

MAKING LAW OUT OF PRINCIPLES OF ENVIRONMENTAL JUSTICE

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At this second lecture, let me take a moment to express my gratitude to Jose Juan Gonzalez and his staff for his extraordinary hospitality and organization. I could not have asked for more and I would like to thank you for all you have done for me, as well as for the success of this Congress.

In my first lecture I addressed principles of justice (distributive, procedural and corrective) as organizing principles in the efforts to combat poverty and environmental degradation. In this lecture I would like to examine how we might better integrate those principles into the laws and policies we design. I will look at four legal constructs or approaches which have had some success and where further achievements are possible. At the outset I would like to emphasize that these are not mutually exclusive approaches; indeed, I think all are necessary and must be pursued. For each of them I will pose what I see as some current challenges to be taken up through research, public outreach, lobbying and litigation.

In general, legal measures concerning the environment can be grouped into four broad categories: traditional private law, especially tort and property law; public regulation; market mechanisms; and constitutional or human rights law.

Private Law

Chronologically, private law is probably the first approach to translating principles of justice, especially corrective justice, into environmental law. It resonates internationally in perhaps the best-known decision concerning environmental harm, the

inter-state *Trail Smelter* arbitration.¹ The arbitral panel, which found no international treaties or precedents on point for transboundary air pollution, relied heavily on inter-state cases from within federal systems. Most of these judgments were, in turn, founded on private law concepts of nuisance. Nuisance is an equitable doctrine that imposes liability when, after examining and balancing the benefits and burdens accruing to litigating parties, one party's use of property or resources is found to be an unreasonable or unjust interference with the other party's property or other interests. Private tort actions were long the primary avenue for mitigating or halting pollution. A modern variant can be seen in the application of the polluter pays principle in liability regimes.

Significantly, the recent US Supreme Court judgment in *Massachusetts v. EPA* relied on *Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company, Ltd.*,² the same key 1907 case utilized by the Trail Smelter tribunal. It did so in its analysis that found standing for states and local communities to sue the EPA for its failure to regulate greenhouse gases. The judgment and the multitude of briefs filed in the case are well worth study, because they may support a variety of actions for transfrontier pollution as a form of international nuisance, including from emission of greenhouse gases. Several cases recently filed at the ICJ also exemplify the continued validity of nuisance or good neighborliness. *Ecuador v. Colombia* and *Argentina v. Uruguay* are cases concerned with this application of the principle of corrective justice.

1 *Trail Smelter (U.S. v. Can.)* (1941) RIAA iii.1905 at 1965; Ann. Digest (1938-40) no. 104.

2 *Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company, Ltd.*, 206 U.S. 230 (1907). This case defined the nature of the suit as one brought by the state in its capacity as quasi-sovereign, a capacity that gives it an interest "independent of and behind the titles of its citizens, in all the earth and air within its domain." The Supreme Court found that "it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source."

The challenge today is to use concepts like nuisance on behalf of the poor, indigenous, and minorities who are bearing a disproportionate environmental burden without obtaining corresponding benefits. Internationally, it requires addressing the export of polluting industries and activities so that future Bhopal's do not occur; domestically it means challenging the siting of polluting activities in poor neighborhoods. It is clear that little gets the attention of government and corporations like a lawsuit asking for abatement and millions of dollars in damages. Applying past doctrines to contemporary problems requires research into the facts and potential causes of action, legal clinics at law schools, pro bono representation, and participation in amicus curiae briefs.

In addition to allowing private actions based in tort, some countries have relied on the long-established property doctrine of public trust to protect those resources deemed to fall within the public domain.³ The doctrine of public trust, traced to Roman law, holds that navigable waters, the sea, and the land along the seashore are common property open to use by all.⁴ Given its long-standing recognition as a legal doctrine, courts may recognize and enforce public trusts without legislation. U.S. courts have adopted and applied the public trust doctrine to fishing rights, access to the shore, and navigable waters and the lands beneath them.⁵ After the publication of Joe

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

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

5 See, e.g. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927). Fishing rights, free access to the shore, and navigation are traditional rights that are

Sax's influential law review article in 1970,⁶ courts began to expand the doctrine and apply it to other resources, including wildlife and public lands.⁷

The public trust doctrine emphasizes the equal right of use by all in the present and the preservation of the corpus of the trust for the future. It emphasizes the duties of the government as trustee, imposing on it an obligation to conserve the corpus of the trust and ensure common access to and use of it by present and future generations.⁸ One limitation is that the public trust doctrine extends only to those natural resources which are viewed as part of the corpus of the trust and not to the environment as a whole.⁹ Normally public lands are included, but not the regulation of activities on other property unless they have an impact on public lands.

