, under the same conditions, appeal against a decision addressed to him or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him. . . .

In 1986, the ECJ was asked to decide whether a measure by the European Parliament was capable of being attacked in Court. The Court found:

> An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system. Measures adopted by the European Parliament in the context of the EEC

[2] The European Parliament, called 'Assembly' in the Treaty Establishing the European Economic Community (25 March 1957) 298 UNTS 11 (hereinafter 'EEC Treaty'), did not have a right of access to the court.

[3] When the EEC Treaty was concluded, English was not one of the official languages of the Treaty. The French, German, Italian, and Dutch versions stated the phrase 'of direct and individual concern to him' at the end of the paragraph respectively as: 'la concernent directement et individuellement'; 'die sie unmittelbar und individuell betreffen'; 'la riguardano direttamente e individualmente'; and 'hem rechtstreeks en individueel raken'.

Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court.[4]

The Court thus concluded that an action under Article 173 EEC Treaty against measures adopted by the European Parliament was admissible.

In a 1990 case, it also allowed the European Parliament to appeal to the Court, 'provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement'.[5] The Court justified this decision by explaining that the institutional balance in the Treaty provisions required that the European Parliament was able to bring actions: '[O]bservance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.'[6]

Later amendments to the Treaty explicitly included the European Parliament in the provision of Article 173 EEC Treaty, the current Article 263 TFEU. However, the judgments mentioned above maintain their value. They show how the Court interpreted the provision of Article 173 EEC Treaty *contra legem.* Indeed, it was a bold step to argue that the maintenance of the institutional balance *required* allowing Parliament's active—or passive—standing. The opposite argument also has points in its favour: the EEC Treaty had very deliberately given a rather subordinate role to the European Parliament. It called it 'Assembly'; gave it only a consultative function in the legislative procedures (Articles 43(2) and 100 EEC Treaty); provided for the Parliament to have only one ordinary session per year; and for its members to be delegated by the national parliaments of the member states (Articles 137ff EEC Treaty). The ECJ, which could have declared actions by or against the European Parliament inadmissible, thus made a deliberate political choice by declaring such actions possible, relying mainly on what it understood to be the spirit and the system of the EEC Treaty.

[4] Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339, para. 25; see also Case 34/86, *Council v. European Parliament* [1986] ECR 2155, referring to EEC Treaty, *supra* note 2, Art. 164 stated: 'The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.'

[5] Case C-70/88, *European Parliament v. Council* [1990] ECR I-2041, para. 27.

[6] *Ibid.*, para. 22.

3. Environmental NGOs and Private Persons before the EU Courts

A. The *Plaumann* Jurisprudence

The Court had its first opportunity to discuss Article 173(2) of the EEC Treaty in 1963.[7] Plaumann, a German company that imported clementines, sought the annulment of a Commission decision that refused to authorize Germany to suspend customs duties for some imported products. The Court stated:

> [T]he second paragraph of Article 173 does allow an individual to bring an action against decisions addressed to 'another person' which are of direct and individual concern to the former, but this Article neither defines nor limits the scope of these words. The words and the natural meaning of this provision justify the broadest interpretation. Moreover provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively. Therefore, the Treaty being silent on the point, a limitation in this respect may not be presumed.
>
> . . .
>
> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[8]

Plaumann was, in the Court's judgment, affected by reason of its commercial activity—namely, the import of products—which could at any time be practised by any person; therefore, the company was not distinguished from other persons, and the action was held to be inadmissible.

The Court upheld this line of reasoning in its later judgments. In *Deutz and Geldermann v. Council*, the ECJ stated that, in order to be individually concerned, the legal position of persons 'must be affected because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom a measure is addressed'.[9] The possibility of determining more or less precisely the number and even the identity of persons to whom the measure applied was irrelevant, 'as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question'.[10]

[7] Case 25/62, *Plaumann v. Commission* [1963] ECR 95. [8] *Ibid.*, at 106–107.
[9] Case C-26/86, *Deutz and Geldermann v. Council* [1987] ECR I-941, para. 9.
[10] Case C-209/94P, *Buralux and others v. Council* [1996] ECR I-615, para. 24.

In *Greenpeace and others v. Commission* in 1995,[11] the General Court[12] had to deal with a true environmental case for the first time. Greenpeace and 16 local residents—farmers, fishermen, etc.—had asked for the annulment of a Commission decision granting Spain financial assistance from the European Regional Development Fund for the construction of two power plants on the Canary Islands. The Commission had taken its decision, even though the relevant EU legislation provided that measures financed by the funds 'shall be in keeping with the provisions of the Treaties . . . and with Community policies, including those concerning . . . environmental protection'.[13] EU legislation required that power plants had to be subject to an environmental impact assessment before authorization could be given.[14] However, the Spanish authorities had authorized the power plants without such impact assessment.

The applicants asked the General Court to adopt a liberal approach in relation to the question of standing as the issue in question was the protection of the environment, whilst the approach adopted by the Court in the past had concerned purely economic interests.

The General Court observed that the *Plaumann* case, and most of the other cases previously decided by the Court, concerned, in principle, economic interests. It held, though, that the essential criterion applied in earlier judgments, and in particular in the *Plaumann* decision, 'remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected'. As the General Court could not find any element, which differentiated the 16 applicants from any other local resident, farmer, fisherman, or tourist, their application was held to be inadmissible.

On appeal, the ECJ upheld the judgment of the General Court.[15] In accordance with its earlier case law, it was held that the decisive element against the admissibility of the application was that the measure under attack

[11] Case T-583/93, *Greenpeace and others v. Commission* [1995] ECR II-2205 (General Court, GC); see on this case also L. Krämer, *Casebook on EU Environmental Law* (2002), at 403.

[12] The name 'General Court' is used throughout in this contribution, also for judgments that were given before the name was actually attributed to the Court. Further, the various provisions of primary EU law will as far as possible be quoted by their present number in order to avoid confusion; where necessary, the present number has been included in addition to the original numbers.

[13] Council Regulation 2052/88 (EEC) of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ 1988 L 185/9, Art. 7.

[14] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

[15] Case C-321/95P, *Greenpeace and others v. Commission* [1998] ECR II-1651.

might affect 'generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision'.

Both the General Court and the ECJ omitted to discuss the fact that the Environmental Impact Assessment Directive[16] sharply differentiated in Article 6 between the 'public', which has to be informed of a project, and the 'public concerned', which has a *right* to participate in the impact assessment procedure and give its opinion on the project in question. The Directive requests member states' administrations to identify the 'public concerned' for each project. It was therefore simply not correct to state that the persons who were particularly affected by the power plant projects—for example, because they lived close to the project—could not be identified in advance and therefore be distinguished from other persons living on the Canary Islands. Thus at least those of the applicants who were part of the 'public concerned' should have been granted legal standing. The simple truth is that the General Court and the ECJ overlooked the existence of Directive 85/337 and its Article 6.[17]

In *Danielsson and others v. Commission*,[18] the applicants were a number of people from Tahiti who opposed nuclear tests planned by France for the Mururoa Islands in the Pacific Ocean. The Commission had to assess, under existing EU law, whether the tests were particularly dangerous experiments and whether they were liable to affect the territories of other Member States. The Commission concluded that this was not the case. The applicants were of the opinion that their health and safety was threatened by the tests and asked for interim relief, since they lived close to Mururoa.

The General Court concluded:

> The contested decision concerns the applicants only in their objective capacity as residents of Tahiti, in the same way as any other persons residing in Polynesia. . . . Even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to

[16] Directive 85/337, *supra* note 14; now replaced by Directive 2011/92 of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1.

[17] It is significant that Directive 85/337 was not referred to once in the General Court's judgment. It may be mentioned that in view of the amendments which Directive 85/337 underwent since 1998—though not with regard to the distinction between 'public' and 'public concerned'—Case T-583/93 *Greenpeace*, *supra* note 11, would be decided differently today. Indeed, under Article 11 of the present version of that Directive, members of the public concerned have right of access to a court, where their right of participation in the environmental impact assessment procedure was not respected, or where such an assessment was not made at all.

[18] Case T-219/95R, *Danielsson and others v. Commission* [1995] ECR II-3051 (GC).

distinguish them individually in the same way as a person to whom the contested decision is addressed. . . . [19]

The application was thus dismissed as inadmissible. This means that, as numerous people were threatened with regard to their fundamental right to health, each person was disqualified from being able to introduce court action. Ebbesson called this decision 'a tragicomic reading'.[20] The General Court made no other reference to the individual human right to health.

B. The *Union de Pequenos Agricultores* and *Jégo-Quéré* cases

The applicant in case *Union de Pequenos Agricultores* was a trade organization. It had asked for the annulment of a Council Regulation affecting several of its members, which it considered to be invalid. It argued that there was no legal remedy available at national level, as the regulation in question was directly applicable and member states took no implementing measures. The General Court considered these arguments insufficient to justify a departure from the interpretation of Article 173(2) EEC Treaty. It considered that the applicant and its members were not individually concerned by the regulation in question and dismissed the application.[21]

On appeal, the ECJ decided to hear the case in plenary session with a view to reconsidering its case law on the question of 'individual concern'. Advocate General Jacobs argued strongly in favour of a change in the Court's case view.[22] However, the ECJ confirmed its jurisprudence in the *Plaumann* case. As regards the individual right of access to justice, it stated:[23]

Individuals are . . . entitled to effective judicial protection of the rights which they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . By Article 173 and Article 184 [now Articles 263 and 277 TFEU] on the one hand, and by Article 177, [now Article 267 TFEU] on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review to the Community Courts . . . [u]nder that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid

[19] Ibid., paras 70–71.

[20] J. Ebbesson, 'European Community', in J. Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (2002) 49, at 83.

[21] Case T-173/98, *Union de Pequenos Agricultores* [1999] ECR II-3357 (GC).

[22] Advocate General (A-G) Jacobs, Opinion of 21 March 2002 in Case C-50/00P *Union de Pequenos Agricultores* [2002] ECR I-6677.

[23] Case C-50/00P, *Union de Pequenos Agricultores*, *supra* note 21.

down in the fourth paragraph of Article 173 of the Treaty [now Article 263(4) TFEU], directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid . . . to make a reference to the Court for a preliminary ruling on validity. . . . Thus, it is for the Member States to establish a system of legal remedies and procedures, which ensure respect for the right to effective judicial protection.

The final conclusion of the Court was quite unambiguous:

While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU Treaty [Treaty establishing the European Community (EC Treaty), now Article 48 TEU (Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community] to reform the system actually in force.[24]

This approach of the ECJ, placing the responsibility for a change of the status quo of Article 263(4) TFEU on the member states, eventually even by promoting an amendment of the EU Treaty, became even more visible in the *Union de Pequenos Agricultores* case.[25] This case is of interest because the ECJ had to decide on an appeal against a judgment of the General Court that had made a new interpretation of Article 263(4) TFEU.[26] The General Court had accepted the criticism put forward by Advocate General Jacobs against the Court's interpretation[27] and had stated that:

[T]here is no compelling reason to read into the notion of individual concern . . . a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. . . . In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.[28]

[24] *Ibid*., paras 40–45.
[25] Case C-263/02P, *Commission v. Jégo-Quéré* [2004] ECR I-3425.
[26] Case T-177/01, *Jégo-Quéré v. Commission* [2002] ECR II-02365 (GC).
[27] A-G Jacobs, *supra* note 22, para. 33.
[28] Case T-177/01, *Jégo-Quéré v. Commission*, *supra* note 27, paras. 49–51.

On appeal, however, the ECJ did not see sufficient reason to change its interpretation of Article 263(4) TFEU. Rather, it repeated its earlier interpretation of that provision, arguing that the Treaty had established a complete (that is, exhaustive) system of remedies, and that it was thus for the member states to establish a system of remedies and procedures which ensured respect for the right to effective judicial protection.

Of particular interest is the Court's reaction to the criticism of Advocate General Jacobs, who had argued that in the case of an EU regulation, where no national executive measures were taken, the only possibility the individual had was to contravene the EU regulation and defend himself, when brought before a court, with the argument that the relevant EU regulation was invalid. He concluded: 'Individuals clearly cannot be required to breach the law in order to gain access to justice.'[29] The ECJ declared:

> [T]he fact that [the] Regulation . . . applies directly, without intervention by the national authorities does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation . . . may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.[30]

It remains a mystery as to what the ECJ meant by the phrase that domestic law 'may permit' the adoption of measures which may then be challenged, or with the phrase that an individual may himself 'seek' 'a measure': as an EU regulation is directly applicable in all member states, there is no reason for a member state to become active and take measures, on its own initiative or on the request of an applicant. The ECJ appears to imply that an EU regulation requires implementing measures by the member states in order to ensure effective judicial protection—which means by all 27 member states! While this may sometimes be the case, it is clearly not so for all regulations. Therefore, the Court's understanding goes against the letter and the spirit of Article 288 TFEU, which declares a regulation to have general application, to be binding in its entirety and to be directly applicable in all member states.

[29] A-G Jacobs, *supra* note 22, para. 43.
[30] Case C-263/02 P, *Commission v. Jégo-Quéré*, *supra* note 25, para. 35.

Furthermore, the Court of Justice held that the principle of effective judicial protection:

> . . . cannot have the effect of setting aside the condition in question [i.e. the condition of direct and individual concern] expressly laid down in the Treaty . . . , [without going] . . . beyond the jurisdiction conferred by the Treaty on the Community Courts. . . . Such an interpretation [as made by the General Court] has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC [Article 263 TFEU].[31]

With the decisions in the *Unión de Pequenos Agricultores* and *Jégo-Quéré* cases, the Court of Justice effectively ended the discussion on access to justice of individual persons or non-governmental organizations at EU level. It continued to refer to the *Plaumann* jurisprudence[32] and repeated its argument that the fundamental right to effective judicial protection was no reason to interpret Article 263(4) TFEU differently. Further, it argued that Article 263(4) TFEU also applied in situations where the applicant had no possibility of bringing an action before the national courts.[33]

The General Court did not maintain its interpretation of Article 263(4) TFEU mentioned in the *Jégo-Quéré* case, but aligned itself completely with the opinion of the ECJ.[34] In *EEB and Stichting Natuur en Milieu v. Commission*, it had to discuss the applicants' argument that the Aarhus Convention[35] had created a new legal situation, as it provided for a right of access to justice of individual persons and environmental organizations. However, the General Court declared that, in the hierarchy of norms, an international agreement ranked below EU primary law. For this reason, the

[31] *Ibid.*, paras 36–38.

[32] Case C-444/08P, *Azores v. Council* [2009] ECR I-200, para. 36; Case C-355/08P, *WWF-UK v. Council* [2009] ECR I-73, para. 41; Case C-362/08P, *Sahlstedt and others v. Commission* [2009] ECR I-2903, para. 26.

[33] Case C-444/08P, *Azores v. Council*, *supra* note 32, para. 71.

[34] Reference to the Plaumann-doctrine: Case T-16/04, *Arcelor v. European Parliament and Council* [2010] ECR II-211 (GC), para. 99; Case T-403/07, *Union nationale de l'apiculture v. Commission* [2008] ECR II-239; Case T-241/07, *Buzzi v. Commission* [2008] ECR II-234, para. 19; Case T-532/08, *Norilsk Nickel v. Commission* [2010] ECR II-3959, para. 97; Case T-18/10, *Inuit Tairiit Kanatami and others v. European Parliament and Council* [2011] ECR II-05599, para. 41; Case T-291/04, *Enviro Tech v. Commission* [2011] ECR II-08281, para. 102. Reference to the judgments in *Jégo-Quéré*, *supra* note 26, and *Union de Pequenos Agricultores, supra* note 21; Case T-16/04, *Arcelor*, para. 103; Case T-94/04, *EEB v. Commission* [2005] ECR II-4919, para. 48; Case T-37/04, *Azores v. Council* [2008] ECR II-103, para. 92.

[35] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (hereinafter 'Aarhus Convention').

Aarhus Convention could not, in law, influence the interpretation of Article 263(4) TFEU.[36]

In *WWF-UK v. Council*, the General Court once more repeated the *Plaumann* doctrine and found, furthermore, that the capacity of WWF, having the statutory purpose to protect the environment, was not different from 'any other person in the same situation. As is apparent from the case law, that capacity is not by itself sufficient to establish that the applicant is individually concerned by the contested regulation'.[37]

C. The Requirement of 'Direct Concern'

The requirement of Article 263(4) TFEU that a natural or legal person who is not the addressee of a measure must be *directly* concerned by the measure was the subject of much less discussion in the past, as both the ECJ and the General Court, when examining the admissibility of an action under Article 263(4) TFEU, laid the main emphasis on *individual* concern. It found that a direct concern exists when the measure in question itself, and not another supplementary measure by an EU institution or a member state, impairs the legal position of the person concerned.[38] When the measure of the EU institution is addressed to the member states, which is frequently the case, it may not leave any discretion to the member states, but obliges the member states to automatically execute the EU measure.[39] Where such a discretion exists, it is not the EU measure but the subsequent national measure that is of 'direct' concern and which may thus be attacked in court.

The Lisbon Treaties, which entered into force at the end of 2009, amended Article 263(4) TFEU. It now reads as follows:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

[36] Joined Cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu* [2005] ECR II-4945 (GC), para. 71, referring to the decision in Case C-240/90, *Germany v. Commission* [1992] ECR I-5383, para. 42.

[37] Case T-91/07, *WWF-UK v. Council* [2008] ECR II-81 (GC), para. 86.

[38] Case 113/77, *Toyo Bearing v. Council* [1979] ECR 1185; Case 132/77, *Société pour l'exportation de sucre* [1978] ECR 1061; Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutschland* [1994] ECR I-833.

[39] An example is the decision by the EU Commission under Directive 92/43 of 21 May 1992 on the conservation of habitats and of wild fauna and flora, 1992 OJ L 206/7, to include a specific habitat in the list of the EU network 'Natura 2000' of protected habitats. The member state in question is then obliged to designate this area as a special area of conservation.

The last part of this phrase constitutes an innovation, as there is no longer a requirement to be individually concerned when the measure taken by the EU institution is:

- a regulatory act;
- which does not entail implementing measures;
- which is of direct concern to a person.

No substantive jurisprudence has yet been delivered on that provision which would significantly change the jurisprudence of the Court of Justice and of the General Court.[40]

D. Summary

The jurisdiction of the Court of Justice and of the General Court with regard to access to environmental justice may be summarized as follows:

(i) Access to justice to the EU Courts under Article 263(4) TFEU is only possible when the applicant is either the addressee of the measure taken by the EU institution or when the applicant is directly and individually concerned by the measure.

(ii) An individual concern only exists when the applicant is affected by the measure in a way that distinguishes that person from all other persons and concerns him or her in a way that is similar to that of an addressee. It is not sufficient that the concern affects a specific group of persons which is identifiable or the number of which is known.

(iii) There is a human right to effective judicial protection that is also recognized by the EU. However, the EU Treaties have set up a complete system of legal remedies and procedures designed to ensure judicial protection by the EU Courts. The fact that a human right—the right to health or the right to own property—is impaired by the measure is no reason to set aside the existing system on access to justice and to reinterpret the provision in a different way so that a person must be individually affected by a measure in order to have legal standing.

[40] However, it is noted that in Cases T-338/08, *Stichting Natuur en Milieu and others v. Commission*, CJEU, Judgment of 14 June 2012 (not yet published), and T-396/09, *Vereniging Milieudefensie and others v. Commission*, CJEU, Judgment of 14 June 2012 (not yet published), the General Court discussed the question of what constitutes a regulatory act in detail. These judgments were appealed. These cases will not be discussed here.

(iv) The fact that an applicant intends to protect the general interest in having a clean and unimpaired environment is not sufficient to make him or her individually concerned.

(v) The EU Courts cannot change the interpretation of Article 263(4) TFEU without exceeding their powers. It would be up to the Member States to amend the Treaties, if they wished to reach another understanding of Article 263(4) TFEU. This obligation also follows from the principle of 'sincere cooperation', laid down in Article 4 TEU.

(vi) The Aarhus Convention is an international agreement. It ranks higher than secondary EU legislation, but ranks lower than primary EU law. For this reason, the Aarhus Convention cannot be used as a vehicle to amend the interpretation of Article 263(4) TFEU.

(vii) There is a principle of effective judicial protection in EU law. This principle requires that the national judge must do everything possible to make Article 9(3) of the Aarhus Convention operational and allow legal standing for persons in environmental matters.

(viii) An environmental organization has no rights beyond that of any other natural or legal person.

4. Assessment of the Courts' Interpretation of Article 263 TFEU

A. The 'Complete System' of Judicial Protection Set Up by the EU Treaties

The ECJ has argued in a number of cases that the system of access to justice as set up by the EU Treaties was a 'complete system' which consisted of the possibility:

- of addressing the EU Court of Justice under the conditions of Article 263 TFEU;
- of addressing national courts;
- of national courts being able to ask for a preliminary judgment by the EU Court of Justice (Article 267(2) TFEU).

The ECJ argued that it was not in its competence to modify this system and to grant access to the EU courts in situations other than those laid down in Article 263 TFEU.

However, Advocate General Jacobs rightly pointed out that the Court has taken a much more 'generous and dynamic interpretation of the Treaty, or

even a position contrary to the text'[41] of Article 263(4) TFEU. Jacobs quoted judgments where the Court did not limit itself to the interpretation of directives, regulations or decisions of an EU institution but went further to examine Council proceedings,[42] as well as where the Court had also examined infringement of a rule of the European Atomic Energy Treaty or the Treaty on the Coal and Steel Community.[43]

Looking at the case law by which the Court granted access to the EU courts to the European Parliament,[44] it must be stated that in those decisions the Court did not consider whether the system set up by Article 263 TFEU[45] was 'complete'. Rather, the Court considered that other principles and considerations laid down in the EU Treaties enabled and even required it to give active and passive standing to the European Parliament. The Court found that the need to maintain an institutional balance between the EU institutions was the decisive argument.

Of course, the Court could have argued that the EEC Treaty of 1957 had set up a careful balance between the different institutions, and had deliberately left the European Parliament in a subordinate position. It could also have argued that access to justice, according to the authors of the EEC Treaty, was provided only for the most relevant institutions and bodies of the EEC, but not for the European Investment Bank, the Economic and Social Committee, or the European Parliament. Further, it could have argued that a change in this institutional balance would require a decision by the member states, but that the ECJ would exceed its powers if it gave standing to the European Parliament. Indeed, it cannot be seriously suggested that the lack of standing of the European Parliament was a 'gap' in the Treaty provisions; rather, this was a quite deliberate decision by the authors of the EEC Treaty, which had given only very limited powers to the 'Assembly'—which they had not even called the 'Parliament'.

These arguments do not signify that I disagree with the Court's findings in the cases concerning the European Parliament. They only mean that the arguments used by the Court of Justice in the case of standing for individual persons or environmental organizations are ideological rather than being based on sound legal grounds.

One might argue that the importance of the European Parliament and the question of its standing in EU courts are much greater than the importance of

[41] A-G Jacobs, *supra* note 22, para. 71.

[42] Case 22/70, *Commission v. Council* [1971] ECR 263, paras 39ff.

[43] Case C-62/88, *Greece v. Council* [1990] ECR I-1527, para. 8.

[44] See *supra* Section 1.

[45] At the time of the Court taking its decisions, the relevant provision was EEC Treaty, *supra* note 2, Art. 173.

individuals or NGOs having access to EU courts in environmental matters. However, it is also arguable whether such reasoning should rather have been directed to a solution pursuant to which the Court of Justice should have refused access to the EU courts by the European Parliament, on the basis that such an important question might have been better decided by the drafters of the EEC Treaty than by the Court.

In any case, in addition to the jurisprudence of the European courts, the environment has also been the subject of important changes in the treaty law of the European Union. The EEC Treaty of 1957 did not even countenance the terms 'environment', 'environmental policy', or 'environmental protection'. This did not prevent the ECJ in 1985 from recognizing, without any basis for such a statement in the EEC Treaty, that the protection of the environment was one of the essential objectives of the EEC.[46]

In 1987, Title VII was introduced into the Treaty, which provided for EU 'action' in the field of the environment, whereby measures had to be decided unanimously by the Council. However, Article 2 of the Treaty, which described the objectives of the European Community, did not mention the environment.

In 1993, the Maastricht Treaty on European Union also amended Article 130r (now Article 191 TFEU). The new version provided for an EC environmental *policy*; some measures at EU level were to be taken by majority decisions, with the co-decision of the European Parliament. Article 2 of the EC Treaty gave the EC the task to 'promote throughout the Community a harmonious and balanced development, sustainable and non-inflationary growth respecting the environment, . . . '.

Article 2 of the Amsterdam Treaty of 1999 stated that the Union had the task 'to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development'. Article 2 of the EC Treaty was also amended, and assigned to the EC the task:

> . . . to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life. . . .

[46] Case C-240/83, *ADBHU* [1985] ECR 531, paras 12 and 13:

> [T]he principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community. The directive [Directive 75/439 on waste oils which was repealed in 2008] must be seen in the perspective of environmental protection which is one of the Community's essential objectives.

Majority decision-making in EU environmental matters thus became the rule. The integration requirement was transplanted from Article 174 EC Treaty (now Article 191 TFEU) to Article 6 (the present Article 11 TFEU).

The Lisbon Treaties strengthened the function of the environment in the overall Union system by providing, in Article 3(3) TEU:

> The Union . . . shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.

Article 21(2)(f) TEU fixed the purpose of the Union to 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. Article 11 TFEU mirrored these provisions by declaring: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.'[47]

The content of all these provisions appears clear: The objective of sustainable development which the EU tries to achieve within the European Union, and at the global level, cannot be reached without adequate protection of the environment and consideration of environmental requirements in *all* other EU policies.

This evolution and the present status of the protection of the environment clarify the increasing importance that the drafters of the EU Treaties attached and continue to attach to the protection of the environment. The present role of the environment is fundamentally different from that of 1957. Thus even though the Court correctly observed that Article 263(4) TFEU had not been amended in its substance since 1957, the question still needs to be asked whether or not a new interpretation of that provision was necessary in order to take account of the increased importance of the environment in the balance of EU substantive law and policy and, more particularly, of the transition of the European Economic Community to a European Union, where, pursuant to the principle of subsidiarity, all decisions are to be taken as closely as possible to the citizen. Such a provision as Article 1 TEU would have been unthinkable

[47] See also a very similar provision in the Charter of Fundamental Rights of the European Union, OJ 2007 C 303/1, Art. 37:

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

in the EEC Treaty of 1957; it demonstrates the increased importance of the environment in the balance of EU substantive law.

Thus, in the same way that the Court considered that the need to maintain an institutional balance between the European Parliament, the Council, and the Commission allowed or required it to grant standing to the European Parliament, it could come to the conclusion that the balance of substantive law between the need to protect the environment and the economic-oriented provisions of the EU Treaties (i.e., free circulation of goods, free transport, free competition, free provision of services) allowed or required an interpretation of Article 263(4) TFEU for decisions to be made on the balance between these two policy objectives, and not to leave this balancing decision to the EU Commission, the Council, and the European Parliament. There is no rule or legal principle in EU law that prevents the Court of Justice from deciding in this sense, provided that it has the will. It is clearly not correct to state that the Court had no competence to do so when, as mentioned at the beginning of this section, the Court has assumed such a competence in other situations.

B. Preliminary Judgment under Article 267 TFEU

As indicated in the previous section, the ECJ has argued in its judgments that the procedures before national courts and the possibility for national courts to ask the ECJ for a preliminary ruling would ensure complete protection of the interests of persons. Access to national courts in environmental matters will not be discussed here except to say that the national provisions on access to justice are very diverse, reflecting different legal cultures and different perceptions by national judges on the role, function, and importance of the environment in the 21st century.[48]

As regards the procedure according to Article 267 TFEU, numerous authors have drawn attention to the fact that there is quite a difference in an approach that grants direct access to the EU courts and an approach that provides for a preliminary judgment by the EU Court. The main differences are:

- The object of litigation before a national court and the European Court of Justice are different. In the *Greenpeace* case, for example, the question

[48] See M. Cappelletti (ed.), *Access to Justice and the Welfare State* (1981); Ebbesson (ed.), *supra* note 20; A. Epiney and K. Sollberger *et al.*, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht* (2002); O. Zetterquist: 'Access to Justice in the EU—Knocking on Heaven's Door?', in N. Wahl and P. Cramer (eds), *Swedish Studies in European Law* (2006) 257; N. de Sadeleer, G. Roller, and M. Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (2005).

before the national court concerned the validity of the national permit for the power plants, whereas the case before the EU courts concerned the question whether the Commission decision to finance the construction was validly given. Whether the national procedure succeeds also depends on a number of procedural provisions (standing, representation, delays, etc.) that might affect the outcome of the procedure and lead to a formal decision by the national court or to a refusal to submit a preliminary question to the EU courts. For example, in German law, the breach of an individual right must be argued in order to have access to courts.[49]

- National courts are not competent to decide on the validity of an act taken by an EU institution. It is therefore highly arguable whether they should be addressed by a person who wishes to obtain a declaration that a specific EU measure is not valid. The principle of 'efficiency of justice', invoked so often by the Court of Justice, pleads in favour of *national* measures being attacked before *national* courts, and *EU* measures being attacked before *EU* courts.
- National courts may be reluctant to submit a question for preliminary ruling to the EU Court of Justice. In Denmark, for example, consultation first takes place with the government, which then gives advice to the national judge as to whether the case should be submitted. Only then can a case be submitted. Greek, Portuguese, Spanish, and Irish judges did not submit any environmental cases for a preliminary ruling to the EU Court for a very long time. By mid-2013, one environmental case had been submitted by a Spanish court and one by an Irish court, and none by any court of the two other countries. In 2011/2012, two British courts found that the United Kingdom was in breach with regard to its obligations under EU air pollution requirements, but refused to impose any remediation measures on the United Kingdom Government, stating that it was for the EU institutions to enforce the relevant air pollution directive; they did not accept the request for a preliminary ruling.[50]
- National courts might err on the question whether they may or must submit a question to the EU Court; it is they who formulate the question, without the applicant having any possibility of decisively influencing the content of the question asked.

[49] See Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure), Art. 42(2).

[50] See *Case R (ClientEarth) v. Secretary of State for Environment, Food and Rural Affairs* [2011] All ER (D) 115 (Dec) (QB); *Case R (ClientEarth) v. Secretary of State for Environment, Food and Rural Affairs* [2012] EWCA Civ. 897. The case is under appeal in the Supreme Court of the United Kingdom.

It was for these reasons that the Aarhus Convention Compliance Committee concluded that '[the system set up by Article 267 TFEU] cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies'.[51]

As already mentioned, the Court of Justice's argument, according to which domestic law would always allow an applicant to indirectly challenge the EU measure in question and thus obtain access to the Article 267 procedure, remains mysterious, and therefore a mere hypothetical possibility. When, for example, Regulation 1829/2003 authorized a genetically modified plant, that decision became directly applicable throughout the EU, without any implementing measure having to be taken at national level. It is impossible to see how domestic law would generate supplementary decisions which then could be tackled in the national court and lead to a request for a preliminary ruling. These examples could be multiplied.

C. The Principle of Sincere Cooperation

The Court of Justice also uses the principle of 'sincere cooperation' laid down in Article 4(3) TEU as a basis for its argument that it would be up to the Member States to improve the present situation. This principle reads: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.' The Article then continues:

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives.

These provisions, which begin by mentioning the mutual obligations that flow from the principle, show that it is all too easy, when the Court of Justice bases arguments on this principle, to establish obligations for member states only. With the same justification, one might argue that it follows from this principle that access to justice against a measure taken by an EU institution

[51] Aarhus Convention Compliance Committee, 'Findings and Recommendations with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union' (adopted 14 April 2011), para. 90. See also P. Pagh-Rasmussen, 'Kan groenne organisationer handhave miljoekrav? Om Aarhus-konventionen om borgernes miljoerettigheder', 10 *Tidsskrift for Miljø* (2008) 496.

should in the first instance be granted by the procedures of the EU and not by the procedures adopted by member states.

Moreover, 'sincere cooperation' is a principle that concerns relations between the EU institutions and the EU member states. It appears more than doubtful that an amendment of the EU Treaties could be considered to be an obligation that flows from the duty of sincere cooperation. Rather, the cooperation should occur within the existing framework of the EU Treaties.

As far as individual member states are concerned, it again appears questionable whether the principle of sincere cooperation can be understood in a way that the majority or even all member states would be obliged to amend their national provisions on access to justice in order to allow courts to put, if there be a need, a preliminary question to the Court of Justice. It should not be forgotten that the decision in question was taken by an EU institution. Clearly, the legislation in the 27 different member states and their respective legal cultures would lead to considerable procedural and substantive differences in effective judicial protection concerning environmental matters. This makes it more logical to suggest, in the name of the principle of sincere cooperation, that access be granted to *European* courts against a measure taken by a *European* institution.

As a result, the principle of sincere cooperation cannot be taken to allow the Court of Justice to conclude that it is the EU member states that are responsible for adopting provisions that allow access to justice against an EU decision.