There are three challenges that I see. The first is to examine comparatively the possibility of utilizing, expanding or reviving public trust to expand protection of natural resources. The second challenge is to follow through on the implications of the public

reaffirmed in several state constitutions as well as in jurisprudence. See, e.g., Cal. Const. art. I sec. 25; R.I. Const. art. I sec. 17; Ala. Const. art. 1 sec 24.

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

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

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

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.⁸

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

trust doctrine. Several subsidiary rules of trust law could be important in fleshing out the application of justice principles, such as those that require the trustee to monitor and report on the status of the trust corpus. These rules should impose legal obligations on public officials to monitor the state of the environment and provide information periodically to the public in an accessible form and through an accessible medium.

Monitoring and reporting requirements are already common in national and international environmental law.¹⁰ The commission established by the International Convention for the Regulation of Whaling, for example, collects and analyzes statistical information on the current condition and trend of whale stocks and the effects of whaling activities on the ‘great natural resource’ of whales, which the preamble says should be safeguarded for future generations.¹¹ Another example can be seen in Article 4 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage requires each state party to ensure the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage situated in its territory. Each state party is asked to submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage. The committee keeps the list up to date and also periodically prepares a list of world heritage in danger. So, identifying and insisting on fulfillment of the duties of the trustees of the public trust is the second challenge.

10 Monitoring and reporting are required of states parties to most major environmental agreements, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Article VII), the Convention on Biological Diversity (Article 26), the UN Framework Convention on Climate Change (Article 12), and the Montreal Protocol on Substances That Deplete the Ozone Layer (Article 7).

11 International Convention for the Regulation of Whaling, Washington, DC, 2 December 1946, 161 U.N.T.S. 72 at pmbl. para. 1 (‘recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’) and Article 4.

The third challenge is to examine the appropriateness of extending this doctrine to the air, ecological processes, biodiversity and other components of the environment. Hawaii's constitution provides an expansive example, creating a public trust over all of the state's natural resources:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.¹²

In international law, there are aspects of the doctrine already inherent in the concept of the common heritage of mankind, which recognizes that certain resources, such as those on or under the deep seabed, belong to the common heritage of mankind by virtue of their location in commons areas. Inclusion of the word “heritage,” connotes a temporal aspect in the communal safeguarding of areas or resources incapable of national appropriation. The nature of the common heritage is a form of trust, whose principal aims include restricting use to peaceful purposes, rational utilization in a spirit of conservation, good management or wise use, and transmission to future generations. Benefits derived from the common heritage may be shared through equitable allocation of revenues, or a sharing of scientific knowledge. It would be useful to consider how this might be expanded to the oceans as a whole, to ecosystems like coral reefs, to biodiversity, or the atmosphere.

Regulation

Turning to the second construct, in the 1960s environmental law shifted from a reliance on property and tort law to one of public regulation. General environmental

¹² Haw. Const. art. XI, § 1.

protection statutes were enacted along with specific acts to ensure clean water, clean air, and the survival of endangered species. Christopher Schroeder has pointed out that the shift from private to public law has three advantages in theory – “one procedural, one remedial and one substantive.”¹³ On a procedural level, environmental regulation done right determines levels of environmental quality through a public process that involves collective choices, rather than through a series of private actions and reactions (negotiation or litigation). Of course, this process may be distorted by a lack of transparency or lobbying by powerful interests, but in theory it offers the benefits of a democratic and participatory process, especially if governance is based on theories of subsidiarity or decentralization in which those affected are directly involved in the decision-making. Secondly, regulation emphasizes prevention rather than liability (although successful nuisance actions often led to injunctive relief to prevent further harm). Prevention is a more efficient, cost-effective approach and also one that can help avoid irreparable harm. Finally, substantively, the regulatory system sets levels of environmental quality that the cost-benefit or balancing approach used in tort actions cannot normally achieve, because the latter tend to rely on corrective justice rather than deterrence and they may underestimate the collective losses caused by environmental harm.¹⁴

There are several current challenges posed with the regulatory model: (1) determining at what level of governance – local, state, regional or international – regulations should be enacted; (2) coordinating the various regulations across governance units to ensure compatibility and synergies. (3) ensuring that the legal measures adopted

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

14 *Id.*

are scientifically sound and aim at a high level of protection; (4) making sure that the measures are equitable, that the poor and vulnerable are not made worse off, at a minimum. I would suggest that thought be given to amending environmental impact assessment procedures to require that the social as well as the natural impacts of proposed activities and measures be assessed.

Market Mechanisms

The third construct became popular beginning in the 1980s, with deregulation and privatization. Market-based approaches to changing human behavior emerged in preference to command-and-control measures.¹⁵ In part, this move constituted a reaction to dense regulatory networks that were deemed inefficient and a drain on competitiveness and investment.¹⁶ Economic instruments, however, largely remain within the regulatory framework because they require laws and institutions to oversee their operation. Purely market based approaches such as voluntary agreements tend to be inequitable, ineffective, and unable to truly account for harm to public goods like air, water and other parts of the commons.¹⁷ They do not and perhaps cannot, serve to protect long term interests like future generations. Other papers have pointed out the problems with cap-and-trade programs.

For those who believe in market mechanisms, here are some challenges: first, study and learn from the efforts of human rights NGOs to combat corporate complicity in apartheid. They bought shares in companies with poor records and mounted shareholder

15 See, generally, KLAUS BOSSELMANN AND BENJAMIN RICHARDSON, EDS., ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY (1999).

16 A.W. Reitze Jr., *Environmental Policy – It is time for a New Beginning*, 4 Columbia J. Envtl L. 111 (1989).

17 See Eckard Reh binder, *States between Economic Deregulation and Environmental Responsibility*, in Bosselmann & Richardson, supra note 12 at 58-93.

actions at company meetings. They also used naming and shaming, as well as labeling to encourage consumer awareness and purchasing choices. Challenge deceptive advertising by companies that claim they are green when they are engaged in the worst forms of extractive practices.

Rights-based Approaches

The fourth paradigm is the rights-based approach to environmental protection and poverty alleviation. In addition to its focus on ensuring the enjoyment of all civil, political, economic, cultural and social rights, it emphasizes the right to a certain quality of environment because that quality is linked to, indeed a prerequisite for, the enjoyment of internationally and domestically guaranteed rights. Rights-based approaches were initially thought to have the defect of being non-justiciable, but courts are increasingly enforcing constitutional and international rights to environmental quality. Many courts have broadened standing to permit legal redress for violations of environmental rights, without requiring individualized injury to health or property, because one major motive for guaranteeing environmental rights is to prevent injury from occurring.¹⁸

Looking first at the domestic level and using the US as an example: April 14, 1970, the first Earth Day,¹⁹ was marked in Pennsylvania by legislative approval of a proposed amendment to the state constitution. The author of the proposal said he intended to “give our natural environment the same kind of constitutional protection that [is] given our political rights.”²⁰ The proposed amendment was approved

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

19 See Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169-1210 (1997).

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

overwhelmingly by voters in the state, on May, 18, 1971.²¹ The provision, now Article I, section 27 of the state constitution, sets forth:

Section 27. Natural resources and the public estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Following this example, more than thirty of the fifty states in the United States,²² and more than 130 states around the world, have added constitutional provisions that refer to environmental or natural resource protection as a state constitutional right or governmental duty. The amendments had two stated purposes. First, they were intended to elevate environmental protection as a fundamental value to a constitutional status above the states' legislative and regulatory norms. Second, they aimed to expand standing to sue to allow public interest litigation on behalf of the environment. Many state constitutional provisions in creating environmental rights do so in the context of doctrines of public trust.