D. The New Wording of Article 263(4) TFEU and the Environment

According to the new wording of Article 263(4) TFEU, it is sufficient for an application to the Court to argue that the applicant is directly concerned by an EU measure, provided that the EU measure is a regulatory act and not subject to implementation measures by the EU institutions or by the EU member states. The *individual* concern which had such importance in numerous cases decided by the EU courts need no longer exist; one might truly attribute the merit of having inspired this new provision in Article 263(4) TFEU to Advocate General Jacobs,[52] whose submissions demonstrated a gap in the effectiveness of EU jurisprudence. No doubt, the future will show to what extent the new formulation will allow easier access to the EU courts in environmental matters.

[52] A-G Jacobs, *supra* note 22.

However, the fundamental problem remains: How can decisions by EU institutions, that have the effect of impairing the environment, be attacked before EU courts by private persons or by environmental organizations? The environment, as found by the ECJ,[53] is the subject of *general* interest and therefore is not typically seen as merely an *individual* interest. A decision that impairs the environment is thus a measure that affects the current generation as well as future generations concerning their right to enjoy a clean and healthy environment.

The execution and implementation of general EU legislation, such as the authorizing of a pesticide, of a chemical substance or of a biocidal product that is extremely dangerous for the environment, is granted through a decision of the EU Commission. Sometimes such decisions are addressed to an applicant and sometimes they are of a general nature and do not have a specific addressee. The question then is whether an *individual* person or an environmental organization may argue that they are *directly* concerned.

This raises basic and important questions of principle. The protection of the environment is in the general interest of the EU. However, the EU institutions often take very important and far-reaching decisions that affect the environment. These include such matters as authorizing or restricting the release into the environment of substances or products, granting money for the realization of infrastructure projects, monitoring the application of EU environmental legislation, providing for administrative structures to be set up or amended, and fixing targets for limiting emissions into the environment. Over the last 50 years, the number of EU decisions in all areas has dramatically increased. Examples are found in the sectors of climate change, energy, trans-European networks, fisheries policy, nature conservation issues, water and waste management, product permits, transport, and regional policy. There is little doubt that the institutions have often made serious efforts to strike a fair balance between economic interests (in the broad sense) and environmental concerns.

However, the institutional balance of the EU Treaties provides that it is the Court of Justice that decides whether this balance has been struck correctly. The EU courts were established to 'ensure that in the interpretation and application of the Treaties the law is observed' (Article 19 TEU). This includes questions such as whether the EU policy really aims at a high level of environmental protection in all sectors, whether the environmental requirements are indeed integrated into the elaboration and implementation

[53] Case 240/83, *ADBHU*, *supra* note 46.

of all other EU policies, and whether the EU, as a whole or within its sectoral policies of transport, agriculture or fisheries, is indeed progressing to the achievement of sustainable development.

Seen from this perspective, there are indeed good reasons to interpret Article 263(4) TFEU in a sense that allows the general interest category 'environment' to more frequently be the subject of appeal to the EU Courts. The reluctance of the Courts to accede to such considerations is probably also due to the fear that the number of cases submitted to the Courts would considerably increase and constitute an additional burden for the judges. It might also be questioned why it is only the environment that should be the beneficiary of a more liberal interpretation of Article 263(4) TFEU. There are indeed other general interest categories that might also need better protection by the EU Courts; examples are the interests of asylum seekers, immigrants, persons impaired in their human rights, some categories of disadvantaged workers, and other socially underprivileged groups.

All these arguments are reasonable. However, as far as the rights of people are concerned, it must not be overlooked that, pursuant to Article 6(2) TEU, the EU has already decided to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, as far as individual people's rights are concerned, it should be possible to find remedies in EU law. In contrast, the situation for the protection of the environment remains unsatisfactory.

E. The Aarhus Convention and the Courts' Dilemma

The next question is whether the Aarhus Convention can contribute to finding an appropriate solution for access to EU justice in environmental matters.[54]

All 27 EU member states have ratified the Aarhus Convention. The EU itself adhered to the Convention in 2005.[55] According to Article 216(2) TFEU, the Convention is therefore binding on the EU member states *and*

[54] See T. Crossen and V. Niessen, 'NGO Standing in the European Court of Justice—Does the Aarhus Regulation Open the Door?', 16 *Review of European Community and International Environmental Law* (2007) 332; M. Pallemaerts, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention* (2009); M. Pallemaerts (ed.), *Aarhus at Ten: Interactions and Tensions between International Law and EU Environmental Law* (2011); E. Rehbinder, 'Die Aarhus-Rechtsprechung des Europäischen Gerichtshofs und die Verbandsklage gegen Rechtsakte der Europäischen Union', 10 *Zeitschrift für Europäisches Umwelt- und Planungsrecht* (2012) 23.

[55] Council Decision 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 2005 L 124/1.

EU institutions. Article 9 of the Convention deals with access to justice. Of particular interest in the context of this chapter is Article 9, paragraphs (3) and (4) which read as follows:

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

The Court of Justice has ruled on several occasions on the Aarhus Convention, which it considers to 'form an integral part of the legal order of the European Union'.[56] It held that Article 9(3) of the Convention was part of EU law, but that it did not have direct effect.[57] It then continued:

[T]hose provisions [of Article 9(3) of the Aarhus Convention] although drafted in broad terms, are intended to ensure effective environmental protection . . . if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law. It follows that . . . it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organization . . . to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law . . . .[58]

[56] Case C-240/09, *Lesoochranárske zoskupenie* [2011] ECR I-1255, para. 30.

[57] Contrary to the Court, I am of the opinion that Art. 9(3) is sufficiently precise and unconditional. The words 'if any' in that provision give some discretion to Member States to introduce restrictions to access; however, no Member State is obliged to do so. The Court appears to assume that Member States would have an obligation to introduce restrictions.

[58] Case C-240/09, *Lesoochranárske zoskupenie*, *supra* note 56, paras 46 and 49–52.

In other cases, the ECJ even went so far as to declare that Article 9 of the Aarhus Convention required that legislative acts adopted by a member state could also form the object of judicial control, even where the national law did not normally allow appeals concerning legislative acts; otherwise, according to the ECJ, 'Article 9 of the Aarhus Convention . . . would lose all effectiveness'.[59]

It follows from these judgments that the Court of Justice, when looking at the interpretation and application of Article 9 of the Aarhus Convention by a national court, attached great importance to the effectiveness of access to justice. National rules must be interpreted to the fullest extent possible in a way that allows access to justice, and when the national law does not provide for a judicial remedy—as in the case of judicial appeal against a legislative act—the national law must be set aside.

There is no corresponding jurisdiction of the Court of Justice with regard to access to the EU courts. Here, the statement of the General Court applies, according to which an international agreement ratified by the EU ranks lower than EU primary law and cannot, therefore, amend the interpretation of Article 263(4) TFEU.[60]

However, this reasoning leads to a dilemma: according to Article 216(2) TFEU, the Aarhus Convention is binding on EU institutions. The CJEU and the General Court are EU institutions and are therefore bound by the provisions of Article 9 of the Aarhus Convention. This means in practice that they are, exactly like a national court, obliged to give, to the fullest extent possible, an interpretation of Article 263(4) TFEU which grants access to the EU courts in environmental matters. Otherwise, to use the Court of Justice's own words, Article 9 would lose all its effectiveness. In the same way as national courts, the EU Courts are not allowed, without breaching EU law, to make it impossible or excessively difficult in practice to exercise rights conferred by Article 9 of the Aarhus Convention—which is part of EU law.

It is this obligation of the two EU Courts to reconsider the interpretation of Article 263(4) TFEU that the Aarhus Convention Compliance Committee had in mind when it stated that the EU, without such a reinterpretation of Article 263(4), would be in breach of its obligations under the Aarhus Convention.[61]

[59] Joined Cases C-128/09 to C-131/09, C-134/09, and C-135/09, *Boxus and others* [2011] ECR I-09711, para. 53; Joined Cases C-177/09–179/09, *Le Poumon vert de La Hulpe and others* [2011] ECR I-00173; Case C-182/10, *Solvay and others*, CJEU, Judgment of 16 February 2012 (not yet published). See also, as regards the need to ensure the effectiveness of the Aarhus Convention, *supra* note 35, Art. 9: Case C-416/10, *Krizan and others*, CJEU, Judgment of 15 January 2013 (not yet published), para. 87.

[60] See text accompanying note 36 *supra*.

[61] See Aarhus Convention Compliance Committee, *supra* note 51, para. 88.

In light of this result, it cannot be argued that the obligation for national courts flows from the principle of sincere cooperation as laid down in Article 4 TEU. Indeed, as indicated above, this principle contains obligations not only for EU member states but also for the EU institutions. As both the member states and the EU are parties to the Aarhus Convention, their obligations with regard to that Convention are the same.

How the CJEU intends to reinterpret Article 263(4) TFEU, both in light of the Aarhus Convention as well as to avoid a second statement by the Aarhus Convention Compliance Committee that the EU is breaching its obligations under that Convention, is a matter for the Court itself. It is understandable that the Court wishes to avoid a situation where each individual person could claim to be directly (and individually) affected by an EU measure on the environment, as such a possibility would come close to an *actio popularis*, which is not contemplated by the Aarhus Convention.

F. A Way Forward: Standing for Environmental NGOs

One way forward may be to follow the example of the law of numerous EU member states—an approach which was also partly taken up by the Aarhus Convention itself. This approach would involve considering environmental organizations as being directly (and individually) concerned by environment-related EU measures and thus granting them access to the EU Courts. Provisions could be developed by the Courts to give standing only to those environmental organizations that comply with specified criteria. One set of criteria could be that laid down in Article 11 of Regulation 1367/2006[62] (in summary), namely:

- it is an independent non-profit-making legal person;
- its primary stated objective is the promotion of environmental protection in the context of environmental law;
- it has existed for more than two years and is actively pursuing the objective of environmental protection
- the subject matter which is brought before the Courts is covered by its objectives and activities.

Another, less complex provision could be taken from Dutch law, which considers that the interests of bodies such as environmental organizations 'are deemed to include the general and collective interests which they

[62] Regulation 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006 L 264/13.

specially represent in accordance with their objects and as evidenced by their actual activities'.[63]

The advantage of such a solution is the possibility of seeing the EU Courts decide on more cases where a balance between environmental and other interests has to be struck. The risk that such a solution would lead to an inflationary number of environmental cases brought before the courts is not confirmed by empirical research.[64] Even in member states where an *actio popularis* in environmental matters exists (Portugal and, to some extent, Spain, the United Kingdom, and the Netherlands) high numbers of court cases have not been noted in the past. It can safely be argued that the threat of inflation in the number of court cases is a myth, perhaps launched or supported by vested interests.[65]

There might be other possible adequate solutions to the problem of access to the EU courts in environmental matters. The decisive issue is not *how* a corresponding provision is drafted, but the very fact that it *is* drafted. Indeed, the practice of 50 years of jurisprudence by the Court of Justice shows that the *Plaumann* formula and the general interpretation of the provision of 'direct and individual concern' of Article 263(4) TFEU has had as a consequence that not one single action by an environmental organization has been considered admissible. In practice, thus, this EU jurisprudence has made it impossible, or at best extremely difficult, to bring environmental matters to the EU courts. The Court of Justice had held that, under the Aarhus Convention, national law is not allowed to lead to such an outcome. The same should apply, it is submitted, to EU law. The fact that the EU Courts impose different obligations on national courts in the interpretation of Article 9(3) of the Aarhus Convention than they impose on themselves is legally not acceptable.

5. Conclusion

Article 263(4) TFEU allows individual persons and environmental organizations access to the EU courts when they are individually and directly concerned by a measure which is not addressed to them. Since the end of 2009, access has also been possible in situations where a person is directly concerned by a regulatory measure that does not require implementation measures. In substance, these provisions have not changed since 1957, although the condition of the environment and the perceived need for its protection

[63] See Dutch General Administrative Law Act, Art. 1:2/3.
[64] See, in particular, de Sadeleer *et al.*, *supra* note 48. [65] *Ibid.*, at 168.

have changed very significantly in the meantime, with this need also being reflected in the provisions of the subsequently drafted EU Treaties.

The EU courts have interpreted the provisions of individual concern and direct concern very restrictively, with the consequence that not a single case has been brought by an environmental organization to the courts over the past five decades, and that a case attacking a decision by one of the EU institutions was declared admissible. The Courts held that individual rights to health or to property were not capable of modifying the EU provisions on access to justice. They invoked a number of reasons for their restrictive interpretation that are not convincing, are inconsistent with decisions in other cases and appear to be more of a political than of a legal nature.

The Aarhus Convention has created a new situation. The Convention was ratified by the EU and is therefore, according to Article 216(2) TFEU, binding on the EU institutions; these include the two EU courts. The Court of Justice held, in cases involving national law and national courts, that the judges had to do everything possible to grant individuals or environmental organizations access to the courts in environmental matters. The court practice which made it impossible, or excessively difficult, to access the courts was held to be incompatible with the Convention and with the EU principle of effectiveness. However, up to the present, the courts have refused to apply the same considerations to the question of access to the EU courts. This means that, unless the restrictive jurisdiction by the EU courts is abandoned, the EU will be in breach of its obligations flowing from the Aarhus Convention. One way out of the courts' dilemma would be to grant legal standing to environmental organizations along the lines of the criteria set out in section F above.

5

Environmental Law and Human Rights in the Asia-Pacific

Ben Boer

1. Introduction

This chapter[1] explores the development of the links between human rights and the environment from a legal point of view in the Asia-Pacific region.[2] It discusses the development of a substantive right to the environment and explores the various ways in which this right has been recognized at regional and national level. It also canvasses the procedural aspects of human rights and the environment, namely the right of access of citizens to information, the right to participate in environmental decisions that affect them, and the question of access to justice through the courts and other mechanisms. In this regard, the chapter canvasses the question whether the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') or a regional adaption of it ought to be adopted in the region.

Despite the fact that most countries in the Asian region are members of the global human rights treaties, the actual implementation of legislative and

[1] This chapter draws in part from contributions by the author in B.W. Boer and A.E. Boyle, 'Human Rights and the Environment', Background Paper prepared for the 13th Informal Asia–Europe Meeting (ASEM) Seminar on Human Rights (21–23 October 2013), available at <http://www.asef.org/images/docs/Background%20Paper%20-%20FINAL.pdf> (last visited 26 September 2014). I also gratefully acknowledge the work of my research assistant, Mr Eka Sarjana, Ph.D. candidate in the Sydney Law School.

[2] For the purposes of this chapter, the Asia-Pacific region includes the countries of South Asia, Southeast Asia, Northeast Asia, and the Pacific Island region. As the focus of the chapter is primarily on developing countries in the Asia-Pacific region, Australia and New Zealand are not specifically canvassed.

policy frameworks concerning human rights is generally underdeveloped.[3] The same is true of the implementation of environmental protection regimes, which also remain at a low level of implementation in a number of countries, despite reasonably well-developed environmental legislation. However, despite the inadequacy of the environmental legal frameworks and the lack of government implementation in some countries, the courts, particularly in South Asia and Southeast Asia, have nevertheless been able to achieve significant environmental outcomes by using national constitutional provisions focused on basic human rights, especially the right to life. The chapter canvasses constitutional provisions that include references to various kinds of environmental rights and briefly examines the jurisprudence on human rights and environment in several jurisdictions to illustrate this phenomenon.

In the Pacific Island region, countries have committed to a reasonably satisfactory regional framework on human rights, but a regional human rights instrument exists only as an aspiration at this point.[4] On the environmental side, the Pacific has several region-wide environmental instruments, and many countries have quite well-developed legislation on environmental protection and natural resource conservation, although implementation remains inadequate in some jurisdictions.[5]

[3] For the South Asian Association for Regional Cooperation countries, for example, it was recently stated that 'South Asia today is a black spot for the gross violation of human rights and civil liberties'. G. Basnet, 'New Identity for SAARC: Establishing a Regional Human Rights Mechanism' (2013), available at <http://www.nepalnews.com/archive/2013/others/guestcolumn/may/guest_columns_04.php> (last visited 26 September 2014). In China, Human Rights Watch has documented a range of continuing human rights issues: see Human Rights Watch, World Report 2013—China, at 2, available at <http://www.hrw.org/world-report/2013/country-chapters/china> (last visited 26 September 2014). The Chinese Government has committed itself to respecting 'the principle of the universality of human rights' and maintains that it has 'made unremitting efforts for the promotion and protection of the human rights and fundamental freedoms of the Chinese people': see H.E. Vice Foreign Minister Wang Guangya, Statement at the 58th Session of the United Nations Commission on Human Rights (Geneva), available at <http://www.china-un.org/eng/zghlhg/jjhshsw/rqwt/t29329.htm> (last visited 26 September 2014).

[4] 'We see a Pacific region that is respected for the quality of its governance . . . the full observance of democratic values, and for its defence and promotion of human rights': Pacific Islands Forum Secretariat, 'Human Rights', available at <http://www.forumsec.org/pages.cfm/political-governance-security/human-rights/> (last visited 26 September 2014).

[5] For national environmental law resources in the Pacific region see the Secretariat of the Pacific Regional Environment Programme, 'National', available at <http://www.sprep.org/national/legal-national> (last visited 26 September 2014). For a summary of environmental law in five jurisdictions, see also B. Boer (ed.), *Environmental Law in the South Pacific,* IUCN Environmental Policy and Law Paper No. 28 (1996). See also B.W. Boer, R. Ramsay, and D.R. Rothwell, *International Environmental Law in the Asia-Pacific* (1998), ch. 13.

A. Regional Cooperative Organizations

In the Asia-Pacific, the regional cooperative mechanisms, to which the individual countries belong, provide a useful basis for discussing and comparing the development of environmental management and human rights regimes. Each of the Asian sub-regions dealt with here hosts a regional environment programme of some kind, with variable effectiveness.

South Asia comprises the eight countries of the South Asian Association for Regional Cooperation (SAARC).[6] It covers Afghanistan, Bhutan, India, Sri Lanka, Nepal, Bangladesh, Pakistan, and the Maldives, and is headquartered in Kathmandu. SAARC hosts the South Asian Co-operative Environment Programme (SACEP), which is intended 'to promote and support protection, management and enhancement of the environment in the region'.[7] Environment ministers hold periodic meetings to focus on cooperation concerning environment, natural disasters, and climate change.[8] There is no regional treaty on environment in the SAARC region, nor is there a specific institution dealing with environmental issues. In 2012, Parvez Hassan of Pakistan called for, inter alia: the creation of a SAARC treaty on environment and development which would set binding responsibilities on member states; the creation of a commission or a court on the environment to monitor those responsibilities; and the establishment of a SAARC secretariat on environment with inter-state cooperation.[9]

Southeast Asia includes the ten countries of the Association of Southeast Asian Nations (ASEAN): Brunei, Myanmar/Burma, Cambodia, Indonesia, Laos, Malaysia, Thailand, The Philippines, Singapore, and Vietnam, together with Timor-Leste, which has not yet joined ASEAN.[10] ASEAN deals with a wide range of regional issues. It has a specific focus on environmental issues and has a well-developed institutional framework for environmental cooperation. The ASEAN Senior Officials on the Environment meet

[6] See South Asian Association for Regional Cooperation website, at <http://www.saarc-sec.org> (last visited 26 September 2014).

[7] SACEP, 'About Us: An Overview', available at <http://www.sacep.org/html/about_overview.htm> (last visited 21 November 2014).

[8] See SAARC, Areas of Cooperation, available at <http://www.saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=50> (last visited 26 September 2014) and South Asia Co-operative Environment Programme website, available at <http://www.sacep.org/> (last visited 26 September 2014).

[9] Asian Development Bank, *South Asia Conference on Environmental Justice* (2012) at 11, available at <http://www.adb.org/publications/south-asia-conference-environmental-justice> (last visited 26 September 2014).

[10] N.L. Aung and T. McLaughlin, 'Timor Leste on the ASEAN Waiting List', *Myanmar Times* (7 November 2013), available at <http://www.mmtimes.com/index.php/national-news/8716-timor-leste-on-the-asean-waiting-list.html> (last visited 26 September 2014).

regularly.[11] It is the only Asian sub-region to have its own environmental treaty, entitled the ASEAN Agreement on the Conservation of Nature and Natural Resources. Unfortunately, although concluded in 1985, the agreement has not yet been able to attract a sufficient number of ratifications for it to come into effect.[12] Nevertheless, ASEAN has issued a wide range of declarations, charters, and statements relating to environmental issues.[13] Southeast Asia is also the only Asian sub-region to have its own human rights instrument, the 2012 ASEAN Human Rights Declaration.[14]

Northeast Asia comprises China, Japan, Mongolia, North Korea, South Korea, and Russia. In contrast to the other sub-regions, a unifying regional political organization does not exist. Nevertheless, the Northeast Asian Subregional Programme for Environmental Cooperation (NEASPEC) was established under the auspices of the Sub-regional Office for East and North-East Asia of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), which functions as the NEASPEC Secretariat. The NEASPEC Senior Officials group meets yearly, and is regarded as the governing body of NEASPEC. In contrast to the other sub-regional programmes, NEASPEC has operated at a lower level of intensity, but has recently shown greater signs of cooperative activity across the region.[15]

The Pacific Island region is serviced by several regional organizations. The Secretariat of the Pacific Community (SPC),[16] established in 1947, comprises 22 Pacific island countries or dependencies and the four founding countries of Australia, France, New Zealand, and the United States of America. The island jurisdictions are: American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau,

[11] The ASEAN Secretariat is based in Jakarta; see <http://www.aseansec.org/> (last visited 26 September 2014).

[12] For discussion of reasons why the Agreement has not come into effect, see K.L. Koh, 'Asian Environmental Protection in Natural Resources and Sustainable Development: Convergence versus Divergence?', 4 *Macquarie Journal of International and Comparative Environmental Law* (2007) 43.

[13] A comprehensive collection of declarations, statements, and instruments is found in K.L. Koh, *ASEAN Environmental Law, Policy and Governance: Selected Documents*, 2 vols. (2013).

[14] ASEAN Human Rights Declaration (19 November 2012), available at <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration> (last visited 26 September 2014).

[15] North-East Asian Subregional Programme for Environmental Cooperation (NEASPEC), Senior Officials Meeting (SOM), available at <http://www.neaspec.org/institutional-framework-and-financial-mechanism-0> (last visited 26 September 2014), and generally NEASPEC website, at <http://www.neaspec.org/> (last visited 26 September 2014).

[16] It changed its name from South Pacific Commission in 1997 to reflect the organization's Pacific-wide membership.

Tonga, Tuvalu, Vanuatu, and Wallis and Futuna.[17] The SPC deals with a wide range of regional issues, including human rights, public health, geoscience, agriculture, forestry, water resources, disaster management, fisheries, education, statistics, transport, energy, gender, youth, and culture, with a view to assisting Pacific Island people to achieve sustainable development.[18] The region is actively engaged in debates on human rights, especially concerning climate change in small-island developing states.[19]

The Secretariat of the Pacific Regional Environment Programme (SPREP)[20] is one of the partner agencies of the SPC, and has the same membership. SPREP's focus is on the 'protection and sustainable development of the region's environment'.[21] Of all the regional environment programmes in the Asia-Pacific, SPREP is the most active, with extensive conservation, marine, and climate change programmes and several binding environmental treaties. Having commenced in 1982, the agreement to place SPREP on a legal footing was completed in 1993 and came into force in 1995.[22]

B. Sustainable Development and Human Rights

The convergence of the areas of human rights and environment in the Asia-Pacific region should be understood, as it is in other regions, in the context of the use of sustainable development as the underlying principle or concept intended to reconcile the balance between the need for environment protection and conservation on the one hand, and economic development on the other. Unfortunately, the actual implementation of sustainable development continues to be problematic. The Stockholm Declaration on the Human Environment of 1972 states in its Preamble that '[b]oth 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

[17] See Secretariat of the Pacific Community, 'Members of the Pacific Community', available at <http://www.spc.int/en/about-spc/members.html> (last visited 26 September 2014).

[18] See Secretariat of the South Pacific Community, available at <http://www.spc.int/> (last visited 20 January 2015).

[19] Pacific Islands Forum Secretariat and the Secretariat of the Pacific Communities, 'Human Rights and Governance: Role of Human Rights and Governance in Addressing SIDS Vulnerabilities Including Climate Change' (19 April 2013), available at <http://www.forumsec.org/resources/uploads/attachments/documents/19-%20Human%20Rights%20and%20Governance%20Brief%20SDWG%2019April%202013%20FINAL.docx> (last visited 26 September 2014).

[20] Originally called the South Pacific Regional Environment Programme, it changed its name in 2004 in line with the SPC to recognize Pacific-wide membership.

[21] See SPREP, 'About Us', available at <http://www.sprep.org/about-us> (last visited 26 September 2014).

[22] SPREP, 'Legal Agreement Establishing SPREP' (1993), available at <http://www.sprep.org/attachments/Legal/AgreementEstablishingSPREP_000.pdf> (last visited 26 September 2014).

the right to life itself'.[23] Principle 1 states that '[m]an 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 . . . '. Further, Principle 1 of the Rio Declaration states that '[h]uman beings are at the centre of concerns for sustainable development', and are '. . . entitled to a healthy and productive life in harmony with nature'.[24] However, in the Asia-Pacific region, as elsewhere, there continue to be vast disparities between the rich and the poor.[25] Thus when considering the implementation of sustainable development, achieving any kind of balance between the three pillars of economic development, social and cultural development, and protection of the environment is increasingly difficult to attain.[26] Notwithstanding this, almost all Asian and Pacific Island countries have participated in the major conferences on sustainable development since the Rio Conference on Environment and Development in 1992, and have continued to be involved at some level in the debates concerning the implementation of the Millennium Development Goals (MDGs), which have obvious links to the achievement of human rights associated with combating environmental degradation. The most important of these goals in the present context is Goal Seven, which is intended to 'ensure environmental sustainability'.[27]

[23] See Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), (1972) 11 ILM 4116 (hereinafter 'Stockholm Declaration').

[24] See Rio Declaration on Environment and Development (13 June 1992), 31 ILM 874.

[25] While the United Nations Development Programme (UNDP) states that the Millennium Development Goal target on halving extreme poverty between 1990 and 2010 has been met, it notes that 1.2 billion people still live in extreme poverty; see UNDP, 'Eradicate Extreme Poverty and Hunger: Where do We Stand?', available at <http://www.undp.org/content/undp/en/home/mdgoverview/mdg_goals/mdg1/> (last visited 26 September 2014).

[26] In commenting on the concept of sustainable development and its three 'pillars', Robinson argues:

> The economic agenda dominates decision-making and is a tall pillar. . . . [T]he social sector remains modest in comparison with the economic development pillar. The third pillar is the shortest; the ecological dimension is simply reduced to the utilitarian goal of 'environmental protection'. The resources for environmental protection are inadequate. . . . These unequal pillars cannot support a level roof.

See N.A. Robinson, 'Reflecting on Rio: Environmental Law in the Coming Decades', in J. Benidickson, B.W. Boer, A. H Benjamin, and K. Morrow (eds), *Environmental Law and Sustainability after Rio* (2011) 9, at 14–15.

[27] United Nations, Millennium Development Goals, available at <http://www.un.org/millenniumgoals/> (last visited 26 September 2014).

C. The Millennium Development Goals and Human Rights

In its Preamble, the ASEAN Charter of 2007 explicitly includes as one of the purposes of ASEAN the promotion of sustainable development, 'so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples'.[28] In addition, in 2007, ASEAN issued a Declaration on Environmental Sustainability,[29] which commits the ASEAN community to achieving 'the UN Millennium Development Goals (MDGs), in particular to ensure environmental sustainability in the context of sustainable development'.

In the Asia-Pacific, some important elements of the MDGs are recognized as not having been met; these elements include the effects of climate change and environmental pressures.[30] Nevertheless, the 2012 Bangkok Resolution on ASEAN Environmental Cooperation reiterates the commitment of ASEAN members with regard to the MDGs.[31] The Sustainable Development Goals being developed to replace the MDGs after 2015 continue to be the subject of debate in the Asia-Pacific.[32]

[28] See Section 2.B(2).

[29] ASEAN Declaration on Environmental Sustainability, available at <http://www.asean.org/news/item/asean-declaration-on-environmental-sustainability> (last visited 26 September 2014).

[30] UN Economic and Social Commission for Asia and the Pacific (ESCAP), *Asia-Pacific Aspirations: Perspectives for a Post-2015 Development Agenda* (2013), available at <http://www.adb.org/sites/default/files/pub/2013/asia-pacific-regional-mdgs-report.pdf> (last visited 26 September 2014):

> The Asia-Pacific region as a whole has achieved considerable success with the MDGs, particularly in reducing income poverty. Nevertheless, the region is off track in important areas: hunger, health and sanitation—and even in areas such as income poverty where achievements have been spectacular, large gaps remain. Nearly two-thirds of the world's poor still live in this region. Even after 2015, there will therefore be a significant 'unfinished agenda'. The region also faces many persistent and emerging threats including rising inequality, gender discrimination and violence, demographic shifts and unplanned urbanization, along with climate change and environmental pressures, such as pollution and water scarcity.

[31] The Bangkok Resolution commits the parties to '[c]ontinue the efforts to establish a balance of economic growth, social development and environmental sustainability as well is to strengthen ASEAN's commitments for the attainment of Millennium Development Goals (MDGs) and to accelerate the implementation of the Rio+20 United Nations Conference on Sustainable Development's outcomes' (at § 1). See Bangkok Resolution on ASEAN Environmental Cooperation (26 September 2012), available at <http://environment.asean.org/wp-content/uploads/2012/12/ADOPTED-Bangkok_Resolution_12AMME-26Sep.pdf> (last visited 26 September 2014).

[32] For example, the ESCAP is sponsoring a range of dialogues: see United Nations Sustainable Development Knowledge Platform, 'Sustainable Development Goals', available at <http://sustainabledevelopment.un.org/index.php?menu=1300> (last visited 26 September 2014). See also International Institute for Sustainable Development Reporting Services, Asia-Pacific Coverage, 'Pacific SIDS Recommend Oceans SDG' (4 February 2014), available at <http://asiapacificsd.iisd.

In the Pacific region, an awareness of the centrality of human rights to sustainable development is manifested in the following statement:

> All rights are fundamental to human development—the right to health is just as critical as the right to freedom of speech, and the right to livelihood is inexorably linked to freedom of movement. These are the essential underpinnings of the right to development. Without support for all human rights, [any] real prospect for communities and for Forum member States to attain sustainable development goals will remain elusive.
>
> The interdependence among all human rights is indisputable. Political and civil rights cannot be advanced without respect for economic, social and cultural rights, and vice versa. Economic and social justice can best be achieved in an atmosphere of political stability supported by an independent judiciary. Furthermore, an environment in which the rule of law is respected will attract greater economic investment.[33]

D. The Sustainable Development Goals and Human Rights

A significant aspect of the Rio+20 Conference on Sustainable Development was the setting in place of a process for formulating global Sustainable Development Goals (SDGs). It is intended to be an 'inclusive and transparent intergovernmental process open to all stakeholders, with a view to developing global sustainable development goals to be agreed by the General Assembly'.[34] SDGs aim to address economic, social, and environmental dimensions of sustainable development through the overarching framework of poverty eradication with enhanced environmental considerations. In principle, they address the challenges of the UN's MDGs and build on this experience in order to provide the foundation for a 'green economy'.[35]

Importantly, the mandate of the UN Expert on Human Rights and the Environment refers to a 'safe, clean, healthy and *sustainable* environment'.[36] In the ASEAN context, the 2012 ASEAN Human Rights Declaration includes a provision on 'protection and *sustainability* of the environment', in Article 36, and the 'right to a safe, clean and sustainable environment' in

org/news/pacific-sids-recommend-oceans-sdg/> (last visited 26 September 2014); International Institute for Sustainable Development Reporting Services, Asia-Pacific Coverage, 'Human Rights & Indigenous Peoples' (2014), available at <http://asiapacificsd.iisd.org/category/issues/human-rights-indigenous-peoples/> (last visited 26 September 2014).

[33] Pacific Islands Forum Secretariat, *supra* note 19.

[34] United Nations Sustainable Development Knowledge Platform, *supra* note 32.

[35] Rio+20 Outcome Document, 'The Future We Want', UN Doc. A/CONF.216/L.1 (19 June 2012), §§ 5 and 245–251, available at <http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf> (last visited 23 November 2014 2014);

[36] United Nations Human Rights (UN HR) Council, 'Human Rights and the Environment', UN Doc. A/HRC/19/L.8/Rev.1 (20 March 2012) (emphasis added).

Article 28(f), as noted in Section 3A. It is yet to be made clear exactly what the SDGs will entail,[37] and the principle of sustainable development[38] continues to be debated.[39] There is however a strong demand for a human rights approach to the SDGs to be maintained.[40]

2. Human Rights Organizations in the Asia-Pacific

Every region of the world has generated human rights organizations of various kinds. These are categorized as intergovernmental, governmental and non-governmental bodies. Prominent intergovernmental bodies in other regions include the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and the Inter-American Commission on Human Rights. This section deals with the various organizations and actors that are focused on human rights in the Asia-Pacific region and explores the extent to which they concentrate on environmental matters.

[37] The Open Working Group proposal for Sustainable Development Goals sets out 17 Goals; in relation to human rights, referring to the Rio Outcome document, the proposal:

> . . . reaffirmed the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food and water, the rule of law, good governance, gender equality, women's empowerment and the overall commitment to just and democratic societies for development. It also reaffirmed the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law.

Sustainable Development, 'Open Working Group proposal for Sustainable Development Goals', at Introduction, para. 7, available at <http://sustainabledevelopment.un.org/sdgsproposal.html> (last visited 23 November 2014).

[38] While some maintain that it is a concept, Weeramantry convincingly argues, against the majority of judges in the case, that sustainable development is a *principle* of international law. See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (1997) ICJ Rep 7, at 92 (sep. op. Vice-President Weeramantry).

[39] Bosselmann uses the more desirable term 'sustainability' rather than 'sustainable development': K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2008).

[40] See High Commissioner for Human Rights, 'Human Rights and the Post-2015 Agenda', Letter to all Permanent Missions of the United Nations (6 June 2013), available at <http://www.awid.org/content/download/180256/1958758/file/HC_open_letter_on_HRs_and_post-2015.pdf> (last visited 26 September 2014), which states that the new framework must advance a healthy environment 'as an underlying determinant of internationally guaranteed human rights'. In the ASEAN region, the ASEAN Intergovernmental Commission on Human Rights (AICHR) (discussed in Section 2) has conducted several major workshops on the 'Post-Millennium Development Goals 2015 and Human Rights'; see AICHR, 'The AICHR Follow-Up Workshop on Post Millennium Development Goals 2015 and Human Rights' (22 October 2014), available at <http://aichr.org/press-release/press-release-the-aichr-follow-up-workshop-on-post-millennium-development-goals-2015-and-human-rights/> (last visited 23 November 2014).

A. The Paris Principles

When assessing the effectiveness of national human rights instruments and bodies, regard should be had to the so-called 'Paris Principles'.[41] These are guidelines generated at a 1991 UN meeting in Paris, 'which brought together representatives of national human rights institutions from all parts of the globe to define the core attributes that all new or existing institutions should possess'.[42]

The Principles include six main criteria:

(1) a clearly defined and broadly based mandate predicated on universal human rights;
(2) autonomy from government;
(3) independence guaranteed by legislation or the constitution;
(4) pluralism, including membership that broadly reflects their society;
(5) adequate resources; and
(6) adequate powers of investigation.

The Paris Principles are significant because they set out the benchmarks that all National Human Rights Institutions (NHRIs) should meet before they can obtain accreditation from the International Coordinating Committee.[43] While recognizing that states have the prerogative to set up their NHRIs in accordance with their own structure and needs, the Principles require that even though NHRIs work mainly at the national level, they also must 'cooperate with the United Nations and any other organisation in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights'.[44] In so doing, they encourage the incorporation and application of international human rights standards into domestic practice. With the growth in number of national human rights institutions of various kinds in the Asia-Pacific, the Paris Principles will be of increasing relevance.

[41] UN GA Res. 48/134, 'National Institutions for the Promotion and Protection of Human Rights, Annex, Principles Relating to the Status of National Institutions' (20 December 1993), available at <http://www.un.org/documents/ga/res/48/a48r134.htm> (last visited 26 September 2014) (hereinafter 'Paris Principles').

[42] Asia Pacific Forum, 'Paris Principles', available at <http://www.asiapacificforum.net/members/international-standards> (last visited 26 September 2014).

[43] See Office of the High Commissioner for Human Rights, 'OHCHR and NHRIs', available at <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (last visited 26 September 2014).

[44] The Paris Principles, *supra* note 41, Principle 3(e).

B. Inter-governmental Bodies

1. Asia Pacific Forum of National Human Rights Institutions

The Asia Pacific Forum of National Human Rights Institutions is an inter-governmental body with fifteen full members and six associate members so far.[45] The Forum is a regional organization that supports the establishment and strengthening of NHRIs in the Asia-Pacific.[46] The main purpose of the Asia Pacific Forum is to support all the member states to comply with the Paris Principles on the status of national human rights institutions. Membership is comprised of those countries that comply with the Paris Principles.

A report of the Asia Pacific Forum in 2007 entitled *Human Rights and the Environment* includes a key recommendation that NHRIs 'advocate the adoption and implementation of a specific right to an environment conducive to the realisation of fundamental human rights'.[47] It noted that such a right should:

- recognize the responsibility of the state, as well as individuals, communities, and 'non-state actors', such as transnational corporations, to protect the environment, and to remedy damage to it;
- include a range of procedural rights, such as the right to access information, to participate in decision-making, and to seek remedies if they suffer harm as a result of a degraded environment;
- provide specific protection for environmentally displaced or affected persons.[48]

These issues are taken up in various ways in ensuing sections of this chapter.

[45] Current full members are Afghanistan, Australia, India, Indonesia, Jordan, Korea, Malaysia, Mongolia, Nepal, New Zealand, Palestine, The Philippines, Thailand, Timor Leste, and Qatar. Associate members are Bangladesh, Maldives, Maldives, Oman, Samoa, and Sri Lanka. See Asia Pacific Forum, 'Members', available at <http://www.asiapacificforum.net/members> (last visited 26 September 2014). See also Asia Pacific Forum, *Annual Report 1 July 2011–30 June 2012*, available at <www.ausaid.gov.au/aidissues/humanrights/documents/asia-pacific-forum-annualreport-2011-12.pdf> (last visited 26 September 2014).

[46] See C. M. Evans, 'Human Rights Commissions and Religious Conflict in the Asia-Pacific Region', 53 *ICLQ* (2004) 713.

[47] Asia Pacific Forum, *Human Rights and the Environment: Final Report and Recommendations* (2007), available at <http://www.asiapacificforum.net/support/issues/acj/references/right-to-environment> (last visited 26 September 2014).

[48] *Ibid*., at 33. The precise definition of such an environmental right is further discussed in UN HR Council, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox', UN Doc. A/HRC/22/43 (24 December 2012), available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf> (last visited 26 September 2014) (hereinafter 'UN HR Council Report').

2. ASEAN Intergovernmental Commission on Human Rights

The introduction of the ASEAN Intergovernmental Commission on Human Rights was the first major institutional effort to address general human rights in the Asia-Pacific. Essential background to the establishment of the Commission is an understanding of the 2007 ASEAN Charter, which entered into force in 2008.[49] Before that year, no single constitutive document existed which provided a legal basis for ASEAN. The Charter includes explicit acceptance of the rule of law in the region and refers to the role of human rights concepts. However, as noted below, the Charter contains significant weaknesses which may undermine the effectiveness of the Intergovernmental Commission on Human Rights, and in particular the implementation of the 2012 ASEAN Human Rights Declaration, which has been the primary task of the Commission to date. Nevertheless, importantly in this context, Articles 1 and 2 of the Charter contain significant statements concerning human rights, the rule of law and sustainable development, and links human rights and environment in various ways. Article 1 of the Charter states that the purposes of ASEAN are:

> 7. To strengthen democracy, enhance good governance and the rule of law, and to promote and *protect human rights and fundamental freedoms*, with due regard to the rights and responsibilities of the Member States of ASEAN. . . .
> . . .
> 9. To promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples. . . . [Emphasis added.]

More generally, the ASEAN Charter can be seen as a game-changer in the context of legal developments in the region. Not only does it invest ASEAN with a permanent legal personality, thus providing a solid legal and institutional foundation for ASEAN decision-making, but it also commits ASEAN member states to the principles of democracy, the rule of law and good governance, and respect for and protection of human rights and fundamental freedoms. It also resolves to ensure sustainable development for the benefit of present and future generations, and places the well-being, livelihood, and welfare of ASEAN peoples at the centre of the ASEAN community-building

[49] Charter of the Association of Southeast Nations (January 2008), available at <http://www.asean.org/archive/publications/ASEAN-Charter.pdf> (last visited 26 September 2014) (hereinafter 'ASEAN Charter'). See also B. Boer, 'Environmental Law in Southeast Asia', in P. Hirsch (ed.), *Routledge Handbook on the Southeast Asian Environment* (forthcoming 2015), and K. L. Koh, 'The Role of ASEAN in Shaping Regional Environmental Protection', in P. Hirsch (ed.).

process. It provides that member states shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter, and to comply with all obligations of membership. However, in considering the question of enforcement of the provisions of the Charter, it can be seen to suffer from the same weaknesses as some of the previous ASEAN declarations and statements,[50] namely the lack of legal and institutional mechanisms for implementation and enforcement. This is manifested, for example, in Article 20 of the Charter, which states that as 'a basic principle, decision-making shall be based on consultation and consensus', and where that cannot be achieved 'the ASEAN Summit may decide how a specific decision can be made'.

In relation to environmental issues, the Charter lists the ASEAN Ministerial Meeting on the Environment (AMME) and the ASEAN Senior Officials on the Environment (ASOEN), under the auspices of the 'Socio-Cultural Community'. A range of working groups have been set up relating to environmental matters, including nature conservation and biodiversity, marine and coastal environment, multilateral environmental agreements, environmentally sustainable cities, water resources management, disaster management, and the Haze Technical Task Force.

The ASEAN Charter certainly represents some strong steps forward concerning transboundary and national environmental management in the region. However, the lack of mandatory wording and the weak provisions on implementation and enforcement mean that the potential of the Charter to serve as a basis for the development of stronger and more consistent environmental legal regulation at a regional level and more robust environmental law regimes at a national level remains elusive. With such weaknesses, strong support for recognition of the environmental aspects of human rights across the ASEAN region cannot be expected in the short term.[51]

Turning now specifically to the ASEAN Intergovernmental Commission, Article 14 of the 2007 ASEAN Charter states: 'In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.' The Commission was duly established in 2009, with detailed Terms of Reference adopted by the 2009 ASEAN Foreign Ministers Meeting. Ten members were appointed, one from each ASEAN state.

[50] See, e.g., the ASEAN Declaration on Sustainability (20 November 2007), available at <http://www.asean.org/news/item/asean-declaration-on-environmental-sustainability> (last visited 26 September 2014).

[51] For a brief critique of the Charter five years after its inception, see R. A. Brata, 'Reviewing the ASEAN Charter', *The Jakarta Post* (7 March 2013), available at <http://m.thejakartapost.com/news/2013/03/07/reviewing-asean-charter.html> (last visited 26 September 2014).

The purposes and principles of the Commission, as set out in its Terms of Reference, generally conform to internationally accepted concepts of human rights. However, certain elements may function to restrict the full implementation of those rights. In particular, the purposes include, in Article 1.4 'to promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural, and religious backgrounds, and taking into account the balance between rights and responsibilities'. On the other hand, the purposes also include, at Article 1.6: 'To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member states are parties.' Thus the question of whether the Declaration's promotion of human rights as qualified by Article 1.4 might water down these international standards remains to be seen.

The Commission was tasked (in summary):

- to develop strategies for the promotion and protection of human rights and fundamental freedoms;
- to develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;
- to enhance public awareness of human rights among the peoples of ASEAN;
- to promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN member states;
- to encourage ASEAN member states to consider acceding to and ratifying international human rights instruments; and
- to promote the full implementation of ASEAN instruments related to human rights.

However, it can be noted that the Commission was not given any particular implementation or enforcement powers. Article 3 of the Commission's Terms of Reference states: 'The AICHR is an inter-governmental body and an integral part of the ASEAN organisational structure. It is a consultative body.'[52] Accordingly, Article 6 of the Terms of Reference states that as a basic principle, decision-making is to be based on consultation and consensus 'in accordance with Article 20 of the ASEAN Charter'. ASEAN's cautious step-

[52] ASEAN Intergovernmental Commission on Human Rights, 'Terms of Reference' (October 2009), available at <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf> (last visited 26 September 2014) (hereinafter 'Terms of Reference').

by-step approach in the area of human rights is consistent with the way it has approached many other issues seen as regionally sensitive, but it is important to note that, according to Article 6 of the Commission's Terms of Reference, the Declaration is to be reviewed after five years, 'with a view to further enhancing the promotion and protection of human rights within ASEAN'.[53]

While the mandate and functions of the ASEAN Intergovernmental Commission on Human Rights include the promotion of 'the full implementation of ASEAN instruments related to human rights', the practice of the Commission remains, at this point, at the level of advice, encouragement, consultation, training workshops, and the development of common approaches on the promotion and protection of human rights in the region, in accordance with the 'consultative' tenor of its Terms of Reference.

3. A Pacific Human Rights Commission

With regard to the Pacific Island region, the SPC has initiated discussion on a permanent regional human rights commission. In 2010, the Secretariat stated that such a body:

> . . . would be a sustainable way of ensuring ongoing support for the advancement of human rights and development standards for the region and would support the achievement of all 15 of the Pacific Plan's strategic objectives as well as the Millennium Development Goals. Human rights conventions set standards for development goals ensuring that special interest groups such as women, children and persons with disabilities are included in development planning. Given the lack of both financial and human resources in the region, a regional human rights mechanism would supplement services where national human rights mechanisms are absent and support those that are emerging in the region.[54]

[53] The Commission's progress has been the subject of some critical comment; e.g., Asian Forum for Human Rights and Development, 'Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011–2012', available at <http://www.forum-asia.org/?p=16296> (last visited 26 September 2014). See also 'Civil Society Organisations Demand Meaningful Engagement with ASEAN Human Rights Bodies', Statement issued by the 6th Regional Consultation on ASEAN and Human Rights, Jakarta (1–2 October 2013), available at <http://www.forum-asia.org/?p=16425> (last visited 26 September 2014). The 2014 Review of the Commission's Terms of Reference have also been subject to specific scrutiny in anticipation of the five year review; see Asian Forum for Human Rights and Development, *Four Years On and Still Treading Water: A Report on the Performance of the ASEAN Human Rights Mechanism in 2013* (November 2014), available at <http://www.forum-asia.org/uploads/publications/2014/November/@s-Isi%20Forum%20Asia%20Revisi.pdf> (last visited 23 November 2014).

[54] Secretariat of the Pacific Community, 'Towards a Regional Human Rights Mechanism' (2010), available at <http://www.spc.int/en/publications/doc_download/377-crga-40-paper-36-towards-a-regional-human-rights-mechanism.html>. The Pacific Plan for Strengthening Regional

The Secretariat also noted that the region has the lowest ratification rates worldwide of the nine core international human rights treaties. It argued that establishment of a human rights mechanism would assist Pacific Island countries and territories with regard to ratification and reporting on the implementation of conventions and provision of training, and that it would facilitate and support development of national human rights mechanisms. The statement envisages a process similar to the establishment of the ASEAN Intergovernmental Commission on Human Rights, guided by the Terms of Reference and, similar to the ASEAN body, tasked with the drafting of a regionally binding legal charter for the Pacific Island region.[55] The statement concluded:

> The proposed model for a regional human rights commission for the Pacific is based on a realistic assessment of the financial and human capacity available in the region. It takes into consideration the regional pool of expertise already present as well as the inability of the region to continuously secure funding support for additional human rights programmes. The model also acknowledges the limitations of smaller states in establishing stand-alone national human rights institutions. A regional human rights commission is the most sustainable and practical approach to assisting PICTs [Pacific Island Countries and Territories] in meeting their human rights obligations, including the human rights development objectives contained within the Pacific Plan and the Millennium Development Goals.[56]

C. Non-governmental Bodies

Non-governmental organizations (NGOs) also play a significant role in promoting the implementation of international human rights regimes and systems. As Brian Burdekin notes, '[a]ny regional or sub-regional human rights mechanism that wants to be effective and credible must also develop a modus operandi for working in co-operation with national institutions and civil society'.[57]

International NGOs have been working closely with international human rights bodies under the UN and other agencies to encourage, monitor, and

Cooperation and Integration was developed by the Pacific Islands Forum Secretariat in 2007, see <http://www.forumsec.org/resources/uploads/attachments/documents/Pacific_Plan_Nov_2007_version1.pdf> (last visited 26 September 2014).

[55] 'Towards a Regional Human Rights Mechanism', *supra* note 54, § 9.

[56] *Ibid.*, § 10.

[57] B. Burdekin, 'Keynote Speech', in *National and Regional Human Rights Mechanisms*, Proceedings of the 11th Informal ASEM Seminar on Human Rights (2011) 18, at 22, available at <http://www.asef.org/images/stories/publications/documents/Proceedings%20-11-Human_Rights.pdf> (last visited 26 September 2014).

steer the process of human rights protection all over the world. For example, Human Rights Watch began in 1978 with the founding of its European and Central Asia divisions.[58] Its 2013 *World Report* sets out a range of environmental and human rights issues affecting countries around the world. It argues:

> Unfortunately, in practice, governments and international agencies do not often enough analyse environmental issues through the prism of human rights or address them together in laws or institutions. But they should, and they should do so without fear that doing so will compromise efforts to achieve sustainability and environmental protection. Indeed, rather than undermine these important goals, a human rights perspective brings an important and complementary principle to the fore – namely that governments must be accountable for their actions. And it provides advocacy tools for those affected by environmental degradation to carve out space to be heard, meaningfully participate in public debate on environmental problems, and where necessary, use independent courts to achieve accountability and redress.[59]

There are also many NGOs that, while primarily focused on the environment, recognize that human rights issues are very close to many of their concerns. For example, the International Union for Conservation of Nature (IUCN) regularly includes human rights issues within its quadrennial World Conservation Congress Resolutions and Recommendations on a wide range of matters concerning nature conservation, and specifically on the right to water, the issue of sustainable development, and the rights of indigenous and local communities.[60]

An important non-governmental human rights player is the Asian Forum for Human Rights and Development (AFHRD). This body consists of independent national human rights organizations from several Asian countries. It was established to share information and to communicate with regard to developments and progress related to human rights protection in

[58] Human Rights Watch website, at <http://www.hrw.org> (last visited 26 September 2014).

[59] J. Kippenberg and J. Cohen, 'Lives in the Balance: The Human Cost of Environmental Neglect', in Human Rights Watch, *World Report* (2013) 41, available at <https://www.hrw.org/sites/default/files/wr2013_web.pdf> (last visited 26 September 2014).

[60] See, e.g., the three resolutions adopted by the World Conservation Congress at its session in Jeju, Republic of Korea, 6–15 September 2012: 'The Human Right to Water and Sanitation' (WCC-2012-Res-098-EN), 'IUCN Policy on Conservation and Human Rights for Sustainable Development' (WCC-2012-Res-099-EN), and 'Implementation of the United Nations Declaration on the Rights of Indigenous Peoples' (WCC-2012-Res-097-EN), available at <http://www.iucn.org/about/work/programmes/global_policy/gpu_resources/gpu_res_recs/> (last visited 26 September 2014). See also T. Greiber *et al.*, 'Conservation with Justice: A Rights-based Approach', IUCN Environmental Policy and Law Paper No. 71 (2009), available at <https://portals.iucn.org/library/efiles/documents/eplp-071.pdf> (last visited 26 September 2014).

Asia.[61] While it does not have an explicit human rights and environment brief, it deals with a wide range of development matters which raise human rights concerns in relation to exploitation of the environment.[62]

Further, the Asian Human Rights Commission, established in 1986, is an independent, non-governmental body focusing on the full range of civil, political, economic, social, and cultural rights. The Commission deals with a range of issues that link environmental and human rights causes.[63] It recognizes that:

> Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.[64]

Litigation to achieve environmental outcomes based on the use of constitutional guarantees of human rights in Asian courts is taken up in Section 6.

3. Regional Human Rights Instruments

A. The ASEAN Human Rights Declaration

The ASEAN Human Rights Declaration[65] was adopted by the heads of the 10 ASEAN member countries in 2012. It can be considered as a landmark in the development of human rights protection for the citizens of these countries. Although it is not legally binding, it affirms all of the internationally accepted human rights[66] and purports to guarantee enforceable remedies at national level. It lists the civil and political rights as well as the economic, social, and cultural rights of the 1948 Universal Declaration of Human Rights and the 1966 Covenants.[67]

[61] Asia Forum for Human Rights and Development website, at <http://www.forum-asia.org> (last visited 26 September 2014).

[62] Asian Centre for Human Rights website, at <http://www.achrweb.org/index.htm> (last visited 26 September 2014).

[63] Asian Human Rights Commission website, at <http://www.humanrights.asia/about> (last visited 26 September 2014).

[64] *Ibid.*

[65] ASEAN Human Rights Declaration, *supra* note 14.

[66] The Preamble (*ibid.*) states in part:

> Reaffirming . . . our commitment to the Universal Declaration of Human Rights, the Charter of the United Nations, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties.

[67] UNGA Res. 217A (III), Universal Declaration of Human Rights (10 December 1948); UNGA Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights

In particular with regard to the environment, Article 28 includes reference to many of the rights recognized in other regions such as Europe, Africa, and Latin America as being the basis for using human rights to achieve broader environmental outcomes. It reads:

> 28. Every person has the right to an adequate standard of living for himself or herself and his or her family including:
>
> a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
> b. The right to clothing;
> c. The right to adequate and affordable housing;
> d. The right to medical care and necessary social services;
> e. The right to safe drinking water and sanitation;
> f. The right to a safe, clean and sustainable environment.

Sub-sections (a), (c), (d), and (e) of Article 28 directly relate to environmental conditions; the specific environmental right recorded in Article 28(f) can be favourably compared with the formulation put forward by John Knox, the UN Independent Expert on Human Rights and the Environment, in his report regarding the right to 'enjoyment of a safe, clean, healthy and sustainable environment'.[68] Article 28(f) should also be read in conjunction with Articles 35, 36, and 37 of the Declaration, which focus on the right to development, and incorporate some of the language of the Rio Declaration:

> 35. The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. *The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.* While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.
>
> 36. ASEAN Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions *including the protection and sustainability of the environment* for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.

(16 December 1966); UNGA Res. 2200A (XXI), International Covenant on Civil and Political Rights (16 December 1966).

[68] See UN HR Council Report, *supra* note 48.

> 37. ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States *should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation*. [Emphases added.]

The strength of the language of these Articles could be expected to give some hope that the specified rights, including those pertaining to the environment, might not only be recognized but also implemented and enforced. However, consistent with its non-legally binding nature, the Declaration contains no specific implementing provisions. Article 39 merely states that the 'promotion and protection of human rights and fundamental freedoms' will be achieved through, 'inter alia, cooperation with one another as well as with relevant national, regional and international institutions/organisations, in accordance with the ASEAN Charter'.

It is possible that national courts in ASEAN could entertain actions based on the provisions of the Declaration, based on Article 5, which states: 'Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.'[69] The statement in the last sentence of Article 35, that the 'lack of development may not be invoked to justify the violations of internationally recognized human rights', may also have some potential to be used to protect citizens' environmental rights, but is yet to be tested. The development of human rights jurisprudence in South Asia,[70] as well as in the European courts,[71] where various fundamental human rights have been used as a basis for legal actions to achieve environmental outcomes, could certainly be looked to as precedents. However, it is unlikely that such actions would be brought at this stage of development of the Declaration's implementation.

Despite any criticisms regarding the effectiveness of the formulations contained in the Declaration, its adoption is clearly a positive step for the Southeast Asian countries in beginning to address the political, social, economic, and cultural rights of citizens, and the further development of democracy in the region. Even though the Declaration is not legally binding,

[69] Compare with American Convention on Human Rights (opened for signature 22 November 1969) 1144 UNTS 123, Art. 25 (hereinafter 'ACHR').

[70] See *infra* Section 5.B. [71] See further Chapters 3, 4, and 7 in this volume.

as Gerber notes, it does carry moral weight, in the same way as the 1948 UN Universal Declaration on Human Rights.[72]

Several other analysts have commented on the Declaration. For example:

> The ASEAN Human Rights Declaration is not the unequivocal endorsement of universal human rights that civil society organisations had hoped for. Yet, neither is it an affirmation of cultural relativism, the supremacy of state sovereignty, or the principle of non-interference. In most respects, the drafters achieved their aim, which was to ensure that the Declaration met the standards of the Universal Declaration of Human Rights, and also contained an 'added value' for Southeast Asia.[73]

Further:

> The ASEAN HR Declaration is just an initial step for establishing a human rights mechanism in Southeast Asia. Like the Bangkok Declaration in 1967 that established ASEAN, it was not until 2007 when the ASEAN Charter was adopted, that ASEAN developed an international legal personality with its rights and obligations under international law.
>
> Therefore, ASEAN should aim to develop a binding human rights document while, at the same time, playing a harmonizing role amid the political development gap between ASEAN member states so that the relevant human rights provisions can be enforced effectively in the region.[74]

Finally, it can be noted that the Terms of Reference of the Commission are to be reviewed five years after their entry into force, 'with a view to further enhancing the promotion and protection of human rights within ASEAN'.[75]

In comparison with the development of other regional human rights instruments, the Human Rights Declaration is a rather late inclusion in the various legal and policy instruments produced by ASEAN. In Europe, the European Convention on Human Rights and Fundamental Freedoms has been in place since 1950;[76] the American Convention on Human Rights came into force in 1978;[77] and the African Charter on Human and Peoples'

[72] P. Gerber, 'ASEAN Human Rights Declaration: A Step Forward or a Slide Backwards?', *The Conversation* (21 November 2012), available at <http://theconversation.com/asean-human-rights-declaration-a-step-forward-or-a-slide-backwards-10895> (last visited 26 September 2014).

[73] C.S. Renshaw, 'The ASEAN Human Rights Declaration—Cause for Celebration?', *Regarding Rights* (25 January 2013), available at <http://asiapacific.anu.edu.au/regarding-rights/2013/01/25/the-asean-human-rights-declaration-cause-for-celebration> (last visited 26 September 2014).

[74] R. Eberhard, 'The ASEAN Approach to Human Rights', *The Jakarta Post* (6 December 2012), available at <http://www.thejakartapost.com/news/2012/12/06/the-asean-approach-human-rights.html> (last visited 26 September 2014).

[75] Terms of Reference, *supra* note 52.

[76] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 November 1953) 213 UNTS 222.

[77] ACHR, *supra* note 69.

Rights came into force in 1986.[78] There are various reasons for this delay; they include the reluctance of some members to formulate clear human rights standards to be covered in the Declaration, including channels for redress in the event of breach. In addition, the region's use of the non-intervention principle, sometimes characterized as the 'ASEAN Way' may well have played a part.[79] Further, as hinted at earlier, it is likely that it was only possible to negotiate it after the ASEAN Charter itself was agreed, as the Charter has put ASEAN on a stronger legal and political footing. It has thus come at a crucial stage of political and economic development in the ASEAN countries, and, in comparison with the other Asian sub-regions and the Pacific region, the Declaration is a clear step forward.

B. A Pacific Human Rights Instrument

A Pacific human rights instrument has been under discussion since the 1980s. More recently, the Secretariat of the Pacific Community has promoted further discussion. In a 2010 statement, it noted that although the Pacific Islands Forum Secretariat was established by an agreement that includes human rights in its preamble, 'the Pacific region currently does not have additional legally binding human rights agreements'.[80] It envisaged that the process of drafting of a regionally binding legal charter would begin with the appointment of several independent commissioners within 'a reasonable time frame'.[81]

4. Regional Environmental Instruments

In order to gain a better understanding of the issues surrounding the links between human rights and the environment, it is necessary to include a brief overview of the various regional environmental instruments in Asia and the Pacific.

[78] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, entered into force 21 October 1986) 1520 UNTS 128; 21 ILM 58.

[79] See K.L. Koh and N.A. Robinson, 'Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model', in D.C. Esty and M.H. Ivanova (eds), *Global Environmental Governance: Options & Opportunities* (2002), available at <http://environment.research.yale.edu/publication-series/law_and_policy/782> (last visited 26 September 2014). See also A. Føllesdal, 'The Human Rights Declaration of the Association of Southeast Asian Nations: A Principle of Subsidiarity to the Rescue?', *PluriCourts Research Paper* 13-07 (2013), available at <http://www.ssrn.com/abstract=2359973> (last visited 26 September 2014).

[80] 'Towards a Regional Human Rights Mechanism', *supra* note 54, § 8.

[81] *Ibid.*, § 9.

A. Asian Region

As noted in Section 1, each of the Asian sub-regions hosts their own environment programme. However, only Southeast Asia is home to several region-wide environmental instruments, the most important of which is the ASEAN Agreement on the Conservation of Nature and Natural Resources. Notwithstanding the fact that the Agreement has not yet come into force, it has nevertheless been an influential factor in promoting environmental law and management in the region. Although it does not include any specific reference to human rights, it is implied in a preambular paragraph that points to the connection between conservation and socio-economic development:

> Conscious also that the interrelationship between conservation and socio-economic development implies both that conservation is necessary to ensure sustainability of development, and that socio-economic development is necessary for the achievement of conservation on a lasting basis.

The 1995 Southeast Asia Nuclear-Weapon Free Zone Treaty,[82] which entered into force in 1997, obliges parties not to develop, manufacture, or otherwise acquire, possess, or have control over, nuclear weapons; station nuclear weapons; test or use nuclear weapons; or to engage in associated activities.

The 2002 ASEAN Agreement on Transboundary Haze Pollution[83] has clear implications for rights to life, human health, and livelihood, even though in the ASEAN context it is regarded more as an environmental problem than a human rights problem.[84]

B. Pacific Region

The Pacific hosts a number of regional environmental instruments. As with many multilateral environmental agreements, they have human rights dimensions. The most important of these are the 1986 Convention for the Protection of the Natural Resources and Environment, known as the Noumea Convention,[85] and the 1985 South Pacific Nuclear Free Zone

[82] Southeast Asia Nuclear-Weapon Free Zone Treaty (Bangkok, 15 December 1995, entered into force 11 April 1996) 35 ILM 635.

[83] See ASEAN Agreement on Transboundary Haze Pollution (2002), available at <http://haze.asean.org/?wpfb_dl=32> (last visited 26 September 2014); dealt with further *infra* in Section 5B.

[84] See further A. K. J. Tan 'The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia', 13 *New York University Environmental Law Journal* 647 (2005).

[85] See Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 24 November 1986, entered in force 22 August 1990) (1987) 26 ILM 41,

Treaty.[86] In the Noumea Convention, the definition of pollution focuses on both environmental and human impacts. Article 2(f) states:

> 'pollution' means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

The Nuclear Free Zone Treaty[87] was opened for signature in 1985 and came into force in 1986. It has a major focus on non-nuclear proliferation and security, but also 'to keep the region free of environmental pollution by radioactive wastes and other radioactive matter'.[88] This treaty is of special significance in the Pacific because of the history of nuclear testing in various islands in the region, making some of them uninhabitable, commencing with the United States during World War II,[89] and continuing with France in French Polynesia in the 1960s, 1970s, and 1980s.[90]

5. Environmental Problems and Human Rights in the Asia-Pacific

Although environmental legislation is continuing to develop in many Asian and Pacific jurisdictions, and the field of human rights is gaining more focus, there continue to be many instances of environmental degradation and associated breaches of basic human rights caused by unsustainable development practices. These are exacerbated by very significant increases in consumer demand in many countries, which are placing greater pressures on the land, water, biodiversity, and other natural resources of the region.

This section canvasses four selected and crucial areas—land degradation, haze pollution, dam construction and climate change—which serve to illustrate the close practical links between human rights and environmental regulation.

available at <http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-000892.txt> (last visited 26 September 2014) (hereinafter 'Noumea Convention').

[86] South Pacific Nuclear Free Zone Treaty (Rarotonga, 6 Aug. 1985, entered into force 11 Dec. 1986) 1445 UNTS 177, (1985) 24 ILM 1442.

[87] *Ibid.* [88] *Ibid.*, Preamble.

[89] S.M. Freese, *Nuclear Weapons* (2012).

[90] See *Nuclear Tests Case (Australia v. France)* (1974) ICJ Rep. 253 and *Nuclear Tests (New Zealand v France)* (1974) ICJ Rep. 457.

A. Land Degradation and Human Rights

Land degradation,[91] and its subset of desertification, affects all regions of the world and raises many human rights issues. It is associated with the unregulated or under-regulated use of agricultural pesticides and fertilizers, land and water contamination by the escape of toxic chemicals from industrial sites, and the reduction of the production capacity of agricultural land through loss of soil fertility,[92] resulting in serious effects on human health. Just as importantly, inappropriate agricultural practices result in widespread erosion by water and wind. In combination, these all pose threats to human food security.

Some 20 per cent of the world's land is considered degraded. Analysts identify various hotspots, including Africa south of the equator, Southeast Asia and China.[93] Land degradation and desertification is considered to be a much greater threat in drylands than in lands that are not considered dry.[94]

In contrasting Europe and Asia with regard to drylands, a report on global drylands points out that there are numerous dryland areas in Europe, particularly around the Mediterranean and Central Asia,[95] but Asia has the greatest concentration of dryland degradation.[96]

The United Nations Special Rapporteur on the Right to Food has indicated that worldwide, the number of people suffering from hunger has increased to an estimated 854 million. It is estimated that half of these people live in marginal, dry, and degraded lands. They depend for their survival on lands that are inherently poor and becoming less fertile and less productive

[91] Land degradation is defined as:

Reduction or loss of the biological or economic productivity and complexity of rainfed cropland, irrigated cropland, or range, pasture, forest and woodlands resulting from land uses or from a process or combination of processes, including processes arising from human activities and habitation patterns, such as: (i) soil erosion caused by wind and/or water; (ii) deterioration of the physical, chemical and biological or economic properties of soil; and (iii) long-term loss of natural vegetation.

See United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994, in force 26 December 1996), 1954 UNTS 3, Art. 1 (hereinafter 'UNCCD').

[92] See Ian Hannam and Ben Boer, *Drafting Legislation for Sustainable Soils: A Guide*, IUCN Environmental Law and Policy Paper No. 52 (2004), at 3.