The rights-based approach to implementing principles of justice in law emphasizes each individual's right to a certain quality of environment, because environmental quality is linked to the enjoyment of internationally and domestically

21 The vote was more than 3 -1 in favor of the amendment, with close to 2 million voters. See Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123-24 (1990) in Kirsch, supra n. 19 at note 3.

22 Kirsch, in fact, argues that all of the successfully invoked provisions rely upon public trust doctrine, asserting that "[e]ach of the successful provisions invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship." Kirsch, supra n. 19 at 1173. Provisions that refer to "trust," include Haw. Const. art. XI; Pa. Const. art. I, § 27; Va. Const. art. XI, § 3. For provisions outlining public trust principles, see Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59.

guaranteed rights that cannot be exercised otherwise. A decade ago, former U.N. Secretary-General Kofi Annan in his Annual Report on the Work of the United Nations Organization spoke in favor of this approach because it “describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals.”

Environmental Rights Human Rights Treaties

Most human rights treaties were drafted and adopted before the Stockholm Conference on the Human Environment and therefore they contain few references to the environment.²³ Later treaties²⁴ and declarations,²⁵ especially at the regional level,²⁶ do

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

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

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

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

refer to the right to a safe and healthy or sound environment, while environmental agreements have incorporate procedural human rights deemed necessary or advantageous to achieving environmental protection.²⁷ Several dozen international treaties adopted since the Stockholm Conference call upon states to take specific measures to ensure that the public is adequately informed the risks posed to them by specific activities.²⁸ In

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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

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

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

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

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

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

addition to the right to information, the public is also given broad rights of participation in decision-making and access to remedies for environmental harm. The protections afforded have increased in scope and number since the adoption of Principle 10 of the Rio Declaration on Environment and Development.²⁹ One challenge is for environmental lawyers to become familiar with human rights law and make effective use of it.

Jurisprudence of human rights bodies

Within UN organs, the former United Nations Human Rights Commission took several initiatives relating to human rights and the environment, and many of the mandates have been maintained by the new Council. A Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,³⁰ has a mandate that includes investigating

health and safety. See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 Feb. 1991), 30 I.L.M. 800, art. 1(viii).

29 See, e.g., Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999); the United Nations Convention to Combat Desertification in Those Countries Experiences Serious Drought and/or Desertification (14 Oct. 1994), which places human beings at the center of concern to combat desertification (PmbI) and requires states parties to ensure that all decisions to combat desertification or to mitigate the effects of drought are taken with the participation of populations and local communities. (Art. 3). The Convention places an emphasis throughout on information and participation of local communities. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (September 10, 1998), EMuT, 998:26, Article 15(2), requires each state party to ensure, to the extent practicable that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention. The *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Montreal, January 29, 2000), 39 I.L.M.1027, Art. 23 concerns public awareness and participation, requiring the Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported LMOs should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the Convention.

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

complaints about illicit waste trade.³¹ In its resolutions on this matter, the Commission consistently recognized that such trade “constitute[s] a serious threat to the human rights to life, good health and a sound environment for everyone.”³² The Commission also named a Special Rapporteur on the right to food whose mandate includes the issue of access to water.³³ Since 2001 resolutions on the topic have affirmed the “right to drinking water supply and sanitation for every woman, man and child.”³⁴ A new topic introduced by the Maldives this year involves the Council in examining the human rights implications of climate change.

One advantage to a rights-based approach is accountability. International human rights treaty bodies have received and decided cases from applicants who allege that environmental conditions affecting them have deteriorated to the point that their internationally-guaranteed human rights have been violated. At the global level, UN human rights treaty bodies have indicated through General Comments,³⁵ observations on

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

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

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

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

35 The UN Covenants on human rights, as well as other UN human rights treaties, authorize their treaty bodies to issue General Comments, which constitute authoritative legal interpretations of the rights and obligations contained in the treaty. In General Comments on the right to life and on the minority rights provision of the Covenant on Civil and Political Rights, the U.N. Human Rights Committee has indicated

state reports, as well as decisions on individual complaints,³⁶ that they view environmental protection as a pre-requisite to the enjoyment of the internationally-guaranteed rights they monitor. An important new venue is likely to arise soon with the adoption of a Protocol establishing a complaints procedure for the International Covenant on Economic, Social and Cultural Rights.