[93] UNCCD Secretariat, 'Zero Net Land Degradation: A Sustainable Development Goal for Rio +20', Policy Brief (May 2012), available at <http://www.unccd.int/Lists/SiteDocumentLibrary/Rio+20/UNCCD_PolicyBrief_ZeroNetLandDegradation.pdf> (last visited 26 September 2014).

[94] *Ibid.*, at 16.

[95] United Nations Environment Management Group, *Global Drylands: A UN System-wide Response,* (October 2011), at 22, available at <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/Global_Drylands_Full_Report.pdf> (last visited 26 September 2014).

[96] *Ibid.*, at 33.

because of repeated droughts, climate change, and unsustainable land use.[97] This is an issue that affects a number of Asian countries, and especially China[98] and India.[99]

Practices which result in land degradation and desertification are clearly unsustainable, and many instances can be cited which indicate breaches of basic human rights.[100] The Secretariat of the United Nations Convention to Combat Desertification invited states:

> [I]n accordance with their domestic legal and policy framework, to include provisions in their domestic law, possibly including constitutional or legislative review that facilitates the progressive realisation of human rights such as the right to life, food and water in the context of the combat of DLDD [Desertification, Land Degradation and Drought].[101]

The preamble to the UNCCD specifically refers to the link between desertification, sustainable development, and the social problems of poverty, food security, and matters arising from demographic dynamics. Annex II of the Convention, which is focused on regional implementation in the Asian region, provides that in carrying out their obligations, parties consider particular conditions, including 'the significant impact of conditions in the world economy and social problems such as poverty, poor health and nutrition, lack of food security, migration, displaced persons and demographic dynamics'.[102]

The Rio+20 outcome document, *The Future We Want*, recognizes that urgent action is required to reverse land degradation and commits to striving 'to achieve a land-degradation-neutral world in the context of sustainable development'. As indicated by its name, the UNCCD Policy Brief urges that the achievement of land degradation neutrality be the subject of one of the

[97] J. Ziegler, 'Message from United Nations Special Rapporteur on the Right to Food', in UNCCD Secretariat (ed.), *Human Rights and Desertification: Exploring the Complementarity of International Human Rights Law and the United Nations Convention to Combat Desertification* (2008) 7, available at <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/HumanRightsandDesertification.pdf> (last visited 26 September 2014).

[98] Q. Du and I. Hannam (eds), *Law, Policy and Dryland Ecosystems in the People's Republic of China*, IUCN Environmental Policy and Law Paper No 80 (2011), available at <https://portals.iucn.org/library/efiles/edocs/EPLP-080.pdf> (last visited 26 September 2014).

[99] UNEP Environment Management Group, *Global Drylands: A UN System-wide Response* (20 October 2011), available at <http://www.unemg.org/index.php/global-drylands-a-united-nations-system-wide-response> (last visited 26 September 2014).

[100] See R. Jha, 'Alleviating Environmental Degradation in the Asia-Pacific Region: International Co-operation and the Role of Issue-Linkage' (February 2005), available at <http://ssrn.com/abstract=677881> (last visited 26 September 2014).

[101] UNCCD Secretariat, *Human Rights and Desertification*, *supra* note 97, at 28.

[102] UNCCD, *supra* note 91, Annex 2, Art. 2(d).

emerging Sustainable Development Goals, with a target date of 2030.[103] Such an outcome would clearly be of benefit in the Asia-Pacific.

B. Transboundary Air Pollution

A particular issue that has affected large numbers of people in the Southeast Asian region is that of forest fires causing significant transboundary air pollution and involving human rights violations. Land clearing activities, particularly for conversion to palm oil plantations by large companies, have been occurring in Indonesia for over two decades. It is evident that these activities have created severe problems, with repeated transboundary 'haze' pollution events. With regard to direct human rights impacts, Frances Seymour states:

> As with other direct impacts of climate change on the lives and livelihoods of vulnerable people, those mediated through their impacts on forests pose a challenge to the traditional human rights framework. 'Duty bearers' are widely dispersed in time and space, and it is virtually impossible to trace the responsibility for climate change from individual sources of emissions through to impacts on particular individuals. Nevertheless, the impacts are real, and in principle can be mitigated. Accordingly, the loss of forest-based income sources and ecosystem services due to climate change could be seen as violations of economic, social, and cultural rights. Further, the exacerbation of those losses (through adaptation options foregone) due to poor forest management could be similarly understood.[104]

Transboundary air pollution was one of the issues contemplated in the 1985 ASEAN Agreement, Article 20 of which included the responsibility for ensuring that activities within their jurisdiction or control do not cause damage to the environment or the natural resources within the jurisdiction of other ASEAN members of areas beyond the limits of national jurisdiction. In order to fulfil that responsibility, 'Contracting Parties shall avoid to the maximum extent possible and reduce to the minimum extent possible adverse environmental effects of activities under their jurisdiction or control, including effects on natural resources, beyond the limits of their national jurisdiction', with consequent provisions requiring transboundary impact assessment, prior notification of plans that may significantly affect other parties, and

[103] UNCCD Secretariat, 'Zero Net Land Degradation', *supra* note 93, at 12; combating desertification and halting and reversing land degradation was included as part of Goal 15 in the Open Working Group Proposal for Sustainable Development Goals available at <http://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf> (last visited November 5 2014).

[104] F. Seymour, 'Forests, Climate Change, and Human Rights: Managing Risk and Trade-offs' (October 2008), at 10, available at <http://www.forestday.org/fileadmin/downloads/seymour_humanrights.pdf> (last visited 26 September 2014) (footnote omitted), republished in S. Humphreys (ed.), *Human Rights and Climate Change* (2010) 207.

notification of emergency situations or sudden grave natural events which may have repercussions beyond national jurisdiction.

In an uncharacteristically bold attempt to address this transboundary pollution issue, ASEAN members concluded the ASEAN Agreement on Transboundary Haze Pollution[105] in 2002. The objective of the Agreement is:

> . . . to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, through consistent national efforts and intensified regional and international cooperation. This should be pursued in the overall context of sustainable development and in accordance with the provisions of this Agreement. (Article 2.)

While the agreement does not directly refer to the human rights aspects of forest fires, it does mention their effects on human health. 'Haze pollution' is defined as 'smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment' (Article 1(6)). Nine ASEAN countries signed and ratified the agreement (Malaysia, Singapore, Brunei, Myanmar, Vietnam, Thailand, Laos, Cambodia, and the Philippines), and it entered into force in 2003. The Indonesian Parliament, after much delay, finally voted to ratify the agreement in September 2014.[106]

Despite domestic laws in Indonesia prohibiting the lighting of forest fires, and making companies involved liable to having their profits seized, operations closed down and being sued for damages, the burning of forests continues to occur, especially on the island of Sumatra, and severely affecting the neighbouring countries of Malaysia, Thailand, and Singapore, causing heavy losses in terms of economic, moral, and health impacts. This situation could be considered a violation of the ASEAN Human Rights Declaration which includes the right to health and the right to a safe, clean, and sustainable environment, as articulated in Article 28.

One question is whether the violation of these rights can be resolved under the provisions of international environmental law or through human rights law. In the case of forest fires in Southeast Asia, the international environmental law route seems the more straightforward, especially given the early stage of development of implementation of the 2012 ASEAN Human Rights Declaration and its Article 28(f). With Indonesia's ratification of the Haze

[105] ASEAN Agreement on Transboundary Haze Pollution, *supra* note 83.

[106] W. Soeriaatmadja, 'Indonesia's Parliament Agrees to Ratify Asean Haze Pact', *Straits Times* (16 September 2014), available at <http://www.straitstimes.com/news/asia/south-east-asia/story/indonesias-parliament-agrees-ratify-asean-haze-pact-20140916> (last visited 23 November 2014).

Agreement, the question is whether action in the International Court of Justice could be pursued if there were unaddressed breaches.[107] However, with the continuing adherence to the doctrine of non-interference within the ASEAN region, the reality may be that the situation will eventually only be resolved by negotiation and regionally based cooperative activities to reduce the incidence of the forest fires and their effects.[108]

C. Dam Construction

The increased construction of dams post-World War II has raised a range of significant human rights and environmental issues. Most of the world's large dams are in Asia, and their planning and construction has proceeded apace in some countries and regions. Examples of these issues arise in non-peninsular Malaysia, with the construction of the Bakun Dam;[109] the Yangtze Three Gorges Dam Project in Hubei Province, China;[110] the cascade of dams on the upper Mekong (Lancang) River in Yunnan Province, China;[111] the dams

[107] In 2013, Singaporean officials had considered the possibility of taking action against two Indonesian forest companies situated in Singapore. 'Singapore Officials Consider Legal Action Against Forest Fire Companies over the Heaviest Smog to ever Cover the City', *The Independent* (15 September 2013), available at <http://www.independent.co.uk/news/world/asia/singapore-officials-consider-legal-action-against-forest-fire-companies-over-the-heaviest-smog-to-ever-cover-the-city-8669486.html> (last visited 26 September 2014).

The Malaysian Bar Association has also suggested such action: see G. Giam, 'Haze Problem: Bilateral Pressure on Indonesia Works Best' (2006), available at. http://geraldgiam.sg/2006/10/haze-problem-bilateral-pressure-on-indonesia-works-best/, last visited 22 November 2014. See also R.N. Hong, 'ASEAN: In a Daze Over the Haze?', *The Singapore Law Review* (25 December 2013), available at <http://www.singaporelawreview.org/2013/12/asean-in-a-daze-over-the-haze/> (last visited 26 September 2014). It has also been suggested that such an action could be taken on the basis of the *Trail Smelter* Arbitration (a case concerning Canadian liability for loss caused to American farmers by transboundary emission of sulphur dioxide fumes from British Columbia to the State of Washington), reprinted in 33 *AJIL* (1939) 182 and 35 *AJIL* (1941) 684; see T. Koh and M. Ewing-Chow, 'Insight: The Transboundary Haze and the International Law', *The Jakarta Post* (27 June 2013), available at <http://www.thejakartapost.com/news/2013/06/27/insight-the-trans boundary-haze-and-international-law.html> (last visited 26 September 2014).

[108] On liability issues, see A. K. J. Tan, 'Forest Fires of Indonesia: State Responsibility and International Liability', 48 *ICLQ* (1999) 826.

[109] M. Raman, 'The 1996 Malaysian High Court Decision Concerning the Bakun Hydro-electric Dam Project', 2 *Asia Pacific Journal of Environmental Law* (1997) 93.

[110] International Centre for Environmental Management, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, Final Report* (October 2010), available at <http://www.icem.com.au/documents/envassessment/mrc_sea_hp/SEA_Final_Report_Oct_2010.pdf> (last visited 26 September 2014) (hereinafter 'ICEM Report').

[111] See C. Lewis, 'China's Great Dam Boom: A Major Assault on Its Rivers', *Yale Environment 360* (4 November 2013), available at <http://e360.yale.edu/feature/chinas_great_dam_boom_an_assault_on_its_river_systems/2706/> (last visited 26 September 2014).

on the tributaries and on the mainstream of the lower Mekong River;[112] and the Sardar Sarovar Project on the Narmada River in India.[113]

The environmental issues include decreases in biodiversity, reduction of land available for agriculture and other human uses, and loss of cultural heritage. The human rights questions include loss of traditional livelihoods, food security problems from reduction of available agricultural lands and loss of fish production. In a number of Asian countries, the construction of dams on major rivers for the purposes of electricity generation, irrigation, and, in some cases, flood control and the facilitation of navigation, have resulted in the displacement of hundreds of thousands, if not millions of people from their traditional lands. In some countries, this has occurred without adequate compensation to the people affected, with devastating effects on livelihoods for farmers and fishers.[114] Various studies have now been carried out concerning these effects, although not many specifically examine human rights issues.[115] The issues of land expropriation practices, human displacement and resettlement, whereby river-dependent communities are deprived of their natural resource livelihood base, are recognized in some environmental impact assessment reports.[116] However, the human rights aspects of dam construction are generally not adequately taken into account by relevant government and private sector interests. On the other hand, some non-governmental organizations recognize these connections and are very active in their advocacy.[117]

[112] See ICEM Report, *supra* note 110, and F.E. Johns *et al.*, 'Law and the Mekong River Basin: A Social-Legal Research Agenda on the Role of Hard and Soft Law in Regulating Transboundary Water Resources', 11 *Melbourne Journal of International Law* (2010) 154.

[113] J. Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia', 18 *Fordham Environmental Law Review* (2007) 587, at 595–598.

[114] For effect of dam construction on food security in Southeast Asia, see L.D. Paulson, 'Proposed Southeast Asian Dams Endanger Food Security', *RWL Water Blog* (7 September 2012), available at <http://www.rwlwater.com/proposed-southeast-asian-dams-endanger-food-security/> (last visited 26 September 2014)

[115] But see A. Nordling, *Environment and Human Rights in the Mekong Region* (2005), and International Rivers, 'The Human Impact of Dams', available at <http://www.internationalrivers.org/human-impacts-of-dams> (last visited 26 September 2014).

[116] See, e.g., ICEM Report, *supra* note 110.

[117] See, e.g.:

Local and international groups including human rights and environmental NGOs have been working together to use various means in an attempt to ensure that these mega-dam projects do not go forward unless they have taken into account and properly addressed the social and environmental costs of the dams.

R. Kincaid, 'Environmental Rights as Human Rights in the Lower Mekong Basin', *Earth Rights International Guest Blog* (2 August 2013), available at <http://www.earthrights.org/blog/environmental-rights-human-rights-lower-mekong-basin> (last visited 26 September 2014).

D. Climate Change

The various links between human rights and environmental issues are most abundantly clear when examining the effects of climate change on people's basic human rights, including the right to life, livelihood, family, privacy, and the right to food and water security. In the Asian region, the 2007 Malé Declaration on the Human Dimension of Global Climate Change clearly recognized the links between human rights and the effects of climate change, with preambular paragraphs stating: '*Concerned* that climate change has clear and immediate implications for the full enjoyment of human rights' and '*Noting* that the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights is recognized, in varying formulations, in the constitutions of over one hundred states and directly or indirectly in several international instruments.'[118] It called on the United Nations to treat this as a matter of urgency. In recent years, the United Nations Human Rights Council has in several resolutions noted the threat of climate change to individuals and communities, and its implications for the enjoyment of human rights.[119] A 2009 report of the Office of the United Nations High Commissioner for Human Rights found that climate change threatened the enjoyment of a broad array of human rights, and that human rights law placed duties on states concerning climate change, including an obligation of international cooperation.[120] The 2012 Rio+20 Conference on Sustainable Development represents the most recent recognition that climate change is a cross-cutting issue, although the Outcome Document makes no direct link with human rights.[121]

Many people in Asia-Pacific nations are highly vulnerable to the effects of climate change. Low-lying coastal countries and atoll countries present the

[118] Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007), available at <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf> (last visited 26 September 2014) (emphasis in original).

[119] UN HR Council, 'Human Rights and Climate Change', UN Doc. A/HRC/RES/7/23 (28 March 2008), and UN HR Council, 'Human Rights and Climate Change', UN Doc. A/HRC/RES/10/4 (25 March 2009).

[120] UN HR Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights', UN Doc. A/HRC/10/61 (15 January 2009).

[121] We acknowledge that climate change is a cross-cutting and persistent crisis, and express our concern that the scale and gravity of the negative impacts of climate change affect all countries and undermine the ability of all countries, in particular, developing countries, to achieve sustainable development and the Millennium Development Goals, and threaten the viability and survival of nations.

UNGA Res. 66/288, 'The Future We Want', 11 September 2012, Annex, § 25, available at <http://www.un.org/en/sustainablefuture> (last visited 26 September 2014).

most direct risks due to sea-level rise. There is now a range of programmes in the Asia-Pacific region to address the effects of climate change. The most coherent of these is in the Pacific Island region.[122] ASEAN has also made substantial efforts to deal with the issue.[123] The particular issue of migration and people displaced by the effects of climate has garnered the attention of a number of writers.[124]

6. The Right to a Healthy and Sustainable Environment in the Asia-Pacific

Defining what constitutes a healthy and sustainable environment is fraught with difficulty. While Alan Boyle deals with the various versions in other regions in Chapter 7 in this volume, the only attempt in the Asia-Pacific to come up with a definition is found in the 2012 ASEAN Human Rights Declaration (discussed in section 3A, above), where the formulation is similar to that of the UN Independent Expert on Human Rights and the Environment.[125] This section is focused on the development of substantive environment rights in the Asia-Pacific in national constitutions, in legislation, and as interpreted by the courts. It also includes a brief analysis of the achievement of procedural rights along the lines of the Aarhus Convention, and a short discussion of green courts and environmental rights in the region.

A. Constitutional Provisions and Environmental Rights

Many countries have incorporated some form of recognition of environmental rights in their national constitutions in recent years, as recorded in a number of studies.[126] These range from an explicitly stated right to a clean

[122] SPREP Climate Change Overview, available at <http://www.sprep.org/Climate-Change/climate-change-overview> (last visited 26 September 2014):

The Goal under the Climate Change Strategic Priority is that 'By 2015, all Members will have strengthened capacity to respond to climate change through policy improvement, implementation of practical adaptation measures, enhancing ecosystem resilience to the impacts of climate change, and implementing initiatives aimed at achieving low-carbon development.'

[123] ASEAN Cooperation on Climate Change, at <http://environment.asean.org/asean-working-group-on-climate-change/> (last visited 26 September 2014).

[124] See further Chapter 6 in this volume.

[125] See UN HR Council Report, *supra* note 48.

[126] See, e.g., D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012); J. May and E. Daly, 'New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide', 1 *IUCN Academy of Environmental Law e-Journal* (2011), available at

and healthy environment (or similar language) to the use of a 'right to life' provision as a basis for achieving the same environmental outcome. Table 5.1 extracts selected provisions from constitutions of the countries of the Asia-Pacific region which include some kind of recognition of environmental rights.[127] There is a good deal of variation in the ways in which environmental rights are referred to. The language used ranges from robust to weaker approaches. The robust approach is characterized by a direct recognition of a right, sometimes with a corresponding duty on the part of citizens to protect the environment.

The more robust formulations of environmental rights in this table include The Philippines, South Korea, Indonesia, Nepal, The Maldives, Mongolia, Timor Leste, and Fiji. While these generally contain explicit language, some are characterized by ambiguity or are qualified in some way. Further, such provisions still require implementation and enforcement, and thus the role of the courts in many jurisdictions remains paramount, as exemplified by the case of *Oposa v. Factoran*, which is focused on immediately below, and the South Asian 'right to life' cases, dealt with in Section 6.B.

Section 16 of Article II of the Philippines Constitution[128] provides: 'The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.' This provision was relied on in the ground-breaking case of *Minors Oposa v. Factoran*,[129] which concerned the granting of timber licences over more land than what was available to log; only 4 per cent of the relevant land was covered by forest and, at the then current rate of logging, there would be

<http://www.iucnael.org/en/e-journal/previous-issues/157-issue-20111.html> (last visited 26 September 2014); J. May and E. Daly, *Global Environmental Constitutionalism* (2014); C. Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions', Human Rights Institute, University of Connecticut, Economic Rights Working Paper No. 16 (August 2011), available at <http://ideas.repec.org/p/uct/ecriwp/16.html> (last visited 26 September 2014).

[127] This list is not intended to be exhaustive but only to serve as the basis for discussion of some of the issues and difficulties of implementing the provisions. Global studies such as that of Boyd, *supra* note 126; May and Daly, 'New Directions in Earth Rights', *supra* note 126, and May and Daly, *Global Environmental Constitutionalism*, *supra* note 126, canvass a broader range of formulations in the context of recording the phenomenon of global environmental constitutionalism. However, as is recognized in the text below, less explicit mention of rights can nevertheless form the basis for litigation to achieve environmental outcomes.

[128] Constitution of the Republic of the Philippines 1987, available at <http://www.gov.ph/constitutions/1987-constitution/> (last visited 22 November 2014).

[129] *Oposa v. Factoran*, Supreme Court of the Philippines, G.R. No. 101083, 30 July 1993, available at <http://www1.umn.edu/humanrts/research/Philippines/Oposa v Factoran, GR No. 101083, July 30, 1993, on the State's Responsibility To Protect the Right To Live in a Healthy Environment.pdf > (last visited 22 November 2014).

Table 5.1. Environmental rights in national constitutions

Jurisdiction (listed in order of following discussion in the text)	*Constitutional provision*
Constitution of the Republic of The Philippines	Article 16 The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.
Constitution of the Republic of Korea 1987 (South Korea)	Article 35 (1) All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment. (2) The substance of the environmental right is determined by law.
Constitution of the Republic of Indonesia 1945	Article 28H(1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. Article 28F Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.
Constitution of the Republic of Fiji	Environmental rights Article 40 (1) Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures. (2) To the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section.
Constitution of the Kingdom of Bhutan 2005	Article 5. Environment . . . 2. The Royal Government shall: (a) Protect, conserve and improve the pristine environment and safeguard the biodiversity of the country; (b) Prevent pollution and ecological degradation; (c) Secure ecologically balanced sustainable development while promoting justifiable economic and social development; and (d) Ensure a safe and healthy environment.
Nepal Interim Constitution 2007 (under revision 2015)	Article 7-2-1 Both parties shall respect and protect the basic right of a person to life. Article 16. Right relating to environment and health: (1) Every person shall have the right to live in a healthy environment.

Constitution of the Maldives 2008	Article 23 Every citizen has the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realization of these rights by reasonable measures within its ability and resources: (a) adequate and nutritious food and clean water; (b) clothing and housing; (c) good standards of health care, physical and mental; (d) a healthy and ecologically balanced environment . . .
Constitution of the People's Republic of Mongolia 1992	Article 16. Citizen's Rights The citizens of Mongolia enjoy the following rights and freedoms: . . . 2. The right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance.
Constitution of Timor Leste 2002	Article 61 Everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.
Constitution of Bangladesh 1972	Protection and improvement of environment and biodiversity Article 18A. The State shall endeavour to protect and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens (introduced in 2011). Article 32. Protection of life and personal liberty No person shall be deprived of life or personal liberty save in accordance with law.
Constitution of India 1949	Article 2. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law. Article 48A The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.
Constitution of the Islamic Republic of Pakistan	Article 9. Security of person No person shall be deprived of life or liberty save in accordance with law.

no further forest resources available in the Philippines. The plaintiffs claimed that they had 'a clear and constitutional right to a balanced and healthful ecology and [were] entitled to protection by the State in its capacity as *parens patriae*'.[130]

The inter-generational aspect of this case is particularly important in the context of human rights. The 43 minors named as plaintiffs were represented by their parents. The court stated:

[130] *Ibid.*, Cause of action as stated in case at § 15.

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit.[131]

The court recognized that:

> . . . every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[132]

In part as a result of the *Oposa* case and subsequent environmental litigation, it is pertinent to note that the Supreme Court of the Philippines issued new rules of procedure in environmental matters in 2010, the objectives of which encapsulate the constitutional right to a balanced and healthful ecology; provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules, and regulations, and international agreements; introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and enable the courts to monitor and exact compliance with orders and judgments in environmental cases.[133] The various innovative approaches introduced in these Rules, such as the writ of *kalikasan* (literally 'writ of nature') have potentially great significance for environmental rights jurisprudence in the Philippines, elsewhere in Asia and possibly globally.

Article 35(1) of South Korea's Constitution has a clearly stated environmental right with a corresponding duty of citizens to 'endeavour' to protect the environment. However, this is then qualified by Article 35(2), which states that the '[s]ubstance of the environmental right is to be determined by law'. Article 6(1) of the relevant legislation, *Framework Act on Environmental Policy 1999*, states: 'All the people shall have the right to live in healthy and agreeable environments.' However, this merely repeats the constitutional provisions, and no substantive right can be found in the Act itself. Presumably

[131] *Ibid.*, at 7.

[132] *Ibid.*, at 8; for comment on this case, see A. G. M. La Viña, 'The Right to a Sound Environment in the Philippines: The Significance of the *Minors Oposa* Case', 3 *Review of European Comparative & International Environmental Law* (1994) 246, at 248.

[133] Supreme Court, Republic of the Philippines, Rules of Procedure for Environmental Cases (13 April 2010), A.M. No. 09-6-8-SC, available at <http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html> (last visited 26 September 2014).

it is therefore up to the courts to define the right, on a case-by-case basis, and the constitutional guarantee thus remains somewhat hollow.

Article 28H(1) of Indonesia's Constitution provides a strong formulation, while Article 65 of the Law on Environmental Protection and Management[134] draws a clear link between a healthy environment and human rights, as well as referring to related procedural rights. It states:

> (1) Everybody shall be entitled to proper and healthy environment as part of human rights.
> (2) Everybody shall be entitled to environmental education, access to information, access to participation and access to justice in fulfilling the right to a proper and healthy environment.
> (3) Everybody shall reserve a right to submit recommendations and/or objections against businesses and/or activities predicted to affect the environment.

Significantly, the Act states explicitly that these entitlements are conferred 'as part of human rights'. No other jurisdiction in the Asia-Pacific region includes such an explicit statement. However, no cases appear to have come before the courts on the basis of these provisions, and thus they remain in realm of theoretical value.

The Constitution of Fiji presents a broadly formulated right to a clean and healthy environment, referring to protection of the natural world both for present and future generations, thus importing the notion of inter-generational equity. It also specifically mentions achievement of the right to both legislation and 'other measures'. However, curiously, it also authorizes the limitation of these rights 'to the extent that it is necessary'. This limitation could well result in restricting the possibility for legal action to enforce the professed constitutional right, simply by passing a law to limit it whenever it is politically convenient.

Weaker constitutional approaches are less direct. They generally do not include reference to a 'right' *to* environment as such. For example, in Bhutan, the government pledges to protect, conserve, and improve the pristine environment and safeguard the biodiversity of the country; prevent pollution and ecological degradation; secure ecologically balanced sustainable development, while promoting justifiable economic and social development; and, *finally*, ensure a safe and healthy environment. However, as seen in the next section, the 'right to life' provisions in several jurisdictions have been seen to have a similar effect, by virtue of actions in the courts.

[134] Law No. 32 of 2009 on Environmental Protection and Management (in force 3 October 2009), available at <http://faolex.fao.org/docs/pdf/ins97643.pdf> (last visited 26 September 2014).

B. Use of Constitutional Provisions on the Right to Life in the Courts

In various jurisdictions, where a specific environmental right is not embedded in their constitutions, other constitutional provisions which do not relate specifically to the environment but to the area of human rights, such as the right to life, have been used as a basis for legal actions to achieve environmental outcomes. The best-known instances are found in South Asia, where the right to life is used in the courts of Bangladesh, India, and Pakistan. As Razzaque notes:

> The right to environment is not a constitutional right in these three countries and the judiciary has interpreted that the constitutional right to life includes the right to healthy environment. This interpretation by the court has allowed the communities to access to higher court through PIL [public interest litigation].[135]

Razzaque sets out the reasons why it is necessary to use litigation in India, Pakistan, and Bangladesh:

> First, there is a lack of developed administrative and quasi-judicial (e.g. alternative dispute resolution) institutions to attend to the matters of public concern. Second, the lack of effective remedies in the existing environmental legislation. Third, public officials and agencies are not capable of policing the environmental system due to insufficient funds, inadequate staff and lack of expertise. Fourthly, the agencies in charge of protecting the environment may be unwilling to bring action against the violators due to political pressure. The development of the PIEL [public interest environmental litigation] was also influenced by the increasing number of non-governmental organizations working to improve human rights or environmental degradation. Weak legislation to cope with the rapid degradation of the environment, along with the various innovative remedies available from the judiciary of these three countries, expedited the use of PIL for environmental protection.[136]

In India, while there is no explicit provision guaranteeing environmental rights in the Constitution, Article 48A provides that the state 'shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country', while Article 51A focuses on the duty of citizens concerning protection and improvement of the natural environment. However, it is the 'right to life' provision of Article 21 that has been of most significance, with the Supreme Court holding in *M.C. Mehta and Anr. v. Union of India & Ors* that the right to life includes the right to a healthy and pollution-free environment.[137] This was an action for compensation related

[135] Razzaque, *supra* note 113, at 592. [136] *Ibid.*, at 590.

[137] See, e.g., *M.C. Mehta and Anr v. Union Of India & Ors.*, (1987) AIR 1086, Supreme Court of India, 20 December 1986.

to pollution affecting a large number of people. These and other important cases brought by Advocate M.C. Mehta and others have established that the constitutional right to life under the Indian Constitution extends to the right to a clean and healthy environment.[138]

Pakistan has also seen some significant public interest environmental cases. The most important of these is *Shehla Zia v. WAPDA*,[139] which concerned the proposed building of an electric grid station near a residential area. The Supreme Court of Pakistan framed the argument as follows:

> In the present case, citizens having apprehension against construction of a grid station in [a] residential area sent a letter to the Supreme Court for consideration as a human rights case raising two questions; namely, whether any Government agency has a right to endanger the life of citizens by its actions without the latter's consent; and secondly, whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the Authority.

The Supreme Court focused on the interpretation of Article 9 of the Constitution of Pakistan, which provided that 'no person shall be deprived of life or liberty save in accordance with law'. The Court explained:

> Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.

The Court also applied the precautionary principle in the case for the first time in Pakistan, relying on Principle 15 of the Rio Declaration. Parvez Hassan, lead advocate for the plaintiff, commented subsequently:

> What happened in *Shehla Zia v WAPDA* was not a result that we could normally have had in a country where there was a lot of environmental legislation. The Supreme Court came out with very positive results, it knocked down the hurdles of right to sue, entertained the application and accepted the petition and thus made a monumental judgment. What the lawmakers and the executive leadership of the country could not do over the course of several decades, the judiciary was able to start with a single decision.[140]

[138] See further MC Mehta Environmental Foundation, 'Environment Jurisprudence', available at <http://mcmef.org/environment_jurisprudence.html> (last visited 26 September 2014).

[139] *Shehla Zia v. WAPDA*, PLD 1994 SC 693, Supreme Court of Pakistan, 12 February 1994.

[140] P. Hassan, 'Environmental Rights as Part of Fundamental Human Rights: The Leadership of the Judiciary in Pakistan', in A. H. Benjamin (ed.), *Law, Water and the Web of Life: A Tribute to*

In Malaysia, although there is no explicit provision concerning the environment or environmental rights, it can be implied from Article 5 of its Federal Constitution, as found in several cases in the Malaysian courts. Article 5 reads: 'No person shall be deprived of his life or personal liberty save in accordance with law.' In *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan*,[141] Gopal Sri Ram JCA stated:

> [T]he expression 'life' appearing in art (5) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are [the] right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.[142]

C. Procedural Rights and the Aarhus Convention in the Asia-Pacific

The development of environmental law internationally and nationally has seen the increasing acceptance of the need to involve the public at all levels of environmental decision-making. The philosophy behind public participation relates to the idea that those affected by decisions concerning governmental and/or private sector development activities should have the right to influence those decisions.

This philosophy has been translated into legislative requirements in many jurisdictions. The requirements include access to information in relation to potential development activities, the right to participate in spatial planning, the right to make submissions pursuant to Environmental Impact Assessment processes, the right to appeal decisions concerning the merits of development activity and to request judicial review as to the legality of governmental administrative decisions. Some countries have also established formal public environmental inquiry procedures in order to solicit both written and oral submissions from individuals and communities on significant development

Parvez Hassan (2003) 199, available at <https://www.elaw.org/node/6443> (last visited 26 September 2014). See also P. Hassan and J. Hassan, 'Pakistan', in L. J. Kotzé and A. R. Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (2009) 39, and P. Hassan, 'Human Rights and the Environment: A South Asian Perspective', 13th Informal ASEM Seminar on Human Rights (21–23 October 2013), available at <http://www.asef.org/images/docs/Keynote%20speech-Parvez%20Hassan_Human%20Rights%20and%20Environment%20A%20South%20Asian%20Perspective.pdf> (last visited 26 September 2014).

[141] *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan*, Court of Appeal of Malaysia, [1996] 1 MLJ 261.

[142] See H. A. Rahman, 'Human Rights to Environment in Malaysia', 1 *Health and the Environment Journal* (2010) 59, at 61–63.

proposals. In some jurisdictions, systems of legal assistance or 'legal aid' have been established in order to support individuals, non-governmental organizations, and community groups in challenging environmental decisions in courts and tribunals.

These systems have encouraged the development of public interest environmental litigation. Such litigation is not linked to the private interests of the individuals bringing the action, but is brought, as the name implies, in the interests of the broader public. The public can be variously defined as a community, a class of persons, or in major development activities, representing a much broader human constituency, as well as the environment itself.[143] The environmental public interest can be seen to serve as the conceptual basis to equitably achieve economic, ecological, social, and cultural sustainability for both present and future generations.

A wide variety of public interest environmental law organizations have been established in the past 30 years to represent communities and groups through the medium of public interest litigation.[144] These approaches are in line with widely accepted principles embraced by the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. This Convention is considered to be the most advanced international agreement in establishing standards for public participation in environmental matters. Reflecting international norms built up over the past 30 years, its preamble explicitly links human rights and the environment. It recognizes 'that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself'. It further recognizes 'that every person has

[143] In Ecuador and Bolivia, constitutional changes have introduced the idea of granting all nature equal rights to humans, by legally recognizing the earth deity known as 'Pachamama'. See, e.g., J. Vidal, 'Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth', *The Guardian*, 10 April 2011, available at <http://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights> (last visited 26 September 2014). Ironically, the Ecuadorian Pachamama Foundation, which had been instrumental in pushing for these changes, was closed down by the Government in Ecuador in December 2013; see 'Ecuador: Rights Group Shut Down' available at http://www.hrw.org/news/2013/12/06/ecuador-rights-group-shut-down (last visited 23 November 2014).

[144] In the Asian region, these include the Consumers Association of Penang, Malaysia (<http://consumer.org.my/> (last visited 26 September 2014)), the Indonesian Center for Environmental Law (<http://www.icel.or.id/> (last visited 26 September 2014)), Wahana Lingkungan Hidup Indonesia (WALHI) (<http://www.walhi.or.id/> (last visited 26 September 2014)), and the Bangladesh Environmental Law Association (BELA) (<http://www.belabangla.org> (last visited 26 September 2014)). In Australia, Environmental Defenders Offices have been established in every state and territory over the past thirty years, but in recent times have had government support withdrawn, resulting in a diminution of their public interest legal services: see P. Lloyd, 'Govt Cuts Funds to Environmental Defenders Office', *ABC News* (19 December 2013), available at <http://www.abc.net.au/am/content/2013/s3914416.htm> (last visited 26 September 2014).

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'. It explicitly recognizes individual environmental rights, as well as a duty to protect and improve the environment:

> Recognizing also 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.

In order for this right to be guaranteed, the preamble records that 'citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights'. The Convention provides that the public must be informed at an early stage in decision-making, and also details the minimum standard of information that is to be made available in different participatory procedures.[145] It also obliges parties to ensure access to justice in environmental matters.[146]

As noted, the Convention focuses on the procedural aspects of access to environmental information for public participation in environmental decision-making, and access to justice in environmental matters. These elements are based on Principle 10 of the Rio Declaration on Environment and Development. While these procedural rights are now included in the legal regime of human rights in the European region through the jurisprudence of the European Court of Human Rights, the jurisdictions of the Asia-Pacific region have generally been slow to incorporate them.

Although the Convention is seen as a European instrument, it is open for global accession,[147] and that process is now being actively encouraged.[148] As Kofi Annan, former Secretary-General of the UN, observed: '[A]lthough regional in scope, the significance of the Aarhus Convention is global. . . . [I]t is the most ambitious venture in the area of "environmental democracy"

[145] UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, entered in force 30 October 2001) 2161 UNTS 447.

[146] See *ibid.*, Arts 4–9.

[147] *Ibid.*, Art. 19(2) provides: 'Any other State . . . that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.' See also United Nations, *The Aarhus Convention: An Implementation Guide* (2nd ed. 2013), at viii.

[148] UNECE, 'Landmark Meeting of Aarhus Convention Welcomes Global Accession' (5 July 2011), available at <http://www.unece.org/press/pr2011/11env_p32e.html> (last visited 26 September 2014).

so far undertaken under the auspices of the United Nations.' In his view, the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.[149] Despite this sentiment, the possibility of extending the Aarhus Convention to Asian and Pacific countries is currently fairly remote. Although one Asian country is considering accession to the Convention,[150] it is unlikely that others will do so in the short term. With regard to ASEAN for example, Lye comments:

> While it is unlikely that the Aarhus Convention will be adopted in the countries of Southeast Asia in the near future, it is clear that it will serve as a guide and aspiration for environmentalists from all corners of the globe, and point the way for the future.[151]

The barriers to adopting such an instrument in the various Asian sub-regions include cultural and political considerations. However, in ASEAN, given the progress on various environmental fronts, as well as the development of the ASEAN Charter and the ASEAN Human Rights Declaration, the development of a further regional instrument that reflects elements of the Aarhus Convention is now conceivable. Certainly, the civil and political rights provisions of the ASEAN Human Rights Declaration already include the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law (Article 5) and the right to seek, receive and impart information (Article 23). While these provisions are not specifically linked to Article 28(f), which focuses on the right to a safe, clean and sustainable environment, they may form the basis for legal actions that reflect the provisions of the Aarhus Convention in the future.

D. Green Courts and Human Rights in the Asia-Pacific

An indicator of increasing awareness of the need for public participation in environmental decision-making and the achievement of environmental justice is the establishment of specialist environmental courts, or, within the general courts, 'green benches' of judges to hear environmental cases.[152]

[149] UNECE, 'Environmental Rights not a Luxury—Aarhus Convention Enters into Force' (29 October 2001), available at <http://www.unece.org/press/pr2001/01env15e.html> (last visited 26 September 2014).

[150] Mongolia has enquired about membership: UNECE, 'Landmark meeting of Aarhus Convention Welcomes Global Accession', *supra* note 148.

[151] Lye L. H., 'Public Participation in the Environment: A South-East Asian Perspective', in D. M. Zillman, A. Lucas, and G. Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002) 629, at 677.

[152] G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009), at 1; see also N. A. Robinson, 'Ensuring Access to Justice through Environmental Courts', 29 *Pace Environmental Law Review* (2012) 363, at 381.

Some 400 of these bodies have been established at national, and in particular sub-national, level around the world. In the Asia-Pacific, the earliest established of these bodies are the Planning and Environment Court in Queensland, the Environment, Resources and Development Court in South Australia, the Land and Environment Court in New South Wales, and the New Zealand Environment Court. In recent years, various forms of such courts and tribunals have been established in The Philippines, Thailand, Malaysia, Pakistan, India, and China,[153] and they continue to be the subject of a good deal of analysis.[154] Perhaps the most developed specialized body in the Asian region is the National Green Tribunal in India.[155]

It would appear that none of these specialist bodies have specific jurisdiction with regard to human rights arising out of environmental matters.[156] However, the Aarhus procedural rights of access to information, public participation in environmental decision-making and access to justice in environmental matters are being put into practice by the establishment and operation of these bodies. In addition, it can be expected that in jurisdictions where the constitution does not include explicit language with regard to a citizen's environmental rights, the specialist bodies will continue the trend already established in the superior courts of countries such as Bangladesh, India, Pakistan, Malaysia, and Nepal to interpret constitutional provisions such as the right to life in order to achieve environmental outcomes.

[153] See M. Zhang and B. Zhang, 'Specialized Environmental Courts in China: Status Quo, Challenges and Responses', 30 *Journal of Energy & Natural Resources Law* (2012) 361.

[154] See, e.g., 'The Amritsar Dialogue Statement on Green Courts and Tribunals' (2013), available at <http://www.jnu.ac.in/SIS/AmritsarDialogueStatement.pdf> (last visited 26 September 2014); see also B. J. Preston, 'Characteristics of Successful Environmental Courts and Tribunals', 26(3) *Journal of Environmental Law* (2014) 365.

[155] National Green Tribunal Act, Parliament of India, Act No. 19 (5 May 2010, entered in force 2 June 2010). See further M. Chernaik, 'India's New National Green Tribunal', *eLaw Spotlight* (28 December 2011), available at <http://elawspotlight.wordpress.com/2011/12/28/indias-new-national-green-tribunal/> (last visited 26 September 2014). The Asian Development Bank has established an Asian Judges Network on the Environment, and continues to encourage dialogue and promote capacity building among environmental judges in Asia: see 'Environmental Governance and the Courts in Asia, An Asian Judges Network on the Environment', Law and Policy Reform Brief No. 1 (June 2012), available at <http://www.adb.org/publications/environmental-governance-and-courts-asia-asian-judges-network-environment> (last visited 26 September 2014).

[156] Clearly, such bodies do have a role in dealing with environment and human rights; this is obvious from the arguments made previously in this chapter and from the other chapters in this book. See also G. Pring and C. Pring, 'Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment', 11 *Oregon Review of International Law* (2009) 301, at 307: 'Specialized ECTs [Environmental Courts and Tribunals] provide one vehicle for fairly and transparently balancing the conflicts between the human rights of environment and development.'

7. Conclusions

There is little doubt that progress has been made in the development of closer links between human rights and the environment in the Asia-Pacific. However, the overall situation remains patchy in comparison with a number of the world's other regions, especially Europe, Latin America, and the African region. While the discussion on the realization of a substantive environmental right at global level[157] is becoming more sophisticated and broader ranging, that discussion is only just beginning in the Asia-Pacific.

Although the ASEAN Human Rights Declaration includes a clear provision on the right to a safe, clean, and sustainable environment, and a number of countries have clearly stated environmental rights within their constitutions, environmental violations continue to remain unaddressed at both regional and national levels in ASEAN nations. Nevertheless, across the constitutional jurisprudence developed by the courts in the Asia-Pacific as a whole will be a valuable source for the further development of human rights approaches to environmental protection, and this experience will be particularly valuable for the implementation of the 2012 ASEAN Human Rights Declaration. In addition, the introduction and increased use of specialized environmental courts in Asia is likely to see an increase in the use of constitutional human rights provisions and more effective implementation of environmental legislation.

As noted in the Introduction to this volume, the convergence of human rights law and environmental law is a clearly emerging phenomenon, as human rights institutions and instruments as well as the courts continue to be 'greened'. However, without more coordinated and conscious efforts on the part of regional organizations, national governments, and their human rights bodies and environment departments, closer integration will continue to depend on the initiatives of courageous litigants, increased acceptance of cases by the courts, innovative arguments by advocates, and the determination of non-governmental organizations to achieve significant and meaningful change.

[157] See S. Turner, 'Factors in the Development of a Global Substantive Environmental Right', 3 *Onati Socio-Legal Series* (2013) 893.

6

Human Displacement and Climate Change in the Asia-Pacific

*Stefan Gruber**

1. Introduction

Generations of people have been forced to leave their homelands for a wide variety of reasons in the course of human history. The reasons include events such as invasions, genocide, political unrest, and famine. A common feature of many large-scale migrations is that they are triggered by human activities. That is also reflected in the definition of the term 'refugee' in Article 1 of the Convention relating to the Status of Refugees of 1951[1] ('Refugee Convention'), as amended by the Protocol relating to the Status of Refugees of 1967.[2] This is the main international legal instrument dealing with forced migration and exclusively protects people migrating because of a well-founded fear of persecution.[3]

However, that definition, which derives from the experiences of World War II, reflects a very narrow view of forced migration. It does not include human displacement caused by natural disasters and changes in the environment, with some of the most permanent and severe effects being triggered by anthropogenic changes in the climate. While it is understood that people

* The author would like to thank James Davis from Harvard Law School, Alice Gardoll, student intern at the Sydney Centre for International Law, and Jessica Werro from Sydney Law School for their research assistance in the preparation of this chapter.

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 2954) 189 UNTS 137 (hereinafter 'Refugee Convention').

[2] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[3] Refugee Convention, *supra* note 1, Art. 1 defines a refugee as a person 'who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

displaced by the effects of climate change are therefore not protected by refugee status under the Refugee Convention, their situation is not specifically recognized by other international conventions either.[4] That might prove disastrous over the next few decades, as human displacement triggered by climate change is a phenomenon that humankind is not only already facing in some parts of the world, but will soon have to face on a much larger scale. The aim of this chapter is to examine the fact that climate change will likely displace vast numbers of people in many areas of the world, including the Asia-Pacific region, to emphasize the devastating effect of such events on the human rights of those affected, such as the rights to life, food, water, health, and adequate housing—as recognized, for example, by the Universal Declaration of Human Rights of 1948[5] and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)[6]—and to stress the need for legal recognition and assistance for such displaced persons at an international level.

2. The Impact of Climate Change on Communities in the Asia-Pacific Region

Climate change is defined by Article 1 of the United Nations Framework Convention on Climate Change[7] (UNFCCC) as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'. The effects of climate change on people and the environment are very diverse. According to the 2013 report of the Intergovernmental Panel on Climate Change (IPCC),[8] the already observed, or at least likely, effects include decreases in the extent of snow cover, permafrost, and sea ice; glacier melt; increases in soil temperatures; an increase in global average air and ocean temperatures; and rise in sea levels. Some of the consequences identified by the IPCC in its

[4] International Organization for Migration (IOM), *International Dialogue on Migration No. 18: Climate Change, Environmental Degradation and Migration* (2012), at 29.

[5] UNGA Res. 217A (III), 'Universal Declaration of Human Rights' (10 December 1948).

[6] International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter 'ICESCR').

[7] United Nations Framework Convention on Climate Change (opened for signature 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[8] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013).

report are changes in ecosystems, changes in precipitation in many regions, and an increase of extreme weather events. As early as 1990, in the IPCC's first assessment report, the IPCC asserted that 'as similar events have in the past, these changes could initiate large migrations of people, leading over a number of years to severe disruptions of settlement patterns and social instability in some areas'.[9] It further noted that 'the most vulnerable human settlements are those especially exposed to natural hazards, such as coastal or river flooding, severe drought, landslides, severe windstorms and tropical cyclones'.[10] The draft contribution of Working Group II to the Fifth Assessment Report of the IPCC, titled 'Climate Change 2014: Impacts, Adaptation and Vulnerability', predicted that '[w]ithout adaptation, hundreds of millions of people will be affected by coastal flooding and will be displaced due to land loss by year 2100; the majority of those affected are from East, Southeast and South Asia'.[11]

There are numerous examples in human history of changes in the climate, triggering mass migration and the loss and abandonment of entire settlements. For example, when Vikings were settled in Greenland from around 1000 to 1500 AD, the climate allowed for farming and livestock breeding on a scale that sustained the entire population. The climatic circumstances changed rapidly with the dawning of the Little Ice Age, which lasted roughly from 1550 to 1850 AD. The temperature dropped drastically and farming became much harder. In the end, those who did not flee their homeland were killed off by famine. The colony was completely wiped out. Ironically, the current rapid climate change is leading to a large-scale deterioration of permafrost in that region and is turning it once more into arable land.

The Asia-Pacific is already experiencing dramatic effects as a result of climate change, and many inhabitants of the region are likely to lose their homes as a consequence. That may either be caused by sea level rise—which not only submerges coastal land but also causes salinization of temporarily flooded areas, often caused by high winds and storm surges—or by the decline of ecosystems when they can no longer sustain the local population because of increasing desertification or other soil degradation. This chapter focuses on examples from island communities in the Pacific, river deltas in South and Southeast Asia, and the arid areas in

[9] Intergovernmental Panel on Climate Change, Working Group II, *Climate Change: The IPCC Impacts Assessment* (1990), at 3.

[10] *Ibid*.

[11] Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation and Vulnerability, Final Draft Report* (2014), at 3 (ch. 5, 'Coastal Systems and Low-lying Areas'), available at <http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap5_FGDall.pdf> (last visited 8 October 2014).

Northern China, exploring the impact of these phenomena on human rights and potential legal developments for their protection.

A. The Flooding of Island Communities in the Pacific

The Pacific Island region is among the areas most vulnerable to global warming. The sea level rise in that region has been consistently higher, with consequently greater impact, than the global average in recent years, and the coastal communities are struck by frequent tropical cyclones.[12] Apart from Australia, New Zealand, and Papua New Guinea, which account for most of the landmass in the region, many of the regional states consist mainly of low-lying islands and atolls that are only a few metres above sea level. Those islands are inhabited mostly by indigenous people and local communities, many of whom depend on their land and the health of their environment much as their forebears did.[13]

One community that is undergoing relocation is that of the Carteret Islands. The horseshoe-shaped Carteret Atoll is located 86 kilometres north-east of Bougainville and belongs to Papua New Guinea. It includes several low-lying islands with a maximum elevation of only 1.5 metres, which makes them highly vulnerable to floods. The population of around 2,500 people is a culturally unique Halia-speaking community.

The fate of the Carteret Islanders as an island community was sealed by the constantly rising sea level. Further stress on the shoreline has been caused by an increased number of tidal waves and storm surges, which are destroying gardens and crops, damaging houses, and polluting the fresh groundwater supplies with salt water. The Carteret Islanders fought for their homes for many years by building dams and planting mangroves, but in the end it was a fight they could not win. The islands will soon be completely uninhabitable. The Catholic Church of Bougainville gave the Carteret Islanders 41 hectares of land at Tinputz for resettlement and the work on the community's new homes is nearing completion. The first Carteret Islanders moved there in

[12] The sea level rise in the South Pacific has been monitored by the South Pacific Sea Level and Climate Monitoring Project (SPSLCMP) since 1991. SPSLCMP is an 'Australian Government response to concerns raised by member countries of the South Pacific Forum over the potential impacts of human-induced global warming on climate and sea levels in the Pacific region'. Its reports, records, and observations are available at <www.bom.gov.au/pacificsealevel/index.shtml> (last visited 8 October 2014) and <www.bom.gov.au/oceanography/projects/spslcmp/spslcmp_reports.shtml> (last visited 8 October 2014).

[13] E. L. Kwa, 'Climate Change and Indigenous People in the South Pacific: The Need for Regional and Local Strategies', in B. Richardson *et al.* (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (2009) 102.

2009 to build houses and plant crops on a cleared area of jungle to prepare the land for the arrival of the rest of their community.[14] This might be the first organized evacuation in the region caused by climate change, but it is likely a harbinger of similar, albeit much larger, events to come.

However, although the lives and livelihoods of the Carteret Islanders have been saved, their community will have to face further dramatic challenges once they cease to exist as an island community. The Carteret Islanders regard the protection and continuation of their cultural identity as their main concern,[15] but the effects of their changing living conditions and the loss of their traditional homes will generally be devastating. The peoples of the Pacific depend heavily on their lands and the ocean to sustain their daily lives. In many Pacific Island countries, over 90 per cent of the land is owned by indigenous peoples. Land forms part of the peoples' identities and ways of life. Without it they have neither a place nor a cultural identity.[16] Kwa reports that one of the important maxims in the Pacific is 'land is life, without land there is no life'.[17]

The degradation and vulnerability of terrestrial and coastal ecosystems on islands throughout the Pacific region has been exacerbated by climate change over the last few decades. Ecosystems and agriculture are very likely to be adversely impacted by extreme weather events, sea-level rise, inundation, soil salinization, and decline in water supply caused by seawater intruding into freshwater reservoirs.[18] Many small island communities, such as those in the Torres Strait, which are under Australian and Papua New Guinean jurisdiction, have even less ability to cope with the effects of climate change due to existing social and economic disadvantages and inadequate infrastructure.[19]

The island states and communities in the Pacific are well aware of the threats to their territorial integrity posed by climate change.[20] In some cases

[14] 'Carteret Islanders—First Climate Refugees', *Solomon Times Online* (6 May 2009), available at <http://solomontimes.com/news.aspx?nwID=3964> (last visited 8 October 2014).

[15] T. Havini, 'An Uncertain Future', 30 *Explore* (Australian Museum) (2008) 14; generally on the effect of climate change on cultural heritage sites, see S. Gruber, 'The Impact of Climate Change on Cultural Heritage Sites: Environmental Law and Adaptation', 2 *Carbon and Climate Law Review* (2011) 209.

[16] Kwa, *supra* note 13, at 104. [17] *Ibid.*, at 103.

[18] P. Clarke and I. Miller, 'Climate Change and the Law in the Pacific Islands', in W. Gumley and T. Daya-Winterbottom (eds), *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (2009) 101.

[19] D. Green, *How Might Climate Change Affect Island Culture in the Torres Strait?* (2006).

[20] See also J. Barnett and J. Campbell, *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (2010); W. Burns, 'The Impact of Climate Change on Pacific Island Developing Countries in the 21st Century', in A. Gillespie and W. Burns (eds), *Climate Change in the South Pacific: Impacts and Responses in Australia, New Zealand, and Small Island States* (2000)

their very existence might be in jeopardy,[21] which is why they consider the rising sea and the more frequent and intense cyclones not only an environmental issue but also even more as a security concern.[22] Given the small landmass and low elevation of most of those island states, any adaptation and mitigation measures will only have a limited impact. Without significant international assistance and cooperation, their very existence is challenged. In 2000, Tuvalu joined the United Nations with the sole goal of raising awareness of climate change and to convince other countries to join the Kyoto Protocol.[23] Unfortunately, the outcome of such activities has been quite limited so far. In his address to the 63rd UN General Assembly in 2008, the President of Kiribati, Anote Tong, pointed out that 'while the international community continues to point fingers at each other regarding responsibility for and leadership on this issue, our people continue to experience the impact of climate change and sea level rise. And practical solutions continue to evade us'.[24]

B. Climate Change and Asian River Deltas

Another area in the Asia-Pacific where settlements are highly threatened by the effects of climate change is the river deltas.[25] These deltas are often heavily populated, as they not only provide excellent transport routes but also have very fertile soil. The land is usually not very elevated and is therefore highly vulnerable to the effects of increased precipitation and glacier melt. Further, sea level rise makes it more difficult for high water flooding inland to drain into the sea, while an increased number of storm surges can push seawater further upstream, causing even more severe flooding.[26] In addition,

233; D. Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law', 14 *Melbourne Journal of International Law* (2013) 346.

[21] For related discussion, see R. Rayfuse and E. Crawford, 'Climate Change and Statehood', in R. Rayfuse and S. Scott (eds), *International Law in the Era of Climate Change* (2012) 243; S. Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States* (2011), available at <http://www.unhcr.org/4df9cb0c9.html> (last visited 8 October 2014).

[22] E. Shibuya, 'Climate Change and Small Island States: Environmental Security as National Security', in E. Shibuya and J. Rolfe (eds), *Security in Oceania in the 21st Century* (2003) 137, at 138.

[23] S. S. Patel, 'Climate Science: A Sinking Feeling', 440 *Nature* (2006) 734, at 736.

[24] Anote Tong, President of the Republic of Kiribati, Statement at the General Debate of the 63rd Session of the United Nations General Assembly (25 September 2008), available at <www.un.org/en/ga/63/generaldebate/pdf/kiribati_en.pdf> (last visited 8 October 2014).

[25] For scientific background information on the impact of climate change on Asia's rivers, see X. Lu and T. Jiang, 'Larger Asian Rivers: Climate Change, River Flow and Sediment Flux', 208 *Quaternary International* (2009) 1.

[26] S. Agrawala *et al.*, *Development and Climate Change in Bangladesh: Focus on Coastal Flooding and the Sundarbans* (2003), at 17.

fertile land is more likely to be rendered useless by salinization if flooded by seawater. This applies, for example, to the low-lying Mekong Delta in Vietnam, where the expected sea-level rise and increased flooding would significantly harm crop productivity and keep significant portions of the land inundated for some time each year, exposing it to heavy saline intrusion.[27] The impact on the population in the Delta would be devastating. As it stands, around four million people in the area are already living in poverty due in part to landlessness.[28]

One of the places where such developments can already be observed is the south of Bangladesh.[29] The coastal area of the country is very low-lying and divided by 13 rivers, creating one vast delta. The low topography fuels a strong backwater effect which causes a dynamic interaction between the brackish and fresh water when the monsoon gives way to the dry season and vice versa.[30] The coastal area is home to approximately 35 million people, while around 10 million people live in areas lower than one metre above sea level.

Many of the local farmers live very close to the water in elevated houses, waiting out the annual monsoon.[31] The floods leave fertile soil behind, which is the basis for the next crop. The farmers usually plant rice during the rainy season and wait for a few weeks while the area around them is flooded. When the water retreats, they harvest and plant different crops. That cycle is repeated every year and balanced precisely with the extreme weather conditions in the region. However, in the last few years, the floods have steadily been taking more fertile land away and making the harvesting cycles shorter. Many areas will soon be uninhabitable and permanently flooded.

A further source of stress to the low terrain of Bangladesh's coastline is the increasing number of severe tropical cyclones. These are exacerbated by the shape of the Bay of Bengal, which acts like a funnel for storm surges. As those areas are heavily populated due to their fertility, the number of victims of

[27] United Nations Development Programme (UNDP), *Human Development Report 2007/2008, Fighting Climate Change: Human Solidarity in a Divided World* (2008), at 100; International Centre for Environmental Management, *Climate Change Adaptation and Mitigation Methodology*, available at <www.icem.com.au/documents/climatechange/cam/CAM%20brief.pdf> (last visited 3 November 2014).

[28] *Ibid*.

[29] Regarding the impacts of climate change on humans in South Asia, see, generally, S. Byravan and S. C. Rajan, 'The Social Impacts of Climate Change in South Asia', 5 *Journal of Migration and Refugee Issues* (2009) 134.

[30] Agrawala *et al.*, *supra* note 26, at 34–41.

[31] M. Gebauer, 'Bangladesch: In der Todeszone des Klimawandels', *Spiegel* (23 April 2007), available at <http://www.spiegel.de/wissenschaft/natur/bangladesch-in-der-todeszone-des-klimawandels-a-477669.html> (last visited 8 October 2014).

tropical cyclones is often very high. The 1970 'Bhola Cyclone' killed approximately 500,000 people, and the 1991 'Bangladesh Cyclone' killed approximately 140,000, while leaving about 10 million people homeless.[32] In 1998, a flood displaced more than 30 million Bangladeshis and inundated around 100,000 km² of land.[33] That flood was caused by the disastrous combination of heavy rainfall and snowmelt in India and Nepal, 20 per cent more rainfall around Bangladesh's major rivers, and elevated tides in the Bay of Bengal during monsoon season that blocked the outflow of the rivers. More recently, Cyclone Aila left 500,000 people homeless in Bangladesh in 2009.[34] As scientific findings strongly indicate, climate change is contributing significantly to the observed increase in number and severity of heavy storms and especially tropical cyclones, and such events are likely to occur more often.[35] Further, the combination of sea level rise and greater cyclone intensity due to higher sea surface temperature is expected to produce much more severe storm surges, inundating significantly more land than was flooded by the cyclones in 1970, 1991, 1998, and 2009, mentioned above.[36]

The submergence of southern Bangladesh will add a significant number of people to the earth's forced migrant population[37] and will undoubtedly not only put enormous pressure on Bangladesh's economy and political system, but also affect the neighbouring countries on account of the sheer number of people displaced.[38] Most of the farmers come from very remote areas dominated by the surrounding water and without sufficient infrastructure. There is an inadequate number of schools and they are generally only open during dry season.[39] Without a proper education, the farmers and their families will find it difficult to compete for jobs in metropolitan areas and build

[32] Government of the People's Republic of Bangladesh (ed.), *Bangladesh Climate Change Strategy and Action Plan* 2008 (2008).

[33] *Ibid.*

[34] For further information see the website of United Nations Children's Fund (UNICEF), available at <www.unicef.org/bangladesh/4926_6202.htm> (last visited 8 October 2014).

[35] UNDP, *Human Development Report 2007/2008*, *supra* note 27, at 98; K. Emanuel, 'Increasing Destructiveness of Tropical Cyclones over the Past 30 Years', 436 *Nature* (2005) 686; J. P. Donnelly and J. D. Woodruff, 'Intense Hurricane Activity over the Past 5,000 Years Controlled by El Niño and the West African Monsoon', 447 *Nature* (2007) 465; J. Nyberg *et al.*, 'Low Atlantic Hurricane Activity in the 1970s and 1980s Compared to the Past 270 Years', 447 *Nature* (2007) 698.

[36] For more detailed information and references to calculations for the expected severity of future storm surges, see Agrawala *et al.*, *supra* note 26, at 18.

[37] See, e.g., A. Bhattacharyya and M. Werz, *Climate Change, Migration, and Conflict in South Asia: Rising Tensions and Policy Options across the Subcontinent* (2012), at 23–30.

[38] See, e.g., *ibid.*, at 33–46; J. McAdam and B. Saul, 'Displacement with Dignity: Climate Change, Migration and Security in Bangladesh', 53 *German Yearbook of International Law* (2010) 1.

[39] M. Gebauer, *supra* note 31.

themselves a future away from their homes. However, it will be even more difficult to find enough farmland to resettle such a mass of people. If mitigation and adaptation measures fail,[40] millions of people will stream into other areas where they cannot sustain themselves adequately, potentially causing large-scale security problems in the region. If they do migrate without legal recognition of their status, this will increase their vulnerability.

C. Migration Triggered by Desertification and other Soil Degradation

A third example of factors contributing to forced migration is on-going desertification[41] and other types of land degradation in some parts of Asia, which are exacerbated by the changing climate. Those effects can be witnessed, inter alia, in the continual expansion of the Gobi desert in southern Mongolia[42] and northern China,[43] where studies have shown that sandy desertification has been accelerating over the past five decades.[44] That might also have consequences for food security in the area, as China is home to over 20 per cent of the world's population although it has only 10 per cent of the world's total arable land.[45]

Land degradation is caused by a range of factors, such as inappropriate irrigation, poor governance, deforestation, pollution, and unsustainable use of resources and land. Inappropriate irrigation often leads to secondary salinization and alkalescence of the land,[46] as the salt remains in the ground after the water has evaporated. Matters in southern Mongolia are made

[40] For mitigation and adaptation strategies by the Bangladeshi authorities, see Government of the People's Republic of Bangladesh, *supra* note 32.

[41] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted on 17 June 1994) 1954 UNTS 3, Art. 1(a) defines desertification as 'land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities'.

[42] For a comprehensive study on the on-going desertification in Southern Mongolia and in particular Bulgan Soum, which forms part of the Gobi Three Beauty National Park, see S. Begzsuren, *Integrated Desertification Assessment in Southern Mongolia* (2007).

[43] R. Royston, 'China's Dust Storms Raise Fears of Impending Catastrophe', *National Geographic News* (1 June 2001), available at <http://news.nationalgeographic.com/news/2001/06/0601_chinadust.html> (last visited 8 October 2014).

[44] W. Tao and W. Wei, 'Sandy Desertification in Northern China', in K. Day (ed.), *China's Environment and the Challenge of Sustainable Development* (2005) 233; Q. Du and I. Hannam (eds), *Law, Policy and Dryland Ecosystems in the People's Republic of China* (2011).

[45] S. Pater and D. Pater, 'Combating the Expansion of the Gobi Desert—A Case Study of the Shaanxi Province, China', in World Forum of Mayors on Cities and Desertification, Bonn, 11–12 June 1999, *Six Case Studies from Asia, Africa, and Latin America* (2000) 99.

[46] *Ibid.*, at 100.

worse by overgrazing, particularly by large numbers of goats. When those factors are juxtaposed with the effects of climate change, the outcome can be devastating, as land degradation significantly reduces the resilience of an area to climate change impacts.[47] Further, once the thin layer of vegetation in semi-arid or arid areas is gone, sand dunes become mobile and start spreading, as wind can pick up sand more easily when vegetation or other obstacles do not inhibit it.

When formerly arable land turns into desert and can no longer sustain the local population people are forced to move. Such forced migration can have devastating effects on neighbouring dryland areas. When farmers and herdsmen leave their old grounds and move with the expanding sand dunes to the nearest, still usable, patch of land, they place an additional strain on those often highly vulnerable areas and reduce the ability of the original population to use the scarce natural resources in a sustainable way. According to the Millennium Ecosystem Assessment, that might accelerate processes of desertification in those areas or lead to 'internal and cross-boundary social, ethnic, and political strife' through competition over resources, with potential effects on 'local, regional, and even global political and economic stability'.[48]

Desertification also affects cities; for example, with frequent sandstorms hitting Beijing, there is an urgent need to stop the expansion of the country's deserts; the sand dunes are now hovering less than 100 kilometres from China's capital. As one of the measures to fight desertification in that region, the leadership initiated a gigantic project named the 'Green Great Wall' to try to 'force' nature back into its place. The project was launched in 1978 to plant a buffer of approximately 90 million acres of new forest over a length of 2,800 miles across northern China by 2050 in order to stop the desert from claiming even more land and bringing further harm to China's agricultural economy.[49]

The government's decision to use the term 'Great Wall' for a project that is designed to keep the sand dunes out, rather than keeping out the Mongols like its stone and clay predecessor was intended to do, is also an interesting illustration of how the understanding of 'security' has changed over time. While concepts of security have traditionally been focused on military threats, criminal activities, terrorist organizations, and other threats to public order, modern concepts of security have expanded to include such issues as

[47] Asian Development Bank, *Making Grasslands Sustainable in Mongolia: Assessment of Key Elements of Nationally Appropriate Mitigation Actions for Grassland and Livestock Management* (2014), at vi.

[48] Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Desertification Synthesis* (2005), at 8.

[49] J. R. Luoma, 'China's Reforestation Programs: Big Success or Just an Illusion?', *Yale Environment 360* (17 January 2012), available at <http://e360.yale.edu/feature/chinas_reforestation_programs_big_success_or_just_an_illusion/2484/> (last visited 8 October 2014).

epidemics and other large-scale health threats, environmental decay and natural disasters, illegal migration, shortage of resources and food, and economic crises.[50]

However, the Green Great Wall plan has several weaknesses, as drylands are usually not capable of supporting large trees, which can consume high volumes of water. If the groundwater is unsustainably depleted, not only the newly planted—mainly monocultural—trees will eventually die, but the process of desertification might even be accelerated rather than halted or at least slowed down.[51] While the results of this project vary at the local level depending on the availability and quality of resources and governance, activists from the Kubuqi Desert in Inner Mongolia estimate that 30 per cent of newly planted trees die and must be replaced in that region every year;[52] other researchers' overall estimates are closer to 85 per cent.[53] Nevertheless, some promising cases raise hope for at least partial success of the project.[54]

In addition to this mammoth project, the Chinese authorities have also begun to implement several promising programmes and policies, which are directed at changing people's behaviour or giving overexploited land time to recover. In many areas directly threatened by desertification, the number of livestock and crops is being drastically reduced, and conservation and recycling of resources is encouraged. In several cases, the local population has been

[50] For an overview of that debate, see J. Romm, *Defining National Security: The Nonmilitary Aspects* (1993); M. A. Levy, 'Is the Environment a National Security Issue?', 20 *International Security* (1995) 35; R. A. Matthew *et al.* (eds), *Global Environmental Change and Human Security* (2010).