The three fully operational regional human rights systems have examined the greatest number of the complaints that environmental deterioration has affected guaranteed human rights. These systems offer the best venues in most circumstances because they have functioning courts that can render binding judgments and afford reparations. In contrast, UN bodies can only make recommendations. The coming into force recently of the Arab Charter on Human Rights and the drafting of human rights clauses in the ASEAN Charter expands regional human rights systems into new areas and

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

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

offers possibilities for lawyers to propose action that reflects and reinforces the jurisprudence of the other regions, just as the older systems have learned from each other.

The European Convention contains neither a right to health nor a right to environment, but cases have been brought for injury due to environmental harm, invoking the right to life (Art. 2), the right to information (Art. 10), and the right to privacy and family life (Art. 8). Decisions of the former Commission and the Court have held that environmental harm attributable to state action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Convention Article 8(1). The harm may be excused if it results from an authorized activity of economic benefit to the community in general, provided the principle of distributive justice is respected: i.e., as long as there is no disproportionate burden borne by any particular individual or group. The court applies a three part test: the measure must have a legitimate aim, be lawfully enacted, and be proportional.³⁷ States enjoy a margin of appreciation or certain discretion in determining the legitimacy of the aim pursued, but the Court will hold the state to the level of environmental protection it has chosen and nearly always finds a violation if the state fails to enforce its own laws.

In *Okyay and Others v. Turkey*, App. no. 36220/97, judgment of 12 July 2005, the applicants complained under Article 6 of the Convention that their right to a fair hearing had been breached on account of the administrative authorities' failure to enforce the judicial orders to halt the operations of the Yatağan, Gökova (Kemerköy) and Yeniköy thermal-power plants in the Muğla province of south-west Turkey. Relying on Article 56

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

of the Turkish Constitution and section 3 (a) of the Environment Act, the applicants argued that it was their constitutional right to live in a healthy and balanced environment, and their duty to ensure the protection of the environment and to prevent environmental pollution. In examining this case, the European Court not only referred to the domestic law of Turkey, but also to Principle 10 of the 1992 Rio Declaration on Environment and Development and to Council of Europe Parliamentary Assembly Recommendation 1614 (2003) on Environment and Human Rights. Given the applicant's constitutional rights and the international law on point, the Court was satisfied that the applicants could claim that they were entitled under Turkish law to protection against damage to the environment caused by the power plants' hazardous activities. It followed that there existed a genuine and serious "dispute" concerning a "civil right," thus Article 6 applied and had been violated.

Oneryildiz v. Turkey, decided Nov. 30, 2004 by a Grand Chamber of the European Court, exemplifies the integration of poverty alleviation and environmental protection that can be sought through a rights-based approach. The two applicants asserted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property due to a methane explosion at the municipal waste dump near where they lived in Istanbul. In addition to asserting a violation of the right to life and to property, the applicants complained that the administrative proceedings conducted in their case were unfair and violated the fair hearing requirement of European Convention on Human Rights, article 6.

The waste disposal site had originally been selected when the area was uninhabited, but over time unplanned settlements of extremely poor people appeared. In

1991, the district council appointed experts to determine whether the site met existing regulations. The resulting report, transmitted to local authorities, the governor and the Ministry of Health and Environment Office, alerted authorities to a number of dangers giving rise to a major health risk for nearby inhabitants, particularly those living in the slum areas. The experts found that the site exposed humans, animals and the environment to the spread of contagious diseases and the formation of sufficient methane to explode. The Environment Office urged local authorities to remedy the problems, but no action was taken. After two years of inaction, a methane explosion occurred followed by a landslide that destroyed the dwellings and killed thirty-nine people. Two mayors were prosecuted, found guilty and initially sentenced to three months in prison, but the sentences were commuted and enforcement of fines of less than \$7 each were suspended. The applicant won an administrative judgment but the compensation ordered was never paid.

In its judgment, the Court reiterated that the Convention's guarantee of the right to life includes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation extends to any activity, whether public or not, "in which the right to life may be at stake, and a fortiori in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites."³⁸ The primary duty on the state is to put into place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.

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

³⁸ *Oneryildiz v. Turkey*, judgment of Nov. 30, 2004, para. 71.