[51] For an overview of problems related to China's reforestation programs, see J. Watts, 'China's Loggers Down Chainsaws in Attempt to Regrow Forests', *The Guardian* (11 March 2009), available at <http://www.guardian.co.uk/environment/2009/mar/11/china-forests-deforestation> (last visited 8 October 2014); the security terminology has also been directly adopted in the debate over land degradation: H. G. Brauch and Ú. O. Spring, *Securitizing the Ground, Grounding Security*: *Desertification, Land Degradation and Drought* UNCCD Issue Paper No. 2 (2010), available at <http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/dldd_eng.pdf> (last visited 23 November 2014).

[52] A. Trafford, 'Let a Billion Trees Bloom: Can a Great Green Wall of Trees Stop China's Spreading Desert?', *The Washington Post* (23 November 2013), available at <http://www.washingtonpost.com/national/health-science/let-a-billion-trees-bloom-can-a-great-green-wall-of-trees-stop-chinas-spreading-desert/2013/11/22/12908e0e-2d13-11e3-b139-029811dbb57f_story.html> (last accessed 5 May 2014).

[53] S. Cao *et al.*, 'Excessive Reliance on Afforestation in China's Arid and Semi-arid Regions: Lessons in Ecological Restoration', 104 *Earth-Science Reviews* (2011) 240.

[54] For example, 'Future Forest' has planted about 6.2 million trees in the Kubuqi Desert in Inner Mongolia since 2006 with an annual budget of about USD 1 million, and plans to create a half-mile thick barrier spanning 10 miles and consisting of approximately 100 million trees. See Trafford, *supra* note 52.

at least temporarily relocated.[55] Fencing off misused and overgrazed land is usually the most effective way to allow an area to recover. As indicated above, many instances of desertification are thought to be caused mainly by human activities. However, it is the magnification of these factors by climate change that makes them even more destructive. Even a level of human activities that has not previously had adverse consequences might lead to serious consequences once the climate changes. China's government would be well advised to follow through on enforcing its policies for sustainable land use, as desertification is almost impossible to reverse once it reaches a certain point of severity.

3. Developing a Comprehensive International Response

Despite the developments discussed in this chapter, the international response to the issue of people displaced by the effects of climate change has so far been somewhere between slow and non-existent. Although migration and displacement triggered by climate change have at least been addressed by several bodies on the national[56] and international level,[57] not much has happened on the political and legal level. One of the reasons for this might be the fact that many people are or will be internally displaced and will migrate only within the borders of their own country. Such cases are, for example, addressed in the 1998 UN *Guiding Principles on Internal*

[55] Regarding these measures, see further C. Dong, X. Liu, and K. K. Klein, 'Land Degradation and Population Relocation in Northern China', 53 *Asia Pacific Viewpoint* (2012) 163; Y. Zheng, J. Pan, and X. Zhang, 'Relocation as a Policy Response to Climate Change Vulnerability in Northern China', in *World Social Science Report 2013: Changing Global Environments* (2012) 234.

[56] For example, Australia's Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission) stated in its submission to the Australia 2020 Summit in 2008 that:

> As a party to the major international human rights treaties, Australia has an obligation to protect individuals against threats posed to human rights by climate change. The following measures will be required: . . .
>
> - Relocation—the government should facilitate the relocation of communities, including from Australia's territorial islands, if the impacts of climate change make this necessary.
> - Climate change refugees—the government should advocate for a new international agreement and, in the interim, formulate domestic laws to address climate-induced migration.

See Australian Human Rights Commission, 'Submission to the Australia 2020 Summit', available at <www.humanrights.gov.au/submission-australia-2020-summit> (last visited 8 October 2014).

[57] See, e.g., IPCC, *Climate Change 2013*, *supra* note 8 and IPCC, *Climate Change 2014*, *supra* note 11.

Displacement,[58] which rely heavily on human rights law.[59] Another very recent example is the Peninsula Principles on Climate Displacement within States[60] of 2013, which equally stress the links to human rights, 'recognising that voluntary and involuntary relocation often result in the violation of human rights, impoverishment, social fragmentation and other negative consequences'[61] and stating that '[a]ll relevant legislation must be fully consistent with human rights laws and must in particular explicitly protect the rights of indigenous peoples, women, the elderly, minorities, persons with disabilities, children, those living in poverty, and marginalized groups and people'.[62]

In many cases, it will also be very difficult to distinguish between forced migration and migration motivated by economic reasons. However, there is often only a very thin line between the two, and in many cases the displaced people may fall into both categories. Further, it is nearly impossible to isolate climate change as a cause for migration and to foresee its exact impacts on human settlements. All of this makes it very difficult to estimate precisely the number of future and even current numbers of people displaced by climate change,[63] which is why the estimates differ by as much as hundreds of millions if both ends of the whole spectrum of commentators are taken into account.[64] The Stern Review on the Economics of Climate Change,[65] which was commissioned by Her Majesty's Treasury and ranks among the most accepted analyses in that field internationally, estimates that around 200 million people will become permanently displaced by the effects of climate change by 2050.

Despite such obstacles and uncertainties, it is obvious that international mechanisms for the assistance of people displaced by climate change need to

[58] UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

[59] See further the annual reports of the Special Rapporteur on the Human Rights of Internally Displaced Persons on the website of the Office of the High Commissioner for Human Rights at <www.ohchr.org/EN/Issues/IDPersons/Pages/Annual.aspx> (last visited 8 October 2014).

[60] Displacement Solutions, 'Peninsula Principles on Climate Displacement within States' (18 August 2013), available at <http://displacementsolutions.org/peninsula-principles/> (last visited 8 October 2014).

[61] *Ibid*., Preamble. [62] *Ibid*., Principle 7(e).

[63] Norwegian Refugee Council, *Climate Changed: People Displaced* (2009), at 5.

[64] An overview of the debate and different approaches to calculating the number of environmental refugees can be found at Renaud *et al*., *Control, Adapt, or Flee: How to Face Environmental Migration?* (2007), at 47. See also *Achieving Justice and Human Rights in an Era of Climate Disruption*, International Bar Association Climate Change Justice and Human Rights Task Force Report (2014), at 42, available at <www.ibanet.org/PresidentialTask ForceClimateChangeJustice2014Report.aspx> (last visited 23 November 2014), which indicates between 50 to 200 million.

[65] N. Stern, *Stern Review: The Economics of Climate Change* (2006).

be developed and put in place as soon as possible.[66] To prepare for and organize the migration of large communities is something that requires long-term planning. That involves not only identifying land for relocation, but also enabling the people to sustain themselves away from their former homeland.[67] In cases of temporary displacement, such as by natural disasters, rules for crossing borders and temporary stay, and, eventually, repatriation agreements need to be established.

While there is currently no international legislative instrument available to explicitly support people displaced by climate change, several approaches to the issue are being discussed at different levels.[68] One of these approaches focuses on the extension of the 1951 Refugee Convention. However, this is an unlikely, if not impractical, option. As mentioned above, the 1951 Refugee Convention was created against the backdrop of a war-torn Europe devastated during World War II and its aftermath, with millions of people displaced, dispossessed, and persecuted. The Convention has remained unchanged apart from its amendment in 1967[69] and is widely accepted in its current state within the international community. Hence, there is very little motivation or willingness to introduce any major changes and risk the maintenance of consensus, established *modi operandi*, and overall effectiveness of the Convention. While the Assistant High Commissioner for Protection acknowledged in her statement to the 61st Session of the Executive Committee of the High Commissioner's Programme that '[t]here is a high probability that patterns of displacement will be increasingly impacted by environmental factors with conflict, extreme deprivation and climate

[66] For an in-depth analysis of the position in international law in this context, see J. McAdam, *Climate Change, Forced Migration, and International Law* (2012).

[67] In his address to the 63rd UN General Assembly in 2008, the President of Kiribati, Anote Tong, *supra* note 24, at 3, highlighted some of the key issues in preparing his people for a possible future relocation:

> That is why my Government has developed a long-term merit-based relocation strategy as an option for our people. As leaders, it is our duty to the people we serve to prepare them for the worst-case scenario. The strategy involves upskilling of our people to make them competitive and marketable at international labour markets. We want to target labour markets where skills or labour gaps exist and provide those [that] labour for them. We believe this offers a win-win situation for all. We shall be able to provide countries with labour and those countries shall be able to provide potential new homes for our people. The strategy provides our people with an option so that when they choose to migrate, they will migrate on merit and with dignity. They will be received by their adopted countries not as burdens, but as worthwhile members of the community.

[68] For overviews of those discussions, see, e.g., Norwegian Refugee Council, *supra* note 63; Renaud *et al.*, *supra* note 64; K. M. Wyman, 'Responses to Climate Migration', 37 *Harvard Environmental Law Review* (2013) 167.

[69] Protocol Relating to the Status of Refugees, *supra* note 2.

change tending to act more in combination',[70] the United Nations High Commissioner for Refugees stated in the same session that '[i]t is not our intention to revise that Convention. Rather, we want, together with you, to examine protection gaps in the context of people on the move and see if there are new ways to think about—and do—protection'.[71] Consequently, tackling migration triggered by climate change through an extension of the Refugee Convention must likely be ruled out as a feasible avenue.

Another option is to deal with such issues under an additional protocol to the UNFCCC or its successor.[72] Given the complexity of problems related to climate change and the necessity to apply such an instrument to both internal and cross-border displacement, dealing with such displacement issues through a climate change agreement seems, on its face, like an obvious choice. That is not least because mitigation and adaptation are two sides of the same coin. The more successful mitigation is, the more successful adaptation can be. Ultimately, relocation of people should only be the last resort after every other attempt to deal with climate change and its effects has proven unsuccessful. Preventing further climate change from occurring and saving as many threatened inhabited lands as possible, while also preparing for a possible relocation of people affected, must go hand in hand. However, the current agreements focus largely on technical aspects and emission targets. Introducing a separate set of obligations and a focus on adaptation might turn out to be counterproductive and make a new agreement much more complicated. The negotiations regarding a successor agreement to the Kyoto Protocol and the repeated failure so far by the international community to commit and agree on a meaningful and effective consensus indicate that the introduction of additional elements might jeopardize a positive outcome even more. Further elements could be used as a welcome tool by negotiators to water down other parts of an agreement, when new responsibilities, new emission targets, and commitments for developing countries are being discussed. In addition, it might prove to be very difficult to link migration triggered by environmental change and natural disasters to climate change in a manner specific enough for all parties involved to grant assistance

[70] E. Feller, 'Rule of Law 60 Years On', Sixty-first Session of the Executive Committee of the High Commissioner's Programme (2010), available at <http://www.unhcr.org/4cac7f2f9.html> (last visited 8 October 2014).

[71] A. Guterres, 'Opening Statement to the 61st Session of the Executive Committee of the High Commissioner's Programme (ExCom)' (2010), available at <http://www.unhcr.org/4ca995299.html> (last visited 8 October 2014).

[72] See, e.g., K. Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations* (2011), available at <http://www.unhcr.org/4df9cc309.html> (last visited 8 October 2014).

under such an agreement. Therefore, it seems more desirable to take separate legal approaches towards mitigation of climate change and matters of related migration in order to increase the chances of progress in both fields.

Despite these obstacles, there have in fact been several attempts to include displacement issues in an international climate change agreement. The Alliance of Small Island States (AOSIS)[73] has done a great deal of lobbying within the United Nations to raise awareness about the consequences of climate change to their lands and promote more climate-sensitive development. Before the Copenhagen Climate Change Summit 2009, AOSIS held its own Climate Change Summit,[74] which resulted in the Declaration on Climate Change 2009.[75] Besides urging the international community to meet the goals of the UNFCCC and stressing the importance of limiting the increase in global surface temperature to well below 1.5°C above pre-industrial levels, the Declaration stated that '[we] also emphasize that there is an urgent need to consider and address the security implications and the human dimensions of climate change, including where necessary, initiatives for preparing communities for relocation'. While the main goal must be to save all lands threatened with being submerged and sustain the homes of the people from those areas, preparations must be made early to support communities potentially displaced and provide them with new homes if mitigation is not successful. AOSIS reaffirmed this Declaration in 2012, expressing 'profound alarm' that, as a result of climate change, 'entire islands may become uninhabitable or entirely submerged causing mass climate change displacement'.[76]

Another way of dealing with the issue would be to apply various elements of human rights law[77]—such as the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural

[73] The Alliance of Small Island States (AOSIS) is a coalition of small island and low-lying coastal countries that share similar development challenges and concerns about the environment, especially their vulnerability to the adverse effects of global climate change. It functions primarily as an ad hoc lobby and negotiating voice for small island developing States (SIDS) within the United Nations system.

See AOSIS website, at <http://aosis.org/> (last visited 8 October 2014).

[74] Held on 21 September 2009 in New York City.

[75] Alliance of Small Island States (AOSIS) Declaration on Climate Change 2009, available at <http://aosis.org/wp-content/uploads/2012/10/2009-AOSIS-Leaders-Declaration.pdf> (last visited 8 October 2014).

[76] Alliance of Small Island States Leaders' Declaration, 2012, available at <http://aosis.org/wp-content/uploads/2012/10/2012-AOSIS-Leaders-Declaration.pdf> (last visited 8 October 2014).

[77] Regarding the human right to an adequate environment, see, generally, United Nations Human Rights Council, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox', UN Doc. A/HRC/22/43 (24 December 2012); J. H. Knox, 'Linking Human Rights and Climate Change at the United Nations', 33 *Harvard Environmental Law Review* (2009) 477.

Rights of 1966 (ICESCR)—or to eventually develop a new legislative instrument based on those concepts. Of particular importance in this context are absolute rights, such as the right to life.[78] The human rights to health,[79] food,[80] adequate housing,[81] and the right to water may also be affected.[82] These rights are closely related and in many situations cannot be clearly separated from each other. The case studies presented in this chapter reflect how not only the lives and health of people may be at risk or harmed by extreme weather events and other effects directly or indirectly caused by climate change, but also indicate their devastating effects on livelihoods, food production, availability of clean drinking water, or the spread of diseases, amongst other consequences. Another absolute right concerned, at least by

[78] Universal Declaration of Human Rights, *supra* note 5, Art. 3: 'Everyone has the right to life, liberty and security of person.'

[79] *Ibid.*, Art. 25(1); ICESCR, *supra* note 6, Art. 12:

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) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
   (b) The improvement of all aspects of environmental and industrial hygiene;
   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

[80] Universal Declaration of Human Rights, *supra* note 5, Art. 25(1); ICESCR, *supra* note 6, Art. 11:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
   (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
   (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

[81] Universal Declaration of Human Rights, *supra* note 5, Art. 25(1); ICESCR, *supra* note 6, Art. 11.

[82] Closely related to the right to food (Universal Declaration of Human Rights, *supra* note 5, Art. 25(1) and the right to health); ICESCR, *supra* note 6, and Art. 11 quoted *supra*, note 80.

analogy, is the ban on torture and inhuman and degrading treatment.[83] Leaving people affected in such ways without assistance and in some cases without the long-term chance of survival can clearly constitute a violation of this right. The same applies to sending a person back to a place where his or her life is in danger.[84] And finally, the right to self-determination[85] may be affected, which applies particularly to indigenous people,[86] who are forced to abandon their traditional lands and whose existence as an indigenous community is threatened.[87]

While, theoretically, there might be sufficient protection provided by human rights law to anyone displaced by the effects of climate change, there is certainly still a lack of comprehensive and focused protection through those mechanisms. In particular, human rights law mainly covers obligations of countries to protect human rights domestically. However, while some countries suffer from the effects of climate change in a disproportionate manner, they will have to rely heavily on international assistance to protect the rights of their citizens, as they lack the necessary resources.[88] Even though some rights, such as those expressed in Article 11 of the ICESCR,[89] explicitly extend the obligations of states to the international level, the extent of and willingness by other countries to meet extraterritorial obligations under human rights law is often unclear, while related provisions usually have a solely remedial approach and do not focus on mitigation at all.[90] In addition, the legal enforcement of such rights is rather problematic in many cases.[91] Nevertheless, a comprehensive human rights-based approach,[92] ideally through the development of a detailed international treaty outlining duties, responsibilities, and rights, might be a promising option in the long term. As outlined in a recent publication by the International Organization for Migration (IOM), 'in the absence of a unified international legal framework to address these concerns, a combination of existing sources of law—including

[83] Universal Declaration of Human Rights, *supra* note 5, Art. 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

[84] Norwegian Refugee Council, *supra* note 63, at 19.

[85] ICESCR, *supra* note 6, Art. 1(1).

[86] See, further, UNGA Res. 61/295, 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007), Arts 5, 9, and 11.

[87] Human Rights and Equal Opportunity Commission, 'Background Paper Human Rights Dimensions of Climate Change' (2008), at 6–8, available at <www.humanrights.gov.au/papers-human-rights-and-climate-change-background-paper> (last visited 8 October 2014).

[88] M. Gromilova, 'Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach', 10 *Utrecht Law Review* (2014) 76, at 88.

[89] See ICESCR, *supra* note 6, quoted *supra* note 80.

[90] Gromilova, *supra* note 88, at 89 ff.

[91] See further L. S. Horn and S. Freeland, 'More than Hot Air: Reflections on the Relationship between Climate Change and Human Rights', 13 *University of Western Sydney Law Review* (2009) 101.

[92] *Ibid.*

both "hard" and "soft" law and international and regional instruments—offers the best starting point to meet some of the legal challenges posed by environmental migration'.[93] IOM also 'reiterated the significance of adopting rights-based approaches to environmental migration, and enshrining these in national legislation'.[94] Until a comprehensive and effective international legal instrument for the protection of people displaced by the effects of climate change is developed and finally in force, domestic policies and regulations can indeed play an important role in order to assist environmental migrants, although this is usually done in a discretionary manner.[95] Nevertheless, while recognizing the overall importance of a rights-based approach in this context, it should not be developed in isolation from environmental law considerations, but in conjunction with them. As climate change threatens the wellbeing of the environment and humankind equally—with humankind of course being a part of the environment—rigorous environmental protection and mitigation of further climate change promises to prevent further human rights violations in this context in the most effective way. Also, due to the complexity of the matter, any successful solutions will need to employ approaches and partnerships from different disciplines and expertise, while focusing equally on capacity-building, mitigation, and adaptation.[96]

4. Conclusion

When the above examples from the Asia-Pacific region are considered, it becomes evident that finding solutions, agreeing on a binding legal instrument to grant protection to the displaced and sharing relevant responsibilities, is more than urgent. However, the complexity of such an endeavour must not be underestimated. Developing mechanisms to assist people displaced by climate change might prove to be even more difficult than assisting refugees as currently defined under the Refugee Convention, not only because they are more difficult to categorize, and the ultimate reason for their migration might be more difficult to isolate due to the complexity of the impacts of climate change, but also because their refugee status may become permanent. Refugees from combat zones or persecution for reasons listed in the Refugee Convention are expected to return to their home areas once

[93] IOM, *supra* note 4, at 29–30. [94] *Ibid.*, at 30.

[95] G. M. Tabucanon, 'Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim', 30 *UCLA Pacific Basin Law Journal* (2012) 55, at 91–92.

[96] IOM, *supra* note 4, at 48.

the threat has ceased to exist. While there are of course many hundreds of thousands who will never return, in ideal circumstances, some will be refugees only for a limited amount of time, until the political problem leading to their displacement and fear of persecution has been removed, often by international intervention within the region. That, however, is not so for people displaced by climate change.

Unlike in cases of expulsion caused by human activities, no high-level resolutions by the Security Council, no quick-witted talk by politicians, no sanctions against wrongdoers, and no negotiations will *stop* climate change; at best, only the rate of climate change will be slowed. Climate change and its effects are already with us, despite the climate change deniers. It is non-discriminatory, long-lasting and, in many instances, disastrous. While everyone will sooner or later be exposed to its effects, the main burden of humanity's destructive exploitation of nature is distributed in a very uneven way.[97] That applies especially to people displaced by climate change who, unlike those more directly displaced by human action, cannot ever hope to return to their homes. Their precise numbers might still be open to speculation, but as indicated in this chapter there is no doubt that they will be in the many millions. In order to prepare for that challenge and to avoid large-scale humanitarian catastrophes, the international community must act now and deal with those issues comprehensively by protecting the human rights of those affected.

[97] See for example K. Warner *et al.*, *Evidence from the Frontlines of Climate Change: Loss and Damage to Communities Despite Coping and Adaption* (2012), available at http://www.ehs.unu.edu/file/get/10584.pdf (last accessed 5 May 2014); T. Afifi *et al.*, *Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa* (2012), available at http://www.unhcr.org/4fe8538d9.html (last accessed 5 May 2014).

7

Human Rights and the Environment

Where Next?

*Alan Boyle**

1. Introduction

The relationship between human rights and environmental protection in international law is far from simple or straightforward. A new attempt to codify and develop international law on this subject was initiated by the United Nations Human Rights Council (UN HR Council) in 2011.[1] What can it say that is new or that develops the existing corpus of human rights law? Three possibilities are explored in this chapter. First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development.[2] Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Second, a declaration or protocol could be an appropriate mechanism for articulating in some form the still-controversial notion of a right to a decent environment. Third, the difficult issue of extraterritorial application of existing human rights treaties to transboundary pollution and global climate change remains unresolved.

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[1] See United Nations Human Rights Council (UN HR Council), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, Preliminary Report*, UN Doc. A/HRC/22/43 (24 December 2012), available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf> (last visited 9 October 2014).

[2] Rio Declaration on Environment and Development (13 June 1992), 31 ILM 874.

The chapter concludes that the response of human rights law—if it is to have one—needs to be in global terms, treating the global environment and climate as the common concern of humanity.

2. Is the Environment a Human Rights Issue?

Why should environmental protection be treated as a human rights issue? There are several possible answers. Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life. Above all, it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances, including those caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial decisions. Lastly, the broadening of economic and social rights to embrace elements of the public interest in environmental protection has given new life to the idea that there is, or should be, in some form, a right to a decent environment.

Remarkably, the environmental dimensions are rarely discussed in general academic treatments of human rights law, where there is almost no debate on the relationship between human rights and the environment.[3] Thus the literature is mainly written by environmentalists or generalist international lawyers.[4] But the growing environmental caseload of human rights courts and treaty bodies nevertheless indicates the importance of the topic in mainstream

[3] P. Alston, H. Steiner, and R. Goodman, *International Human Rights in Context* (3rd ed., 2008) and O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2010) refer to some of the precedents and list 'environment' in their indexes but there is no significant discussion of the precedents from an environmental perspective. Compare L. Loucaides, 'Environmental Protection through the Jurisprudence of the European Convention on Human Rights', 75 *British Yearbook of International Law* (2004) 249 and R. Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights', 89 *AJIL* (1995) 263.

[4] See, in particular, D. Anton and D. Shelton, *Environmental Protection and Human Rights* (2011); F. Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; J. G. Merrills, 'Environmental Rights', in D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007) 663; J. Ebbesson, 'International Environmental Law: Public Participation', in Bodansky *et al.* (eds) 681; A. E. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental Law Review* (2007) 471; A. E. Boyle and M. R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996).

human rights law. It is self-evident that insofar as we are concerned with the environmental dimensions of rights found in avowedly human rights treaties—the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (AfCHPR)—then we are necessarily talking about a 'greening' of existing human rights law rather than the addition of new rights to existing treaties. The main focus of the case law has thus been the rights to life, private life, health, water, and property. Some of the main human rights treaties also have specifically environmental provisions,[5] usually phrased in relatively narrow terms focused on human health,[6] but others do not, including the ECHR and the ICCPR. The greening of human rights law is not only a European phenomenon, but extends across the ACHR, AfCHPR, and ICCPR. Judge Higgins has drawn attention to the way human rights courts 'work consciously to co-ordinate their approaches'.[7] There is certainly evidence of convergence in the environmental case law and a cross-fertilization of ideas between the different human rights systems.[8]

The rapid development of environmental jurisprudence in Europe has resulted in a consistent rejection of proposals for an environmental protocol to be added to the ECHR.[9] However, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 and revised in 2012

[5] The most important is the African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981, entered into force 21 Oct. 1986) 1520 UNTS 128, Art. 24 (AfCHPR), on which see African Commission on Human and Peoples' Rights (ACHPR), *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, 27 October 2001, paras 52–53 (hereinafter '*Ogoniland* case').

[6] See, e.g., International Covenant on Economic, Social and Cultural Rights (New York, 16 Dec. 1966, entered into force 3 Jan. 1976), 993 UNTS 3, Art. 12 (hereinafter 'ICESCR'); European Social Charter (18 October 1961), 529 UNTS 89, 15 ETS 35, Art. 11; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (signed 17 November 1988, entered into force 16 November 1999) (1988) OASTS 69, reprinted in 28 ILM 156 (1989), Art. 11 (hereinafter 'the San Salvador Protocol'); Convention on the Rights of the Child (New York, 20 Nov. 1989, entered into force 2 Sept. 1990) 1577 UNTS 3, Art. 24(2)(c). See R. Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Boyle and Anderson, *supra* note 4, 89.

[7] R. Higgins, 'A Babel of Judicial Voices?', 55 *ICLQ* (2006) 791, at 798. See also *Diallo Case (Guinea v. Democratic Republic of Congo)*, (2010) ICJ Rep 636, paras 64–68.

[8] See *Caesar v. Trinidad and Tobago*, IACtHR, Judgment of 11 March 2005, Series C No. 123, sep. op. Judge A. A. Cançado Trindade, paras 6–12, at para 7: 'The converging case law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection. . . .'

[9] On 16 June 2010, the Committee of Ministers again decided not to add a right to a healthy and viable environment to the ECHR.

reviews the Court's decisions and sets out some general principles.[10] In summary, cases such as *Guerra*, *López Ostra*, *Öneryildiz*, *Taşkin*, *Fadeyeva*, *Budayeva*, and *Tătar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.[11] Both the right to life and the right to respect for private life and property entail more than a simple prohibition on government interference: governments additionally have a positive duty to take appropriate action to secure these rights.[12] That is why some of the environmental cases concern the failure of government to regulate or enforce the law (*López Ostra*, *Guerra*, *Fadeyeva*), while others focus especially on the procedure of decision-making (*Taşkin*).[13] However, although protection of the environment is a legitimate objective that can justify governments limiting certain rights, including the right to possessions and property, human rights law does not protect the environment per se.[14]

Early in 2011, the UN HR Council initiated a study of the relationship between human rights and the environment.[15] This led in March 2012 to the appointment of an independent expert who was asked to make recommendations on human rights obligations relating to the enjoyment of a 'safe, clean, healthy and sustainable environment'.[16] We will look at the work of the UN HR Council in Section 3. The United Nations Environmental Programme (UNEP) has also considered much the same question, and an expert working group produced a draft declaration and commentary in 2009/10.[17] An earlier project of the UN Commission on Human Rights to adopt a declaration

[10] See Council of Europe, *Manual on Human Rights and the Environment* (2nd ed., 2012) (hereinafter 'Council of Europe Report').

[11] *López Ostra v. Spain*, Appl. No. 16798/90, ECtHR, Judgment of 9 December 1994; *Guerra and Others v. Italy*, Appl. No. 14967/89, ECtHR, Judgment of 19 February 1998; *Fadeyeva v. Russia*, Appl. No. 55723/00, ECtHR, Judgment of 9 June 2005; *Öneryildiz v. Turkey*, Appl. No. 48939/99, ECtHR, Judgment of 30 November 2004; *Taşkin v. Turkey*, Appl. No. 46117/99, ECtHR, Judgment of 10 November 2004, paras 113–119; *Tătar v. Romania*, Appl. No. 67021/01, ECtHR, Judgment of 27 January 2009, para. 88; *Budayeva and Others v. Russia*, Appl. Nos 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, ECtHR, Judgment of 20 March 2008.

[12] See *Budayeva v. Russia*, *supra* note 11, paras 129–133; *Öneryildiz v. Turkey*, *supra* note 11, paras 89–90. See also UN Human Rights Committee (UN HR Committee), *General Comment 6: Article 6 (Right to Life)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (30 April 1982), at 176; *Villagrán-Morales et al. v. Guatemala*, IACtHR, Judgment of 19 November 1999, Series C No. 63, para. 144.

[13] See *infra* Section 3. [14] See *infra* Section 4.

[15] UN HR Council, *Human Rights and the Environment*, UN Doc. A/HRC/RES/16/11 (24 March 2011).

[16] UN HR Council, *Human Rights and the Environment*, UN Doc. A/HRC/19/L.8/Rev.1 (20 March 2012).

[17] UNEP, *High Level Expert Meeting on the New Future of Human Rights and Environment*, Nairobi 2009. This draft declaration was completed in 2010 but has not been published. The author was co-rapporteur together with Professor Dinah Shelton.

on human rights and the environment terminated in 1994 with a report and the text of a declaration that failed to secure the backing of states.[18] With hindsight, it can be seen that this early work was premature and overly ambitious, and indeed it made no headway in the UN. However, the relationship between human rights and environmental protection in international law is far from simple or straightforward. The topic is challenging for the agenda of human rights institutions, and for UNEP, partly because it straddles two competing bureaucratic hegemonies, but also because it poses some difficult questions about basic principles of human rights law. We will explore these in later sections of this chapter.

The merits of any proposal for a declaration or protocol to an existing human rights convention on this subject thus depend on how far it deals with fundamental problems, or merely window dresses what we already know. There is little to be said in favour of simply codifying the application of the rights to life, private life, and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little. As Lauterpacht noted in 1949, '[c]odification which constitutes a record of the past rather than a creative use of the existing materials—legal and others—for the purpose of regulating the life of the community is a brake upon progress'.[19] If useful codification necessarily contains significant elements of progressive development and law reform, the real question is how far it is politic or prudent to go.[20] The question therefore is not whether a declaration or protocol on human rights and the environment should deal with existing civil and political rights but how much more it should add. What can it say that is new or that develops the existing corpus of human rights law? There are three obvious possibilities.

First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Doing so would build on existing law, would endorse the value of procedural rights in an environmental context, and would clarify their precise content at

[18] UN Economic and Social Council (ECOSOC), *Draft Principles on Human Rights and the Environment*, Annex I (6 July 1994). The text of the draft declaration is reproduced in Boyle and Anderson, *supra* note 4, at 67–69. See S. Popovic, 'In Pursuit of Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', 27 *Columbia Human Rights Law Review* (1996) 487.

[19] *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, UN Doc. A/CN.4/Rev.1 (1949), paras 3–14 (hereinafter '*UN Survey*').

[20] *Ibid.*, para. 13.

a global level. In Section 4 we consider whether it could also go further by developing a public interest model of accountability, more appropriate to the environmental context, and drawing in this respect on the 1998 Aarhus Convention.[21]

Second, a declaration or protocol could be an appropriate mechanism for articulating in some form the still-controversial notion of a right to a decent environment. Such a right would recognize the link between a satisfactory environment and the achievement of other civil, political, economic, and social rights. It would make more explicit the relationship between the environment, human rights, and sustainable development and address the conservation and sustainable use of nature and natural resources. This aspect has become more significant following the 2012 Rio+20 United Nations Conference on Sustainable Development.[22] Most importantly, it would offer some means for balancing environmental objectives against economic development. In Section 5, we consider including such a right within the corpus of economic, social, and cultural rights.

Third, in Section 6 we examine the difficult issue of extraterritorial application of existing human rights treaties. This is relevant to transboundary pollution and global environmental problems, such as climate change, because if human rights law does not have extraterritorial scope in environmental cases then we cannot easily use it to help protect the global environment. Even if we cross this hurdle, however, the problems remain considerable.

3. Environmental Rights and the UN Human Rights Institutions

Unlike human rights courts, it has not been clear until now how far the UN human rights community takes environmental issues seriously. There is no doubt that the UN institutions realize that civil, political, economic, and

[21] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998, entered in force 30 October 2001) 2161 UNTS 447 (hereinafter 'Aarhus Convention').

[22] *The Future We Want* (Rio+20, *Outcome of the Conference*), UN Doc. A/CONF.216/L.120-22 (June 2012), para. 8 states:

> We also reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality and women's empowerment and the overall commitment to just and democratic societies for development.

social rights have environmental implications that could help guarantee some of the indispensable attributes of a decent environment. A 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) emphasizes the key point that:

> While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.[23]

The 2011 OHCHR Report notes that '[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes',[24] but it does not attempt to set out any new vision for the relationship between human rights and the environment. It summarizes developments in the UN treaty bodies and human rights courts, and records what the UN HR Council has already done in this field. Three theoretical approaches to the relationship between human rights and the environment are identified.[25] The first sees the environment as a 'precondition to the enjoyment of human rights'. The second views human rights as 'tools to address environmental issues, both procedurally and substantively'. The third integrates human rights and the environment under the concept of sustainable development. It identifies also 'the call from some quarters for the recognition of a human right to a healthy environment' and notes the alternative view that such a right in effect already exists.[26] The report recognizes that many forms of environmental damage are transnational in character, and that the extraterritorial application of human rights law in this context remains unsettled. It concludes that 'further guidance is needed to inform options for further development of the law in this area'.[27]

The UN Commission on Human Rights Resolution 2005/60 also recognized the link between human rights, environmental protection and sustainable development. Inter alia, it '[e]ncourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter

[23] UN HR Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 (15 January 2009), para. 18 (hereinafter 'OHCHR 2009 Report').