- the harmfulness of the phenomena inherent in the activity,
- the contingency of the risk to which the applicant was exposed,
- the status of those involved in bringing about the circumstances,
- whether the acts or omissions attributable to them were deliberate.

In evaluating the circumstances of this case, the Court took particular note of the dangerousness of the activity and indicated that when such activities are undertaken, the state must enact regulations governing their licensing, setting up, operation, security and supervision and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.

Significantly, the Court included the public's right to information among the preventive measure that the state must take to protect the right to life. The Court had previously rejected efforts to imply a right to information in Convention Article 10, holding that the article only prohibits a state from interfering with the free flow of information and does not require the state to collect or disseminate information.³⁹ In *Oneryildiz*, the Court found that its interpretation of some substantive rights to include the right to information "is supported by current developments in European standards," citing Parliamentary Assembly Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993) on the management, treatment, recycling and marketing of waste, as well as Committee of Ministers Recommendation R (96) 12 on the distribution of powers and responsibilities between central authorities and local and regional authorities with regard to the environment. The

³⁹ *Guerra and Others v. Italy*, 1998-I Eur. Ct. Hum. Rts., judgment of 19 Feb. 1998.

Court also mentioned the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment⁴⁰ and the Convention on the Protection of the Environment through Criminal Law.⁴¹ These environmental measures were incorporated into the human rights obligations of the state. Together with Resolution 1087 (1996) the resolutions made it obvious to the Court that public access to clear and full information about dangerous activities is a basic human right. In the Court's estimation, the Turkish authorities instead engaged in delaying tactics that resulted in a failure to take necessary preventive measures or to inform the public. In addition, the authorities allowed the waste collection site to operate despite not conforming to the relevant standards.

The Court held that Turkey also violated its duties in the aftermath of the explosion. According to the Court, where lives are lost in circumstances potentially engaging the responsibility of the state, Article 2 requires "an adequate response" so that any breaches are repressed and punished. The Court considered that the applicable principles in this case were to be found in decisions concerning the use of lethal force. The duty to conduct an official investigation arises not only because criminal liability may be in question, but because in the context of dangerous activities, public authorities "are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents."⁴²

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

Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realizing the likely consequences

40 Lugano, 21 June 1993, ETS No. 150.

41 Strasbourg, 4 November 1998, ETS No. 172.

42 Oneryildiz, at para. 93.

and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity . . . , the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative . . . ; this is amply evidenced by developments in the relevant European standards.

While individuals may not have a right to have responsible parties prosecuted or sentenced, national courts should not allow life-endangering offenses to go unpunished. In this respect, Turkish authorities were found to have acted with exemplary promptness in investigating the circumstances of the accident and ensuing deaths, but the manner in which the Turkish criminal justice system operated did not ensure accountability or the effective implementation of domestic law, in particular the deterrent function of the criminal law. Thus, the procedural aspects of Article 2 were also violated.⁴³ The Court awarded pecuniary and non-pecuniary damages, together with costs and expenses to the applicant as well as non-pecuniary damages to each of his two sons. The informal nature of the neighborhood was not an obstacle.

In the Western Hemisphere, the Inter-American Commission has also devoted attention to environmental quality as it affects human rights.⁴⁴ In a report on human rights in *Ecuador*, the Commission responded to claims that oil exploitation activities were contaminating the water, air and soil, thereby jeopardizing the lives and health of the people of the region.⁴⁵ Both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts in their

43 The Court also found violations of the right to property and the right to a remedy.

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

45 *Report on Ecuador*, p. v.

drinking and bathing water, in the air, and in the soil, with the result that they suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. The Commission noted that:

*[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.*⁴⁶

Governments may therefore be required to take positive measures, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury. While the right to development implies that each state may exploit its natural resources, “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”⁴⁷ The Commission concluded that

*[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ... The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.*⁴⁸

This holding thus sets general standards for environmental rights in the Inter-American system.⁴⁹ More recent Inter-American litigation has enhanced protections for indigenous

46 *Report on Ecuador, id.* at 88.

47 *Id.* at 89.

48 *Id.* at 92, 93.