[24] UN HR Council, *Analytical Study on the Relationship between Human Rights and the Environment, Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/19/34 (16 December 2011), para. 2 (hereinafter 'OHCHR 2011 Report').

[25] *Ibid*., paras 6–9. [26] *Ibid*., para. 12. [27] *Ibid*., paras 64–73.

alia, to effective access to judicial and administrative proceedings, including redress and remedy' (para. 5). Implementation of Rio Principle 10 is the most significant element here because, like the Aarhus Convention, it acknowledges the importance of public participation in environmental decision-making, access to information, and access to justice.

The Council has made the connection between human rights and climate change:

> *Noting* that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.[28]

It is worth noting here that climate change is already regarded in international law as a 'common concern of humanity',[29] and thus as an issue in respect of which all states have legitimate concerns. The Human Rights Council is therefore right to take an interest in the matter. Nevertheless, before concluding that human rights law may provide some answers to the problem of climate change, two observations in the 2009 OHCHR Report are worth highlighting. First, '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.[30] The report goes on to note how the multiplicity of causes for environmental degradation and the difficulty of relating specific effects to historic emissions in particular countries make attributing responsibility to any one state problematic.[31]

Second,

> . . . human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human

[28] UN HR Council, *Human Rights and Climate Change*, UN Doc. A/HRC/RES/10/4 (25 March 2009) (emphasis in original). See, generally, S. Humphreys (ed.), *Human Rights and Climate Change* (2009).

[29] See UN GA, *Protection of Global Climate for Present and Future Generations of Mankind*, UN Doc. A/RES/43/53 (6 December 1988); United Nations Framework Convention on Climate Change (opened for signature 9 May 1992, entered into force 24 March 1994) 1771 UNTS 107, Preamble.

[30] OHCHR 2009 Report, *supra* note 23, para. 70.

[31] One attempt to attribute specific responsibility to a coal mining operation is found in the case of *X-Strata Coal Queensland Pty Ltd & Ors*, *Re* [2007] QLRT 33, 15 February 2007, available at <http://www.austlii.edu.au/au/cases/qld/QLRT/2007/33.html> (last visited 9 October 2014).

rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming.[32]

On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming from the more vulnerable developing states. Its utility is rhetorical rather than juridical. We will return to this question in Section 6.

A final but important point is that the UN HR Council has appointed special rapporteurs to report on various environmental issues.[33] A number of these independent reports have covered environmental conditions in specific countries,[34] but the most significant is the long-standing appointment of a special rapporteur on illicit movement and dumping of toxic and dangerous products and wastes. The activity of the special rapporteur is confined to country visits and annual reports. The present incumbent does not paint an encouraging picture:

> The Special Rapporteur remains discouraged by the lack of attention paid to the mandate. During consultations with Member States, the Special Rapporteur is often confronted with arguments that issues of toxic waste management are more appropriately discussed in environmental forums than at the Human Rights Council. . . . He calls on the Human Rights Council to take this issue more seriously. He is discouraged by the limited number of States willing to engage in constructive dialogue with him on the mandate during the interactive sessions at the Human Rights Council.[35]

This report is revealing for what it says about the lack of priority given to the subject and the sense that it is not really perceived as a human rights issue at all.

One possible explanation for the reluctance of UN human rights institutions to engage more directly with human rights and the environment is their long-standing project on corporate responsibility for human rights abuses. While the primary responsibility for promoting and protecting human rights

[32] OHCHR 2009 Report, *supra* note 23, para. 91.

[33] For a full summary, see OHCHR 2011 Report, *supra* note 24, paras 41–55.

[34] See, e.g., UN HR Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, Addendum, Mission to Costa Rica*, UN Doc. A/HRC/12/24/Add.1 (23 June 2009); UN HR Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, *Vitit Muntarbhorn*, UN Doc. A/HRC/10/18 (24 February 2009).

[35] UN HR Council, *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, Okechukwu Ibeanu*, UN Doc. A/HRC/9/22 (13 August 2008), para. 34.

lies with the state,[36] it has long been recognized that businesses and transnational corporations have contributed to or been complicit in the violation of human rights in various ways. Developing countries, especially, may lack the capacity to control foreign companies extracting minerals, oil, or other natural resources in a manner that harms both the local population and the environment. Weak government, poor regulation, lax enforcement, corruption, or simply a too-close relationship between business and government underlie the problem. Classic examples are Shell's impact on the environment, natural resources, health, and living standards of the Ogoni people in Nigeria,[37] or the health effects of toxic waste disposed of in Abidjan by a ship under charter to Trafigura, an oil trading company based in the EU.[38]

In 2005, at the request of the UN Commission on Human Rights, the UN Secretary-General appointed Professor John Ruggie of Harvard University as his special representative on the issue of human rights and transnational corporations and other business enterprises. The 'Protect, Respect and Remedy Framework' adopted by the UN Human Rights Council[39] does not require us to presuppose that international human rights obligations apply to corporations directly. It focuses instead on the adverse impact of corporate activity on human rights and corporate complicity in breaches of human rights law by government. There are three pillars: first, the state's continuing duty to protect human rights against abuses by business; second, the responsibility of corporations to respect human rights through the use of due diligence;[40] third, individual access to remedy: governments must ensure that where human rights are harmed by business activities there is adequate accountability and effective redress, whether judicial or non-judicial.[41]

What should we make of this 'framework' for business and human rights when considering the current law on human rights and the environment? There is no doubt that states have a responsibility to protect human rights from environmental harm caused by business and industry. It is irrelevant that the state itself does not own or operate the plant or industry in question. As the European Court of Human Rights (ECtHR) said in *Fadeyeva*, the state's responsibility in environmental cases 'may arise from a failure to

[36] See, e.g., UN HR Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/17/4 (6 July 2011).

[37] *Ogoniland* case, *supra* note 5.

[38] UNEP, *Report of the First Meeting of the Expanded Bureau of the Eight Meeting of the Conference of the Parties to the Basel Convention*, UN Doc. UNEP/SBC/BUREAU/8/1/7 (19 April 2007), § III.

[39] UN HR Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/8/5 (7 April 2008).

[40] *Ibid.*, paras 50–72. [41] *Ibid.*, paras 81–102.

regulate private industry'.[42] The state thus has a duty 'to take reasonable and appropriate measures' to secure rights under human rights conventions.[43] In *Öneryildiz*, the ECtHR emphasized that '[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[44] The Court held that this obligation covered the licensing, setting up, operation, security, and supervision of dangerous activities, and required all those concerned to take 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[45]

Nor is this view of human rights law uniquely European. The *Ogoniland* case is a reminder that unregulated foreign investment which contributes little to the welfare of the local population but instead harms their health, livelihood, property, and natural resources may amount to a denial of human rights for which the host government is responsible in international law.[46] As Shelton has observed, '[t]he result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights'.[47] It also shows how empowering national non-governmental organizations (NGOs) can provide the key to successful legal action. This was specifically recognized by the African Commission:

> The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the [African] Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.[48]

These examples do not in any sense invalidate the UN 'Protect, Respect and Remedy' Framework's focus on the need for business to respect human rights, but they do serve to emphasize again that failure by states to respect their human rights obligations is the core of the problem, not the periphery. Even if we endorse the UN Framework, it is still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect.

[42] *Fadeyeva v. Russia*, *supra* note 11, para. 89.
[43] *Ibid.*
[44] *Öneryildiz v. Turkey*, *supra* note 11, para. 89.
[45] *Ibid.*, para. 90
[46] *Ogoniland* case, *supra* note 5.
[47] D. Shelton, 'Communication 155/96 (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*). Case No. ACHPR/COMM/A044/1', 96 *AJIL* (2002) 937, at 942.
[48] *Ogoniland* case, *supra* note 5, para. 51.

Overall, therefore, the record of the UN HR Council and OHCHR on human rights and environment has been somewhat understated until now: human rights courts have contributed a great deal more to the subject than interstate environmental negotiations or the specialists of the UN human rights community. It is not immediately clear why this should be so, but of course it also begs the question what more the UN could contribute to the development of human rights approaches to environmental protection. To answer that question requires us to stand back and review the three difficult questions identified in Section 2. These questions will form the subject of the rest of this chapter.

4. The Development of Procedural Rights in an Environmental Context

Not all 'environmental' rights are found in mainstream human rights treaties. Any consideration of human rights in an environmental context has to take into account the development of specifically environmental rights in other treaties, and it may be necessary to interpret and apply human rights treaties with that in mind.[49] The most obvious example is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UN Economic Commission for Europe (UNECE).[50] As Kofi Annan, former Secretary-General of the UN, observed: 'Although regional in scope, the significance of the Aarhus Convention is global. [I]t is the most ambitious venture in the area of "environmental democracy" so far undertaken under

[49] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, Art. 31(3)(c), regarding general rules of interpretation of treaties: 'There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.' *Demir and Baykara v. Turkey*, Appl. No. 34503/97, ECtHR (Grand Chamber), Judgment of 12 November 2007. As 'living instruments' human rights treaties must be interpreted by reference to current conditions: see *Soering v. UK*, Appl. No. 14038/88, ECtHR, Judgment of 7 July 1989, para. 102; *Öcalan v. Turkey*, Appl. No. 46221/99, ECtHR, Judgment of 12 March 2003, para. 193; *Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR, Advisory Opinion OC-16/99, 1 October 1999, Series A No. 16, paras 114–115; *Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, IACtHR, Advisory Opinion OC-10/89, 14 July 1989, Series A No. 10, para. 43; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgment of 31 August 2001, Series C No. 20, paras 146–148.

[50] See UNECE, *The Aarhus Convention—An Implementation Guide* (2000), available at <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf> (last visited 9 October 2014).

the auspices of the United Nations.'[51] In his view, the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.[52] Its preamble not only recalls Principle 1 of the 1972 Stockholm Declaration on the Human Environment and recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', but it also asserts 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'.

However, these broad assertions of rights in the Aarhus Convention are somewhat misleading. The focus of the Aarhus Convention is in reality strictly procedural in content, limited to public participation in environmental decision-making and access to justice and information. It draws inspiration from Principle 10 of the 1992 Rio Declaration on Environment and Development, which gives explicit support in mandatory language to the same category of procedural rights.[53] Public participation is a central element in sustainable development and the incorporation of Aarhus-style procedural rights into general human rights law significantly advances this objective.[54] In this context the emphasis on procedural rights in Articles 6–8 of the Aarhus Convention can be seen as a means of legitimizing decisions about sustainable development, rather than simply an exercise in extending participatory democracy or improving environmental governance.[55]

The Aarhus Convention is also significant insofar as Article 9 reinforces access to justice and the obligation of public authorities to enforce existing law. Under Article 9(3), applicants entitled to participate in decision-making will also have the right to seek administrative or judicial review of the legality of the resulting decision. A general failure to enforce environmental law will

[51] *Ibid.*, at v. [52] *Ibid.*

[53] Rio Declaration on Environment and Development (13 June 1992), *supra* note 2, Principle 10 provides:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

[54] See UN Conference on Environment and Development, *Agenda 21* (1992), ch. 23, especially para. 23.2, available at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (last visited 25 November 2014).

[55] OHCHR 2011 Report, *supra* note 24, paras 2 and 7–9.

also violate Article 9(3).[56] Article 9(4) requires that adequate, fair and effective remedies are provided. This reflects the decisions in *López Ostra* and *Guerra* under Article 8 of the ECHR.[57]

Anyone who doubts that the Aarhus Convention is a human rights treaty should bear in mind three points. First, it builds upon the long-established human right of access to justice and on procedural elements that serve to protect the rights to life, health, and family life.[58] Second, it confers rights directly on individuals and not simply on states. Unusually for an environmental treaty the most innovative features of the 'non-confrontational, non-judicial and consultative' procedure established under Article 15 of the Convention are that members of the public and NGOs may bring complaints before a non-compliance committee whose members are not only independent of the parties but may be nominated by NGOs.[59] The committee has given rulings which interpret and clarify provisions of the convention and a body of case law is emerging.[60] In all these respects, it is closer to human

[56] UNECE Compliance Committee, *Findings and Recommendations with Regard to Compliance by Kazakhstan with the Obligations under the Aarhus Convention in the Case of Access to Justice in the court of Medeuski Region of Almaty* (Communication ACCC/C/2004/06 by Ms Gatina, Mr Gatin, and Ms Konyushkova (Kazakhstan)), UN Doc. UNECE/MP.PP/C.1/2006/4/Add.1 (28 July 2006), paras 30–31.

[57] *López Ostra v. Spain*, *supra* note 11; *Guerra v. Italy*, *supra* note 11.

[58] See D. M. Zillman, A. Lucas, and G. Pring (eds), *Human Rights in Natural Resource Development* (2002), especially G. Pring and S. Y. Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development', in Zillman *et al.* (eds) 11, and G. Triggs, 'The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective', in Zillman *et al.* (eds) 123; Ebbesson, *supra* note 4; F. Francioni, 'The Right of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (2007) 1; C. Redgwell, 'Access to Environmental Justice', in Francioni (ed.) 153; M. Lee and C. Abbott, 'Usual Suspects? Public Participation under the Aarhus Convention', 66 *Modern Law Review* (2003) 80; J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *YbIEL* (1997) 51.

[59] UNECE, *Decision 1/7: Review of Compliance*, UN Doc. ECE/MP.PP/2/Add.8 (2 April 2004). See also *Report of the Compliance Committee*, UN Doc. ECE/MP.PP/2005/13 (11 March 2005) and, generally, S. Kravchenko, 'The Aarhus Convention and Innovations in Compliance with MEAs', 18 *Colorado Journal of International Environmental Law and Policy* (2007) 1; V. Koester, 'The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)', in G. Ulfstein, T. Marauhn, and A. Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007) 179; C. Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters', in T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009) 221. The compliance procedure adopted in 2007 under the UNECE Protocol on Water and Health is modelled directly on the Aarhus procedure. See Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (17 June 1999) 2331 UNTS 202 (hereinafter 'Protocol on Water and Health').

[60] See, e.g., UNECE Compliance Committee, *Findings and Recommendations with Regard to Compliance by Belgium with Its Obligations under the Aarhus Convention in Relation to the Rights of*

rights treaty monitoring bodies than to the non-compliance procedures (NCP) typically found in other multilateral environmental agreements (MEA).[61] Kravchenko concludes that 'independence, transparency, and NGO involvement in the Convention's novel compliance mechanism represent an ambitious effort to bring democracy and participation to the very heart of compliance itself'.[62] Third, the essential elements of the convention—access to information, public participation in environmental decision-making, and access to justice—have all been incorporated into European human rights law through the jurisprudence of the ECtHR.[63] In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights. To some extent, the same has happened under other human rights treaties, so the point is not simply a European one. For example, the right to 'meaningful consultation' was upheld by the Inter-American Commission in the *Maya Indigenous Community of Toledo* case,[64] and by the African Commission in the *Ogoniland* case.[65]

The Aarhus Convention thus represents an important extension of environmental rights and of the corpus of human rights law. How important can

Environmental Organizations to Have Access to Justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)), UN Doc. UNECE/MP PP/C 1/2006/4/Add 2 (28 July 2006), paras 33–36; *Findings and Recommendations with Regard to Compliance by Ukraine with the Obligations under the Aarhus Convention in the Case of Bystre Deep-water Navigation Canal Construction* (Submission ACCC/S/2004/01 by Romania and Communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine)), UN Doc. UNECE/MP PP/C 1/2005/2/Add 3 (14 March 2005), paras 26–28; *Findings and Recommendations with Regard to Compliance by Kazakhstan, supra* note 56, paras 30–31.

[61] Contrast the Montreal Protocol NCP and the Kyoto Protocol NCP and see UNEP, *Compliance Mechanisms under Selected Multilateral Environmental Agreements* (2007). On human rights treaty bodies, see P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000), and on MEA non-compliance procedures, see Treves *et al.* (eds), *supra* note 59.

[62] Kravchenko, *supra* note 59, at 49.

[63] *Taşkin v. Turkey*, *supra* note 11; *Tătar v. Romania*, *supra* note 11; *Öneryildiz v Turkey*, *supra* note 11; *Lopez Ostra v. Spain*, *supra* note 11; *Guerra v. Italy*, *supra* note 11.

[64] *Maya Indigenous Community of the Toledo District v. Belize*, IACommHR, Case 12.053, Report No. 40/04 (12 October 2004), paras 154–155. The Commission relies, inter alia, on the right to life and the right to private life, in addition to finding consultation a 'fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied'. See also ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991), 1659 UNTS 383 and the UN HR Committee decision in *Ilmari Lansman and Others v. Finland*, Comm. No. 511/1992, UN Doc. CCPR/C/49/D/511/1992 (26 October 1994), para. 9.5, which stresses the need 'to ensure the effective participation of members of minority communities in decisions which affect them'.

[65] *Ogoniland* case, supra note 5, para. 53: '[P]roviding meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.'

best be explained by recalling the most important case, *Taşkin v. Turkey*.[66] Turkey, it should be noted, is not a party to the Aarhus Convention. That did not stop the Strasbourg Court from reading Aarhus rights into the ECHR in a particularly extensive form. Two points stand out. First, participation in the decision-making process by those likely to be affected by environmental nuisances will be essential for compliance with Article 8 of the ECHR and Article 6 of the Aarhus Convention. The Court in *Taşkin v. Turkey* held that, 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8'.[67] The interests of those affected must on this view be taken into account and given appropriate weight when balancing them against the benefits of economic development.[68]

Second, *Taşkin* also envisages an informed process. The Court held that:

> Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. . . .[69]

The words 'environmental impact assessment' are not used here, but in many cases an environmental impact assessment (EIA) will be necessary to give effect to the evaluation process envisaged by the Court. Article 6 of the Aarhus Convention also has detailed provisions on the information to be made available.[70] As a comparison with Annex II of the 1991 Espoo Convention on EIA in a transboundary context shows, the matters listed in Article 6 of the Aarhus Convention are normally included in an EIA.[71]

Like the *Ogoniland* and *Maya Indigenous Community* cases, *Taşkin* thus suggests that the most important contribution that existing human rights law has to offer with regard to environmental protection and sustainable

[66] *Taşkin v. Turkey*, *supra* note 11.

[67] *Ibid*., para. 118. See also *Tătar v. Romania*, *supra* note 11, para. 88.

[68] See, in particular, *Hatton and Others v. United Kingdom*, Appl. No. 36022/97, ECtHR (Grand Chamber), Judgment of 8 July 2003.

[69] *Taşkin v. Turkey*, *supra* note 11, para. 119.

[70] Aarhus Convention, *supra* note 21, Art. 6(6), requires, inter alia, a description of the site, the effects of the activity, preventive measures, and an outline of alternatives.

[71] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309, Annex II (hereinafter 'Espoo Convention') additionally includes an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans.

development is the empowerment of individuals and groups affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social, and economic interests.[72] From this perspective the ICCPR and ACHR case law which espouses participatory rights for indigenous peoples appears simply as a particular manifestation of the broader principle. The key point is that these participatory rights represent the direction in which human rights law with regard to the environment has evolved since 1994.[73]

The Aarhus Convention is also important because, unlike human rights treaties, it provides for public interest activism by NGOs,[74] insofar as claimants with a 'sufficient interest' are empowered to engage in public interest litigation even when their own rights or the rights of victims of a violation are not at issue. Article 9 of the Aarhus Convention thus appears to go beyond the requirements of the ECHR. So does Article 6, which extends public participation rights to anyone having an 'interest' in the decision, including NGOs.[75] 'Sufficient interest' is not defined by the Convention but, in its first ruling, the Aarhus Compliance Committee held that '[a]lthough what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention'.[76] Governments are not required to develop an *actio popularis*, but they must not use national law 'as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment'.[77] Access to such procedures 'should thus be the presumption, not the exception'.[78]

[72] A point recognized by the OHCHR: see *Claiming the Millennium Development Goals: A Human Rights Approach* (2008), at viii, Goal 7: '[A] human rights approach to sustainable development emphasizes improving and implementing accountability systems, [and] access to information on environmental issues.'

[73] The present author gives a fuller account of the Convention in P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (2009), at 288–298.

[74] Aarhus Convention, *supra* note 21, Arts 4(1)(a), 6, and 9. See O. W. Pedersen, 'European Environmental Human Rights', 21 *Georgetown International Environmental Law Review* (2008) 73.

[75] Pursuant to Aarhus Convention, *supra* note 21, Art. 6 participation rights are available to 'the public concerned', defined by *ibid.*, Art. 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

[76] See *Findings and Recommendations with regard to compliance by Belgium*, *supra* note 60, paras 33–36.

[77] *Ibid.* [78] *Ibid.*, para 36. See also Aarhus Convention, *supra note* 21, Art. 9(3).

The contrast between the broader public interest approach of the Aarhus Convention and the narrower ECHR/ICCPR/ACHR focus on the rights of victims of a violation is evident in the case law.[79] This is a significant difference, with important implications for any debate about an autonomous right to a decent or satisfactory environment. Not only do environmental NGOs use access to information and lobbying to raise awareness of environmental concerns, but research has shown that they tend to have high success rates in enforcement actions and public interest litigation.[80] Moreover, the broader approach taken by Aarhus is followed in later European agreements. Thus, Article 8(1) of the 2003 UNECE Protocol on Strategic Environmental Assessment provides that '[e]ach party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.' The public for this purpose includes relevant NGOs.[81]

The question therefore arises: should the ECtHR case law follow the public interest precedent set by Aarhus, as it has in so many other respects?[82] What purpose would public interest environmental litigation serve in a human rights context? NGOs are already entitled to protect the human rights of victims of violations and there is no need to extend their standing for that purpose. Extending their standing in environmental matters only makes sense if the public interest in the environment itself is to be protected—that is the point of the Aarhus Convention. Answering the question in the negative would merely affirm the existing position that human rights law does not have anything to say about protection of the environment as such. Answering it in the affirmative would go some way towards opening the door for a right to a decent environment. That brings us to the question of greatest substance: do we want such a right? Do we want to expand rather than simply interpret the existing corpus of international human rights law? This is not simply a matter of European concern. Rather it potentially affects all of the principal human rights treaties,

[79] See *Kyrtatos v. Greece*, Appl. No. 41666/98, ECtHR, Judgment of 22 May 2003, para. 52; *Metropolitan Nature Reserve v. Panama*, IACommHR, Case 11.533, Report No. 88/03, 22 October 2003, para. 34; *Brun v. France*, UN HR Committee, Comm. No. 1453/2006, UN Doc. CCPR/C/88/D/1453/2006, 23 November 2006, para. 6.3. See *infra* Section 4 where these cases are further considered.

[80] See N. de Sadeleer, G. Roller, and M. Dross, *Access to Justice in Environmental Matters*, Final Report, Doc. ENVA.3/ETU/2002/0030, Part I, § 3.

[81] UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, UN Doc. ECE/MP.EIA/2003/2 (21 May 2003), Art. 2(8).

[82] See C. Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts', 20 *Journal of Environmental Law* (2008) 417.

given the way human rights courts 'work consciously to co-ordinate their approaches'.[83]

5. A Right to a Decent Environment?

What constitutes a decent environment is a value judgment, on which reasonable people will differ. Policy choices abound in this context: what weight should be given to natural resource exploitation over nature protection, to industrial development over air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on? These choices may result in wide diversities of policy and interpretation, as different governments and international organizations pursue their own priorities and make their own value judgments, moderated only to some extent by international agreements on such matters as climate change and conservation of biological diversity. The virtue of looking at environmental protection through the impact of harmful activities on other human rights, such as life, private life, or property, is that it focuses attention on what matters most to individuals: the detriment to important, internationally protected values from uncontrolled environmental harm. This approach avoids the need to define such notions as a satisfactory or decent environment. Instead, it allows a court to balance respect for convention rights and economic development. The Strasbourg Court makes the point very cogently: 'national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion. . . .'[84]

When I first wrote on this subject in 1996, I shared the scepticism of others towards the idea of a right to a decent environment.[85] Fundamentally, it looked like an attempt to turn an essentially political question into a legal one. It would take power away from democratically accountable politicians and give it to courts or treaty bodies. Predictably, Western governments ensured that the idea was stillborn within the UN system. My own scepticism has not disappeared, but it has perhaps been tempered by an awareness of the significant value of such a right in countries whose environmental problems are more extreme than those affecting Western Europe.[86] Moreover, in many

[83] Higgins, *supra* note 7, at 798.
[84] Council of Europe Report, *supra* note 10, at 31.
[85] Boyle and Anderson, *supra* note 4, ch. 3.
[86] Notably the *Ogoniland* case, *supra* note 5, and the *Maya Indigenous Community v. Belize*, *supra* note 64.

respects, the basic elements of such a right already exist. There may therefore be some merit in revisiting the question, particularly in the context of climate change, where some vision of a decent environment most clearly has global implications.

Despite their evolutionary character, human rights treaties (with the exception of the African Convention) still do not guarantee a right to a decent or satisfactory environment if that concept is understood in qualitative terms unrelated to impacts on the rights of specific humans. As the ECtHR re-iterated in *Kyrtatos*, 'neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such . . . '.[87] This case involved the illegal draining of a wetland. The European Court could find no violation of the applicants' right to private life or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved. The applicants succeeded only insofar as the state's non-enforcement of a court judgment violated their Convention rights.

The Inter-American Commission on Human Rights has similarly rejected as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve from development.[88] Nor does the practice of the UN Human Rights Committee differ. In a case about genetically modified crops it held that 'no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant'.[89] None of these cases lends support to any conception of a free-standing individual right to a decent environment.

Should we then go the whole way and create a right to a decent environment in international human rights law? There are obvious problems of definition and anthropocentricity, well rehearsed in the literature.[90] But there are also deeper issues of legal architecture to be resolved. At the substantive level, a decent or satisfactory environment should not be confused with the procedural innovations of the Aarhus Convention, or with the case

[87] *Kyrtatos v. Greece*, *supra* note 79, para. 54.

[88] *Metropolitan Nature Reserve v. Panama, supra* note 79, para. 34.

[89] *Brun v. France*, *supra* note 79, para. 6.3.

[90] See e.g. G. Handl, 'Human Rights and Protection of the Environment: A Mildly Revisionist View', in A. A. Cançado Trindade (ed.), *Human Rights, Sustainable Development and the Environment* (1992) 117; G. Handl, 'Human Rights and Protection of the Environment', in A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights* (2001) 303; Boyle and Anderson, *supra* note 4, chs. 2–4. Contrast D. Shelton, 'Human Rights, Environmental Rights and the Right to the Environment', 28 *Stanford Journal of International Law* (1991) 103.

law on the right to life, health or private life. To do so would make it little more than a portmanteau for the greening of existing civil and political rights. The ample jurisprudence shows clearly that this is unnecessary and misconceived.[91] To be meaningful, a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand.[92] A right to a decent environment is best envisaged, not as a civil and political right, but within the context of economic, social, and cultural rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.

The UN Committee on Economic, Social and Cultural Rights has adopted various General Comments relevant to the environment and sustainable development, notably General Comments 14 and 15, which interpret Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation.[93] They also cover the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health. These are useful and important interpretations that have also had some impact on related areas of international law, including Article 10 of the 1997 UN Watercourses Convention, which gives priority to 'vital human needs' when allocating scarce water resources.[94] On this view, existing economic and social rights help guarantee some of the indispensable attributes of a decent environment. What more would the explicit recognition of a right to a decent environment add?

Arguably, it would add what is currently lacking from the corpus of UN economic and social rights, namely a broader and more explicit focus on environmental quality which could be balanced directly against the Covenant's economic and developmental priorities. Article 1 of the ICESCR reiterates the right of peoples to 'freely pursue their economic, social and cultural development' and to 'freely dispose of their natural wealth and resources . . . ', but other than 'the improvement of all aspects of environmental and industrial hygiene'

[91] See *supra* Section 2.

[92] P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607.

[93] United Nations Committee on Economic Social and Cultural Rights (UNCESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4 (11 August 2000); UNCESCR, *General Comment No. 15: The Right to Water*, UN Doc.E/C.12/2002/11 (20 January 2003). The ICJ has held that 'great weight' should be attributed to interpretations adopted by independent treaty supervisory bodies: see *Diallo Case*, *supra* note 7, paras 66–67.

[94] See *Convention on the Law of the Non-Navigational Uses of International Watercourse; Report of the Sixth Committee convening as the Working Group of the Whole*, UN Doc. A/51/869 (11 April 1997).

(Article 12), the Covenant makes no specific reference to protection of the environment. This is understandable, given that environmental issues were not high on the international agenda until the 1970s; despite the efforts of the treaty organs to invest the Covenant with greater environmental relevance, it still falls short of giving a decent environment recognition as a significant public interest. Lacking the status of a right means that the environment can be trumped by those values which do have that status, including economic development and natural resource exploitation.[95] This is an omission which needs to be addressed if the environment as a public good is to receive the weight it deserves in the balance of economic, social and cultural rights. That could be one way of using human rights law to address the impact of the greenhouse gas emitting activities which are causing climate change and adversely affecting the global environment.

The key question therefore is what values we think a covenant on economic and social rights should recognize in the modern world. Is the environment—or the global environment—a sufficiently important public good to merit economic and social rights status comparable to economic development? The answer endorsed repeatedly by the UN over the past 40 years is obviously yes: at Stockholm in 1972, at Rio in 1992, at Johannesburg in 2002, and at Rio+20 in 2012, the consensus of states has favoured sustainable development as the leading concept of international environmental policy. Although 'sustainable development' is used throughout the Rio Declaration, it was not until the 2002 World Summit on Sustainable Development that anything approaching a definition of the concept could be attempted by the UN. Three 'interdependent and mutually reinforcing pillars of sustainable development' were identified in the Johannesburg Declaration—economic development, social development and environmental protection.[96] This seems tailor-made for a reformulation of the rights guaranteed in the ICESCR.

The challenge posed by sustainable development is to ensure that environmental protection is fully integrated into economic policy. Acknowledging that the environment is part of this equation, the 1992 Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (para. 11) both emphasize that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'. The International Court of Justice (ICJ) has repeatedly referred to 'the need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable

[95] Merrills, *supra* note 4, at 666.

[96] *Report of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (26 August–4 September 2002), Resolution 1, para. 5.

development'.[97] In the *Pulp Mills* case, the Court again noted the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection *that is the essence of sustainable development*'.[98] The essential point of these examples is that, while recognizing that the right to pursue economic development is an attribute of a state's sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights. In *Pulp Mills*, the Court's very limited focus was on whether Uruguay had complied with its international obligations when deciding to build the plant, and its references to integrating economic development and environmental protection have to be seen in that context. It did not attempt to decide whether a policy of building pulp mills was sustainable development in any other sense. In effect, the process of decision-making and compliance with environmental and human rights obligations constitute the key legal tests of sustainable development in current international law, rather than the nature of the development itself.[99]

If the ICJ can handle questions of this kind, then it might be said that it should not be beyond the capability of human rights courts also to do so. In a sense they already have: *Hatton*,[100] the case concerning night flights at Heathrow airport, is self-evidently about sustainable development as understood by the ICJ, albeit one in which the terms of the discussion are limited to balancing the direct impact on the health and family life of the applicants against the benefits to the community at large. Various decisions of the Inter-American Commission on Human Rights[101] and the UN Human Rights Committee[102] in cases concerning logging, oil extraction, and mining on

[97] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (1997) ICJ Rep. 7, para. 140. See also *Belgium v. Netherlands ('Iron Rhine Case')*, Permanent Court of Arbitration, Award of the Arbitral Tribunal, 24 May 2005; R. Higgins, 'Natural Resources in the Case Law of the International Court', in A. E. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (1999) 87.

[98] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, (2010) ICJ Rep. 14, para. 177 (emphasis added).

[99] See Birnie *et al.*, *supra* note 73, at 125–127.

[100] *Hatton v. UK*, *supra* note 68; see also *Fägerskjöld v. Sweden*, Appl. No. 37664/04, ECtHR, Decision on Admissibility of 26 February 2008.

[101] See *Maya Indigenous Community v. Belize, supra* note 64, para. 150.

[102] In *Ilmari Lansman and Others v. Finland*, *supra* note 64, para. 9.7, the Committee concluded that Finland had taken adequate measures to minimise the impact on reindeer herding. Compare with *Lubicon Lake Band v. Canada*, UN HR Committee, Comm No. 167/1984, UN Doc. CCPR/C/38/D/167/1984, 26 March 1990, para. 32.2, where the UN HR Committee found that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, Art. 27 (hereinafter 'ICCPR').

land belonging to indigenous peoples can be viewed from the same perspective. The African Commission's decision in *Ogoniland* is by far the most important case to address the public interest in protecting the environment as such,[103] but it does so in a setting where environmental destruction had caused serious harm to the affected communities.

The decision in *Ogoniland* can be seen as a challenge to the sustainability of oil extraction in that part of Nigeria. Given the degree of environmental harm and lack of material benefits for the Ogoni people, it is not surprising that the African Commission does not see this case simply as a failure to maintain a fair balance between public good and private rights. The decision gives some indication of how a right to a decent or satisfactory environment could be used, but its exceptional basis in Articles 21 and 24 of the African Convention has to be recalled. It is unique in adjudicating for the first time on the right of peoples to dispose freely of their own natural resources and in ordering extensive environmental clean-up measures to be taken.[104] Moreover, the rights created by the African Convention are peoples' rights, not individual rights, so the recognition of a public interest in environmental protection and sustainable development is less of an innovation. The African Convention is the only regional human rights treaty to combine economic, social, civil, and political rights and make them all justiciable before an international court.

Clearly, there can be different views on what constitutes a fair balance between economic interests and individual or group rights in such cases, and any judgment is inevitably subjective. Moreover, neither environmental protection nor human rights necessarily trump the right to economic development. In *Hatton*, the Grand Chamber's approach affords considerably greater deference towards government economic policy than at first instance, and leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from development:[105]

[103] *Ogoniland* case, *supra* note 5. See Shelton, *supra* note 47; K. S. A. Ebeku, 'The Right to a Satisfactory Environment and the African Commission', 3 *African Human Rights Law Journal* (2003) 149, at 163; J. C. Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter', 1 *African Journal of Legal Studies* (2005) 129, at 139; F. Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights', 52 *ICLQ* (2003) 749.

[104] Although ICCPR, *supra* note 102, Art. 1(2) also recognizes the right of peoples to 'freely dispose of their natural wealth and resources', it is not justiciable by the UN HR Committee under the procedure for individual complaints laid down in the Optional Protocol: see *Lubicon Lake Band v. Canada*, *supra* note 102, para. 32.1.

[105] *Hatton v. UK*, *supra* note 68, paras 97–104.

At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.[106]

On this basis, decisions about where the public interest lies are mainly for politicians, not for courts, save in the most extreme cases where judicial review is easy to justify. That conclusion is not inconsistent with the *Ogoniland* case, where the problems were undoubtedly of a more extreme kind. But *Ogoniland* shows that the right to a decent environment can be useful at the extremes,[107] which is why the debate becomes relevant to climate change.

Any comparison between *Hatton* and the *Ogoniland* case will inevitably point to the more conservative approach of European law. But would we want other human rights courts deciding where the appropriate balance between economic and environmental objectives should lie? Should we let judges determine whether to allow the construction of coal-fired power stations instead of extending schemes for generating renewable energy? *Hatton* may suggest that, except at the extremes, human rights courts are not usually the best bodies to perform this balancing task, compared with national or international political institutions. Even if European human rights law did endorse the right to a decent environment, in whatever form, it seems unlikely that the outcome of *Hatton* would differ. On any view, the balance would in principle be for governments to determine and, on the facts of that case, any court or tribunal would probably have upheld the government's approach. This does not provide a good basis for tackling government policy on climate change from a human rights perspective.

As I have argued elsewhere,[108] the distinction between *Hatton* and *Taşkin* is important in this context. *Hatton* shows understandable reluctance to allow the European Court of Human Rights to become a forum for appeals against the policy judgments of governments, provided that they do not disproportionately affect individual rights. *Taşkin* shows greater willingness to insist that decisions made by public authorities follow proper procedures involving adequate information, public participation and access to judicial review. This remains a tenable and democratically defensible distinction. One would expect most judges of the European Court of Human Rights to be comfortable with it.

However, if we do take the view that judges are not the right people to decide what constitutes a decent or satisfactory environment, is there then no

[106] *Ibid.*, para. 97. [107] *Ogoniland* case, *supra* note 5.
[108] Birnie *et al.*, *supra* note 73, at 296.

role for international human rights law in this debate? The obvious alternative would be to follow the logic of the ICESCR and revert to the UN human rights institutions and treaty bodies and allow them, rather than courts, to oversee expansion of the corpus of economic and social rights to include a right to a decent environment. That would give the UN Committee on Economic, Social and Cultural Rights a mandate to review the scope of the Covenant in relation to the environment.[109] It would allow the balance between environmental protection and economic development to be argued in an inter-governmental forum, through a 'constructive dialogue' with states parties. Although the current UN monitoring process has 'built-in defects', including poor reporting and excessive deference to states,[110] two additional mechanisms now exist through which compliance can be scrutinized. First, as we noted earlier, the High Commissioner for Human Rights has the power to appoint special rapporteurs to report on environmental conditions in individual countries or on specific topics.[111] Second, in 2009, an optional protocol for individual complaints under the Covenant was opened for signature.[112] Sceptics often question the value of all these monitoring processes, but if they do have value then the environment should be a larger part of the process.

Potentially, therefore, the ICESCR model could provide a mechanism for balancing environmental claims against competing economic objectives, if the Covenant were to be amended in appropriate terms. While this would not expand the role of courts, it would expand the corpus of human rights law in a manner that fits comfortably into the existing system. It would modernize the Covenant, while also giving it greater coherence and consistency with contemporary international environmental law and policy. In that form, it could give human rights law and the UN Committee on Economic and Social Rights something to contribute to the global challenge of climate change and might help to counteract the evident inaction of states revealed by the Copenhagen, Cancun, Doha, and Warsaw negotiations. It is this conclusion which most forcibly undermines the argument that a right to a decent environment is redundant and that general international environmental law

[109] The Committee is composed of independent experts and was established by ECOSOC Res. 17 (28 May 1985) to carry out the monitoring functions assigned to it in Part IV of the ICESCR, *supra* note 6. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998), ch. 2.

[110] Leckie, 'The Committee on Economic, Social and Cultural Rights', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 129.

[111] See *supra* notes 34 and 35.

[112] UNGA Res. 63/117 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (10 December 2008).

is better placed to regulate global environmental problems.[113] What may have been persuasive when I first the approached the topic in 1996 now looks increasingly threadbare given the unimpressive record of too many states parties to the UN Convention on Climate Change.[114] Unrestrained carbon emissions are not a recipe for a decent environment of any kind.[115]

Incorporating a right to a decent environment in the ICESCR will not stop the effects of global climate change by itself, but it might add to political pressure on governments to move further and faster towards goals already enshrined in the UN Framework Convention on Climate Change (UNFCCC) and in the commitments undertaken at Cancun in 2011, Doha in 2012, and Warsaw in 2013. In common with the UNFCCC, this kind of human rights approach to climate change would recognize that the only viable perspective is a global one, focused not on the rights of individuals, or peoples, or states, but of humanity as whole. It would reconceptualize in the language of economic and social rights the idea of the environment as a common good or common concern of humanity. That would indeed mark '[l]e passage d'un droit international de bon voisinage plutôt bilateral, territorial et fondé sur la reciprocité des droits et obligations, à un droit international plutôt multilateral, global, dans le cadre duquel les obligations sont souscrites au nom d'un intérêt commun . . . '.[116]

6. Human Rights, Transboundary Pollution, and Climate Change

Does existing human rights law have any role in tackling transboundary pollution or global climate change? The simple, sceptical, answer is no, but only if we choose to locate the *lex specialis* in the customary international law

[113] Contrast the arguments I advanced in A. Boyle, 'The Role of International Human Rights Law and the Protection of the Environment', in Boyle and Anderson, *supra* note 4, at 43.

[114] See A. Boyle, 'The Challenge of Climate Change: International Law Perspectives', in S. Kingston (ed.), *European Perspectives on Environmental Law and Governance* (2012) 55.

[115] See Intergovernmental Panel on Climate Change, *Special Report: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. Summary* (2011), available at <http://ipcc-wg2.gov/SREX/images/uploads/SREX-All_FINAL.pdf> (last visited 9 October 2014).

[116] '[t]he transition from an international law of neighbourly relations, essentially bilateral, territorial and founded on reciprocity of rights and obligations, to an international law essentially multilateral and global, in the framework of which obligations are subscribed to in the name of a common interest'. See S. Maljean-Dubois, 'La "fabrication" du droit international au défi de la protection de l'environnement: rapport général sur le thème de la première demi-journée', in Y. Kerbrat, S. Maljean-Dubois, and R. Mehdi (eds), *Le droit international face aux enjeux environnementaux* (2010) 9, at 17 (footnotes omitted, trans. ed.).

on prevention and control of transboundary harm,[117] or in global regulatory agreements such as the UN Framework Convention on Climate Change, with its associated protocols, non-binding accords, and decisions of the parties.[118] On this view, the problem is properly addressed by international law at an interstate level, not at the level of human rights law. However, a more nuanced approach to such arguments is evident in the case law, and it is far from clear that the *lex specialis* principle operates in this way.[119] A mutually exclusive relationship between human rights law and general international law on transboundary and global environmental protection is neither consistent with the evolution of international environmental law as a whole nor with contemporary developments in international human rights law.

First, it harks back to the classical era when humans, whether at home or abroad, were still viewed as objects of international law, not as subjects meriting their own rights. It is unnecessary here to recall this debate, save only to remember that even today only governments can bring claims against another state for violations of general international law.[120] If human rights law has no application to environmentally harmful activities in one state that directly impact humans in other states, then whatever right they may have to be protected from transboundary harm will be exercisable only by the state acting on their behalf. But regardless of legal theory, real-world problems of pollution and unsustainable use of renewable resources that are the core of

[117] Rio Declaration, *supra* note 2, Principle 2; *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, Report of the International Law Commission on the Work of Its 53rd Session, UNGAOR 56th session, Supp. No. 10 (A/56/10) (2001); United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Arts 192–222; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Rep. 226, para. 29; *Pulp Mills* case, *supra* note 98, paras 101 and 187–197; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, ITLOS, Advisory Opinion of 1 February 2011, paras 111–131.

[118] In particular the 1997 Kyoto Protocol, the 2001 Marrakesh Accords, the 2010 Copenhagen Accords, the 2011 Cancun Agreements, and decisions adopted by the conference of the parties at Durban in 2011, on all of which see UNFCCC website, at <http://unfccc.int/2860.php> (last visited 9 October 2014).

[119] See *Nuclear Weapons Advisory Opinion*, (1996) ICJ Rep. 226, paras 25–34; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), at 96; J. Pauwelyn, *Conflict of Norms in International Law* (2003), at 385–416; *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission; Finalized by Martti Koskenniemi*, UN Doc. A/CN.4/L.682 (13 April 2006), paras 56–122.

[120] See *Draft Articles on Diplomatic Protection with Commentaries*, II(2) *YbILC* (2006), 'Commentary to Article 1'. See also G. Gaja, 'The Position of Individuals in International Law: An ILC Perspective', 21 *EJIL* (2010) 11; A. Clapham, 'The Role of the Individual in International Law', 21 *EJIL* (2010) 25.

most environmental problems do not suddenly stop at national borders, nor do they have any less impact on those who live beyond the border. Some of these problems may indeed be only transboundary in scale, like localized air pollution, affecting only two or three states or a particular region. But the climate system, forests, and terrestrial ecosystems, and the marine environment, are inevitably shared elements of a global ecological system—a fact recognized by the development of global environmental agreements and the evolution of concepts such as sustainable use of natural resources, intergenerational equity, and common concern of humankind.[121] In the terminology of the law of state responsibility, much of the law relating to these global environmental problems—like climate change—falls squarely into the category of obligations owed to the international community as whole.[122] So, of course, does international human rights law.[123]

Second, one significant trend of international environmental policy over the past 30 years, pursued initially in isolation from international human rights law, but now in essence derived from it, has been the attempt to ensure non-discriminatory treatment, including access to justice and effective remedies, for those individuals or communities who are directly affected by transboundary pollution and environmental problems.[124] If nuisances do not stop at borders, it makes little sense to treat the victims differently depending on where they happen to live. Making national remedies available to transboundary victims in these circumstances is consistent with the view that there are significant advantages in avoiding resort to interstate remedies for the resolution of transboundary environmental disputes wherever possible.[125] In this broader sense, transboundary claimants can be empowered to

[121] See Rio Declaration, *supra* note 2, and Birnie *et al.*,*supra* note 73, ch. 3, at 106.

[122] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, II(2) YbILC (2001), Arts 42 and 48, and commentary in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (2002), at 254–260 and 276–280.

[123] *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, (1970) ICJ Rep. 3, paras 33–34.

[124] Elaborated in OECD Council Recommendations C(74) 224 (14 November 1974); C(76) 55 (11 May 1976); C(77)28 (17 May 1977); C(78)77 (21 September 1978); C(79)116 (8 May 1979), reproduced in OECD, *OECD and the Environment* (1986). See, generally, OECD, *Legal Aspects of Transfrontier Pollution* (1977); H. Smets, 'Le principe de non-discrimination en matière de protection de l'environnement', 2 *Revue européenne de droit de l'environnement* (2000) 1; Birnie *et al.*, *supra* note 73, at 304–311.

[125] A. Levin, *Protecting the Human Environment* (1977), at 31–38; P. Sand, 'The Role of Domestic Procedures in Transnational Environmental Disputes', in OECD, *Legal Aspects of Transfrontier Pollution*, *supra* note 126, 145; R. Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *Recueil des Cours* (1975) 139, at 224; G. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *YbIEL* (1990) 3, at 18ff.; A. Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law', 17 *Journal of Environmental Law* (2005) 3.

act as part of the enforcement structure of international environmental law by giving them access to the same information, decision-making processes and legal procedures as nationals. The Aarhus Convention represents one element of this development, an element now firmly established within the pantheon of human rights law by the ECHR.[126] This development shows how victims of transboundary pollution already have rights in international law which they can exercise within the legal system of the polluting state; what remains uncertain is whether they also have human rights exercisable against the polluting state.

How far a state must respect the human rights of persons in other countries thus becomes an important question once we start to ask whether we can view climate change and transboundary pollution in human rights terms. That is the debate initiated by the UN HR Council's characterization of climate change as a human rights issue.[127] It is also posed by the *Aerial Spraying* case, initiated by Ecuador in 2007 following alleged cross-border spraying of herbicides by Colombian aircraft during anti-narcotic operations.[128] Ecuador argued, inter alia, that the resulting pollution violated the human rights of indigenous people in Ecuador whose health, crops, and livestock had suffered.[129]

The extraterritorial application of human rights law is not itself novel, but it has normally arisen in the context of occupied territory or cross-border activities by state agents.[130] Although the ICCPR only requires a state party to secure the

[126] See *supra* Section 2. [127] *Human Rights and Climate Change*, *supra* note 28.

[128] The ICJ case was settled in 2013 on terms very favourable to Ecuador.

[129] See Ecuador's Application Instituting Proceedings, *Aerial Herbicide Spraying (Ecuador v. Colombia)*, ICJ, 31 March 2008 and UN HR Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum: Mission to Ecuador*, UN Doc A/HRC/4/32/Add.2 (28 December 2006); UN HR Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Preliminary Note on Mission to Ecuador and Colombia, Addendum*, UN Doc A/HRC/7/11/Add.3 (4 March 2007).

[130] See T. Meron, 'Extraterritoriality of Human Rights', 89 *AJIL* (1995) 78; M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 73; C. M. Cerna, 'Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law',Center for Human Rights and Global Justice, Working Paper No. 6 (2006), available at <http://chrgj.org/wp-content/uploads/2012/07/WPS_NYU_CHRGJ_Cerna_Final.pdf> (last visited 9 October 2014); L. Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* Case', *European Human Rights Law Review* (2006) 391; R. Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', *European Human Rights Law Review* (2005) 115; M. Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in an Age of Globalisation', 52 *Netherlands International Law Review* (2005) 349; H. King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rights Law Review* (2009) 521; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

relevant rights and freedoms for everyone within its territory or subject to its jurisdiction,[131] in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted that:

> . . . while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions.[132]

The ICESCR makes no reference to territory or jurisdiction, but it too was interpreted by the Court as applying extraterritorially to occupied territory.[133]

The IACtHR has followed the ICJ's fairly broad interpretation of 'jurisdiction' in its reading of Article 1 of the American Convention on Human Rights,[134] and in cases concerning the American Declaration of Human Rights.[135] The case law on Article 1 of the European Convention is more cautiously worded, and extraterritorial application is ostensibly exceptional,[136] but it has nevertheless been applied in cases involving foreign arrests, military operations abroad, and occupation of foreign territory.[137]

[131] ICCPR, *supra* note 102, Art. 2; American Convention on Human Rights (San Jose, 22 Nov. 1969, entered into force 18 July 1978) 1144 UNTS 143, Art. 1; European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 November 1953) 213 UNTS 222; these articles make no reference to territory, but, respectively, require parties to ensure to everyone 'subject to' or 'within' their jurisdiction the rights set out therein. See, generally, De Schutter, *supra* note 3, at 142–179.

[132] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Palestine Wall Case*'), Advisory Opinion, (2004) ICJ Rep. 136, para. 109. See also UN HR Committee, *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10.

[133] *Palestine Wall Case*, *supra* note 132, para. 112. See also the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, (2008) ICJ Rep. 353, at 386, para. 109.

[134] *Inter-state Petition IP-02, Admissibility, Franklin Guillermo Aisalla Molina, Ecuador–Colombia*, IACommHR, Report No. 112/10, 21 October 2010, paras 89–100.

[135] *Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Cuba*, IACommHR, Case 11.589, Report No. 86/99, 29 September 1999, para. 23; *Coard and others v. United States*, IACommHR, Case 10.951, Report N. 109/99, 29 September 1999, para. 37.

[136] See *Banković and others v. Belgium and others*, Appl. No. 52207/99, ECtHR (Grand Chamber), Decision on Admissibility of 12 December 2001, paras 59–82, where the Court found that aerial bombardment did not bring the applicants within the jurisdiction or control of the respondent states.

[137] See *Al-Skeini and others v. United Kingdom*, Appl. No. 55721/07, ECtHR (Grand Chamber), Judgment of 7 July 2011, paras 130–142; *Öcalan v. Turkey*, *supra* note 49, para. 91; *Ilaşcu and others v. Moldova and Russia*, Appl. No. 48787/99, ECtHR (Grand Chamber), Judgment of 8 July 2004, paras 310–319 and 376–94; *Issa and others v Turkey*, Appl. No. 31821/96, ECtHR (Grand Chamber), Judgment of 16 November 2004, para. 71; *Cyprus v. Turkey*, Appl. No. 25781/94, ECtHR (Grand Chamber), Judgment of 10 May 2001, para. 78.

The ratio of these and other similar cases is that where a state exercises control over territory or persons abroad, human rights obligations will follow. As the IACommHR explained in a case involving the shooting down of civilian aircraft over the high seas:

> ... In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and non-discrimination, 'without distinction as to race, nationality, creed, or sex.' Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[138]

In *Al-Skeini* the European Court reiterated that 'the Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question'.[139] It held the European Convention on Human Rights applicable to deaths caused by the British Army during its occupation of Iraq.

None of these cases is environmental, but they give a good indication of the way that international courts have approached the extraterritorial application of all the main human rights treaties. We also know from the human rights case law reviewed earlier in this chapter that a failure by the state to regulate or control environmental nuisances within its own territory may interfere with human rights.[140] How then should we answer the question whether the obligation to protect human rights from such environmental nuisances also applies extraterritorially? Can we conclude that the transboundary victims of nuisances with extraterritorial effects are within the 'jurisdiction' of the respondent state when the enjoyment of their human rights is affected? There are no precedents directly in point, but a good case

[138] *Alejandre, Costa, de la Pena y Morales v. Cuba*, *supra* note 135, para. 23 (footnotes omitted).

[139] *Al-Skeini v. UK*, *supra* note 137, para. 136.

[140] See *López Ostra v. Spain*, *supra* note 11; *Guerra v. Italy*, *supra* note 11; *Fadeyeva v. Russia*, *supra* note 11; *Öneryildiz v. Turkey*, *supra* note 11; *Taşkin v. Turkey*, *supra* note 11; *Tătar v. Romania*, *supra* note 11; and *Budayeva v. Russia*, *supra* note 11.

can nevertheless be made for extraterritorial application of human rights treaties to environmental nuisances. Given the failure of much of the literature to deal with this question in any depth (or even to ask it), it is worth doing so here.

Firstly, the human rights case law is not consistent in its treatment of extraterritorial harm. At one extreme, the UN Human Rights Committee observed in *Delia Saldias de López v. Uruguay*: 'It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[141] On this view, any harmful effect on human rights anywhere is potentially within the 'jurisdiction' of the respondent state, insofar as courts have emphasized authority or control over the person rather than simply focusing on control of territory.[142] Nevertheless, that view was rejected in *Banković*, where the ECtHR held that:

> [T]he Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. . . . The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to 'jurisdiction'.[143]

However, *Banković* has not been followed in later cases,[144] nor is it supported by case law under other human rights treaties,[145] and it appears to be a decision particular to its own unusual circumstances.[146] Moreover, it is far removed on its facts from transboundary pollution cases.

Second, while it is less plausible to say that the polluting state 'controls' the territory of the state affected by pollution,[147] it is entirely plausible to

[141] *Delia Saldias de Lopez v. Uruguay*, UN HR Committee, Comm. No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (29 July 1981), para. 12.3, referring to ICCPR, *supra* note 102, Art. 2. See also *Lilian Celiberti de Casariego v. Uruguay*, UN HR Committee, Comm. No. 56/1979, UN Doc. CCPR/C/OP/1 at 92 (29 July 1981).

[142] See, in particular, King, *supra* note 130; Gondek, *supra* note 130, at 375.

[143] *Banković v. Belgium*, *supra* note 136, para. 75.

[144] *Al-Skeini v. UK*, *supra* note 137; *Öcalan v. Turkey*, *supra* note 137; *Ilaşcu v. Moldova and Russia*, *supra* note 137; *Issa v Turkey*, *supra* note 137; and *Cyprus v. Turkey*, *supra* note 137.

[145] *Inter-state Petition IP-02*, *supra* note 134; *Alejandre, Costa, de la Pena y Morales v. Cuba*, *supra* note 135; and *Coard v. US*, *supra* note 135.

[146] See, in particular, Gondek, *supra* note 130; Wilde, *supra* note 130, at 120–124.

[147] Significant transboundary pollution is arguably a violation of the permanent sovereignty of a state (and its people) over their own natural resources, and in a serious case might amount to a de facto expropriation: see the preamble to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *supra* note 117, and *Ogoniland* case, *supra* note 5, para. 55.

conclude that the victims of transboundary pollution fall within the 'jurisdiction' of the polluting state—in the most straightforward sense of legal jurisdiction. The jurisdiction of national courts to hear cases involving transboundary harm to extraterritorial plaintiffs is recognized in private international law and in environmental liability conventions.[148] As we noted at the beginning of this section, in such cases the Aarhus Convention and earlier Organisation for Economic Co-operation and Development (OECD) practice require the polluting state to make provision for non-discriminatory access to justice in its own legal system. The Aarhus Convention applies in general terms to 'the public' or 'the public concerned', without distinguishing between those inside the state and others beyond its borders.[149] Article 3(9), the non-discrimination article, requires that:

> [T]he public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

The principle of non-discrimination has also been adopted by the International Law Commission in its articles on transboundary harm,[150] by the

[148] See Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12, Art. 5; Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, UN Doc. ECE/MP.WAT/11-ECE/CP.TEIA/9 (21 May 2003), Art. 13; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (21 June 1993) 32 ILM 1288, Art. 19; Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (12 September 1997) 36 ILM 1454, Art. XI; Protocol to Amend the Convention On Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as Amended By the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982 (12 February 2004), Art. 13. See, generally, C. McLachlan and P. Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (1996), especially C. McLachlan, 'Transnational Tort Litigation: An Overview', in McLachlan and Nygh (eds) 1; G. Walter and R. Dalsgaard, 'The Civil Law Approach', in McLachlan and Nygh (eds) 41, and F. K. Juenger, 'Environmental Damage', in McLachlan and Nygh (eds) 201.

[149] Aarhus Convention, *supra* note 21, Art. 2(5). See *Findings and Recommendations with regard to compliance by Ukraine*, *supra* note 60, paras 26–28; UNECE, *The Aarhus Convention—An Implementation Guide*, *supra* note 50, at 41.

[150] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *supra* note 117, Art. 15 prohibits discrimination based on nationality, residence, or place of injury in granting access to judicial or other procedures, or compensation, in cases of significant transboundary harm: see *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, *supra* note 117, at 427–429. See to the same effect *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, II(2) *YbILC* (2006), Principle 8(2) and Convention on the Law of the Non-Navigational Uses of International Watercourses (21 May 1997), 36 ILM 700, Art. 32.

UNECE in its environmental conventions,[151] and by the Southern Common Market (MERCOSUR).[152] The IACtHR has held that 'the fundamental principle of equality and non-discrimination constitute a part of general international law . . . '. [153] There is little point requiring that national remedies be made available to transboundary claimants if they cannot also resort to international or regional human rights law when necessary to compel the polluting state to enforce its own court orders or laws or to assess and take adequate account of the harmful effects of activities which it authorizes and regulates. That is exactly how domestic claimants have successfully used human rights law in environmental cases.[154]

Moreover, where it is possible to take effective measures to prevent or mitigate transboundary harm to human rights, then the argument that the state has no obligation to do so merely because the harm is extraterritorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat extraterritorial nuisances no differently from its treatment of domestic nuisances.[155] To deny transboundary pollution victims the protection afforded by human rights treaties when otherwise appropriate would for all these reasons be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents.

On that basis, a state which fails to control harmful activities within its own territory which cause or risk causing foreseeable environmental harm extraterritorially does owe certain human rights obligations to those affected, because they are within its jurisdiction and control, even if they are not within

[151] In addition to the Aarhus Convention, it is listed in the preamble of the Convention on the Transboundary Effects of Industrial Accidents (17 March 1992) 2105 UNTS 457 among 'principles of international law and custom'. See also Espoo Convention, *supra* note 71, Art. 2(6); Convention on the Transboundary Effects of Industrial Accidents, Art. 9.

[152] Las Leñas Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters (27 June 1992), ch. III, Art. 3. The position under the North American Free Trade Agreement (NAFTA) is less clear. Transboundary plaintiffs appear to have equality of standing under some US environmental statutes: see Trans-Alaska Pipeline Authorisation Act, 43 USC § 1635(c)(1) which allows 'any person or entity, public or private, *including those resident in Canada*' (emphasis added) to invoke the Act's liability provisions. The North American Agreement on Environmental Cooperation (8, 9, 12, 14 September 1993, entered into force 1 January 1993) 32 ILM 1480, Art. 6 which provides for 'interested persons' to have access to legal remedies for violation of environmental laws, may also apply to transboundary litigants. See, generally, S.-L. Hsu and A. Parrish, 'Litigating Canada–U.S. Transboundary Harm: International Lawmaking and the Threat of Extraterritorial Reciprocity', 48 *Virginia Journal of International Law* (2007) 1.

[153] See *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion OC-18/03, 17 September 2003, Ser. A, No. 18 (2003), para. 83.

[154] See *supra* Section 2.

[155] See OECD Council Recommendations, *supra* note 124; Smets, *supra* note 126; Birnie *et al.*, *supra* note 73; and Knox, 'Myth and Reality of Transboundary Environmental Impact Assessment', 96 *AJIL* (2002) 291.

its territory. It is most likely to violate the human rights of those affected extra-territorially if it does not permit them equal access to environmental information and participation in EIA permitting procedures, or if it denies access to adequate and effective remedies within its own legal system.[156] Moreover, in keeping with the principle of non-discrimination, the environmental impact of activities in one country on the right to life, private life or property in other countries should be taken into account and given due weight in the decision-making process.[157] There is no principled basis for suggesting that the outcome of cases such as *Hatton* should depend on whether those affected by excessive noise or any other environmental problem are in the same country, or in other countries.[158] It seems entirely consistent with the case law and the 'living instrument' conception of human rights treaties to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. The same proposition applies just as much to other human rights treaties as to the European Convention.

However, even if this reasoning is correct in cases of transboundary pollution affecting individuals in a neighbouring state, it does not follow that it will be equally valid in cases of global environmental harm, such as climate change. Here, the obvious problems are the multiplicity of states contributing to the problem and the difficulty of showing any direct connection to the victims. The inhabitants of sinking islands in the South Seas may justifiably complain of human rights violations, but who is responsible? Those states like the UK, the US, and Germany whose historic emissions have unforeseeably caused the problem? Those states like China and India whose current emissions are foreseeably making matters worse? Or those states like the US or Canada which have opted out of Kyoto and failed to take adequate measures to limit further emissions so as to stabilize global temperatures at 1990 levels? Or the governments of the Association of Small

[156] See Draft Principles on the Allocation of Loss in the Case of Transboundary Harm, *supra* note 150, paras 51–67. Principle 6(1) sets out the core obligation:

States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

See also Aarhus Convention, *supra* note 21, Arts 3(9) and 9(4).

[157] As they would have to be in transboundary environmental impact assessments: see Espoo Convention, *supra* note 71, Art. 3(8).

[158] International Law Association, Committee on Transnational Enforcement of Environmental Law, 'Toronto Conference (2006): Final Report', Rule 2, and commentary.

Island States, which may have conceded far too much when ratifying the Kyoto Protocol or in subsequent climate negotiations? It is much harder to frame such a problem in terms of jurisdiction or control over persons or territory as required by the human rights case law. It is also harder to contend that any of these governments have failed to strike the right balance between their own state's economic development and the right to life or private life in other states when they have either complied with or are exempt from greenhouse gas emissions reduction targets established by Kyoto and agreed by the international community as a whole.[159] Inadequately controlled transboundary pollution is clearly a breach of general international law,[160] and, as I have argued here, may also be a breach of human rights law. However, given the terms of the Kyoto Protocol and subsequent voluntary agreements it is far from clear that inadequately controlled climate change violates any treaty obligations or general international law.[161] In those circumstances the argument that it nevertheless violates existing human rights law is far harder to make.

At this point, it may be better to accept, as the UN HR Council appears to have done, that existing human rights law is not the right medium for addressing the shared problem of climate change, and that further negotiations through the UNFCCC process are the only realistic answer, however unsatisfactory that might be. If it wants to take climate change seriously then it must find a better way of giving human rights concerns greater weight within the UNFCCC negotiating process, and, as we saw in the previous section, that can best be achieved by using the ICESCR and the notion of a right to a decent environment to pressurize governments.

7. Conclusions

Articulating a right to a decent or healthy environment within the context of economic, social, and cultural rights is not inherently problematic. Clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development, but this could be achieved without doing damage to the fabric of human rights law, and in a manner which fully respects the wide margin of appreciation that states are entitled to exercise when balancing economic,

[159] Greenhouse gas emissions reduction targets under Kyoto Protocol apply only to Annex I developed state parties, not to developing countries, including China, India, and Brazil. Compare Kyoto Protocol, Arts 2–9, which apply to Annex I parties, and Art. 10, which applies to all parties.

[160] *Pulp Mills Case*, *supra* note 98, paras 101 and 187.

[161] Boyle, *supra* note 114.

environmental, and social policy objectives. It would build on existing precedents under the ICESCR, and reflect international policy on sustainable development endorsed at Rio in 1992 and in subsequent international conferences. The further elaboration of procedural rights, based on Rio Principle 10 and the Aarhus Convention, would facilitate implementation of such a right, and give greater prominence globally to the role of NGOs in public interest litigation and advocacy. These two developments go hand in hand. They are not a necessary part of any declaration or protocol to the ICESCR on human rights and the environment, but they do represent a logical extension of existing policies and would represent a real exercise in progressive development of the law. A declaration or protocol on human rights and the environment thus makes sense provided it brings together existing civil, political, economic, and social rights in one coherent whole, while at the same time reconceptualizing in the language of economic and social rights the idea of the environment as a common good. It would, in other words, recognize the global environment as a public interest that states have a responsibility to protect, even if they only implement that responsibility progressively and insofar as resources allow.

Using existing human rights law to grapple with climate change is more challenging. Giving human rights extraterritorial scope in environmental cases is not the problematic issue, however. As we have seen, the argument that transboundary victims come within the jurisdiction or control of the polluting state can be made, is consistent with existing human rights law, and is supported by developments in international environmental law. If that is correct, then a state does have to take account of transboundary environmental impacts on human rights and it is obliged to facilitate access to remedies and other procedures. But as noted above, climate change is quintessentially a global problem. It cannot easily be addressed by the simple process of giving existing human rights law transboundary effect. It directly affects the majority of states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. Moreover, much of the economic policy that drives greenhouse gas emissions worldwide is presently lawful and consistent with the terms of the UNFCCC and the Kyoto Protocol. It is no more likely to be derailed by human rights litigation based on ICCPR rights than the UK's policy on Heathrow airport in the *Hatton* case. The response of human rights law—if it is to have one—needs to be in global terms, treating the global environment equally with climate change[162] as the common concern

[162] As recorded *supra* note 29, the Preamble to the UNFCCC does precisely that: 'Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind . . . '.

of humanity. That is why locating the right to a decent environment within the corpus and institutional structures of economic, social, and cultural rights makes more sense. In that context, the policies of individual states on energy use, reduction of greenhouse gas emissions, land use, and deforestation could be scrutinized and balanced against the evidence of their global impact on human rights and the environment. This is not a panacea for deadlock in the UNFCCC negotiations, but it would give the rights of humanity as a whole a voice that at present is scarcely heard. Whether the Human Rights Council wishes to travel down this road is another question for politicians to answer rather than lawyers, but that is where it must go if it wishes to do more than posture on climate change.

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