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

peoples over their lands and resources. In the *Awes Tingni v Nicaragua* case, the indigenous succeeded in obtaining an order from the Inter-American court that the logging licenses on their lands be cancelled and that the government, together with representatives of the community, demarcate and grant legal title to their traditional lands.

In Africa, *SERAC v. Nigeria*,⁵⁰ contains a full exposition of the implications of a rights-based approach to environmental protection. Like the situation in the Inter-American Commission reviewed in Ecuador, this communication alleged that oil production activities produced contamination causing environmental degradation and health problems; that the consortium disposed of toxic wastes in violation of applicable international environmental standards and caused numerous avoidable spills near villages, consequently poisoning much of the region's soil and water; that the government aided these violations by placing the state's legal and military powers at the disposal of the oil companies; and that the government executed opponents and, through its security forces, killed innocent civilians and attacked, burned, and destroyed villages, homes, crops, and farm animals. Further, the government failed to monitor the activities of the oil companies, provided no information to local communities, conducted no environmental impact studies, and prevented scientists from undertaking independent assessments.

The Commission held that Nigeria breached its obligations with respect to, inter alia, the right of peoples to a "general satisfactory environment favorable to their

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

development” (Article 24).⁵¹ The obligations were found to contain four separate but overlapping duties: to respect,⁵² protect,⁵³ promote,⁵⁴ and fulfill⁵⁵ the guaranteed right entailing “a combination of negative and positive duties.”⁵⁶ The Commission concluded its analysis by emphasizing that environmental rights and economic and social rights are essential elements of human rights in Africa, that the Commission intends to apply them, and that “there is no right in the African Charter that cannot be made effective.”⁵⁷

Prospects and Problems

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

Second, all legal systems establish a hierarchy of norms. Constitutional or human rights guarantees usually are at the apex and “trump” conflicting norm of lower value.

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

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

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

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

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

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

57 *Id.*, para. 68.

Thus, to include respect for the environment as a constitutional right, or international human right, should ensure that it will be given precedence over other legal norms that are not rights-based. The Montana Supreme Court indicated some of the implications in the case *Cape-France Enterprises v. The Estate of Peed*, 305 Mont. 513, 29 P.3d 1011 (2001), describing the right to a clean and healthful environment as “a fundamental right that may be infringed only by demonstrating a compelling state interest...” one that is, “at a minimum, some interest ‘of the highest order and ... not otherwise served,’ or ‘the gravest abuse endangering [a] paramount [government] interest []’”⁵⁸ Thus, environmental protection is not an ordinary policy choice and the burden of proof will be on the government to demonstrate a compelling reason for permitting the environment to deteriorate. This is important given the short-term costs that may make it politically unpopular to adopt and implement measures of environmental protection. A right to environmental quality can act as the brake or limitation on domestic political processes the otherwise might take a short term view and permit activities that are significantly harmful to the environment and the people in it.

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

58.” *Armstrong v. State* 1999 Mt. 261, 296 Mont. 361, 989 P. 2d 364, at fn. 6. See also the discussion later in this article.

as well.”⁵⁹ Citizen efforts to counter environmental harm tend to promote democratic governance as well as enhance compliance with environmental norms, something seen in particular over the past decade in Central and Eastern Europe.

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

Fourth, as already mentioned a rights-based approach enhances accountability by allowing utilization of international petition procedures to bring international pressure to bear when governments lack the will to prevent or halt environmental harm that threatens human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation. Sometimes the problem is the result of a combination of governmental lack of capacity and lack of political will. Pollution may be caused by powerful enterprises whose business and investment are important to the state or the state may have inadequate monitoring systems to ensure air or water quality. In these instances, petition procedures can help to identify problems and encourage their resolution, including by the provision of technical assistance. States may even welcome complaints if the results give them leverage in the domestic political arena to overcome opposition to needed measures. The availability of individual complaints

⁵⁹ Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 *Stan. Env'tl L.J.* 71, 88 (2005).

procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.

Turning to the problems, there are limits to what can be achieved through a rights-based approach. First, relying on existing human rights guarantees is anthropocentric, because environmental harm must affect human well-being before human rights guarantees can be invoked. Unless there is a specific right to a healthy or ecologically-balanced environment, international human rights procedures cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes. It will be important to follow judicial application of the new Constitution of Ecuador, given its declaration that nature is a legal person, to see how this provision is interpreted and applied.

The anthropocentric approach that applies absent a right to environment is reflected in the European Court's decision in the case of *Kyrtatos v. Greece*.⁶⁰ The applicants own real property adjacent to a protected wetland, an important natural habitat for various protected species. The European Court found a violation of the fair hearing provisions article 6 § 1 because a local judgment blocking construction on the site had been ignored by local authorities. With respect to article 8, however, the Court found no violation, affirming that the crucial element for article 8 is the actual harmful effect on a person's private and family life, not deterioration of the environment *per se*. The Court indicated that applicants must demonstrate that the environmental deterioration directly affects their well-being, that is to say, they must clearly delineate the link between environmental degradation and the enjoyment of human rights. A dissent asserted that the Court should recognize the growing awareness about the quality of the

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

environment and the implication of environmental degradation on people's lives, which "would be perfectly in line with the dynamic interpretation and evolutionary updating of the Convention that the Court adopts in many fields." This view did not prevail, but it suggests that further research and litigation might have an impact on judicial views in this respect.

A second limitation to a rights-based approach to environmental protection is found in the limited mandates of human rights bodies in respect to remedies. The European Court can award monetary damages, but has little power to order injunctive relief or mandate specific action. Thus, rights may be vindicated with money for the applicants to move away from the environmental harm, but it is not clear that the environmental conditions themselves are improved in the short term. *Fadayeva v. Russia* is a case in point; she was awarded compensation, but the industrial facility, the steel mill, remained in operation as before. Yet, the COM does not close a case until there is compliance with the judgment, including general measures to ensure that the violation IS not repeated. In its recent meetings, the COM has invited the Russian authorities to hold consultations with the COE and experts on the general measures to be adopted to ensure that there is no repetition of the violation. It also requested the Russian authorities to draft an environmental code to be reviewed by the COE for compliance with regional standards.

A further limitation is that the decisions of the Inter-American Commission, the African Commission, and the UN bodies are recommendations that lack the binding force of judgments of the regional courts. While good faith cooperation with international bodies given monitoring power and the authority to hear complaints suggests that states

should comply, they may take the view that mere recommendations need not be strictly followed.

Third, and less commonly, some states envisage rights as restraints on governmental power, with duties of governmental abstention, and do not accept human rights obligations that require affirmative management of resources and regulations to ensure that private conduct – which is responsible for the large majority of environmental harm – is properly controlled. But constitutional and human rights law now widely accepts affirmative state obligations to protect individuals against private as well as public violations of rights. It is important because the major difference between constitutional provisions that are based on traditional doctrines of public trust and those that enshrine environmental rights seems to be the extent to which private-source environmental harm is addressed. Including the right to environment in the constitution places it on an equal footing with rights to property and allows for a balancing of community and individual interests, more than does public interest doctrine.

A fourth limitation is inherent in the traditional scope of human rights law: a right to an environment of a certain quality is complicated by both temporal and geographic elements absent from other human rights protections. Environmental degradation harms not only those currently living, but also future generations of humanity as well. Can those not born be said to have rights and if so, who represents such future generations and how should courts protect their interests?

The most politically-charged aspect of a right to environment may be the potentially vast expansion of the territorial scope of state obligations. Presently, human rights instruments require each state to respect and ensure guaranteed rights "to all

individuals within its territory and subject to its jurisdiction." This geographic limitation reflects the reality that a state normally will have the power to protect or the possibility to violate human rights only of those within its territory and jurisdiction. Nature recognizes no political boundaries, however. A state polluting its coastal waters or the atmosphere may cause significant harm to individuals thousands of miles away. States that permit or encourage GHG emissions or depletion of the tropical rain forest can contribute to global warming that threatens the entire biosphere.

Ultimately, the definition of a right to environment will have to include substantive environmental standards to restrict harmful air pollution and other types of emissions. Although establishing quality standards requires extensive international regulation of environmental sectors based upon impact studies, such regulation is by no means impossible. Adoption of quality standards demands extensive research and debate involving public participation, but substantive minima are a necessary complement to the procedural rights leading to informed consent. Otherwise, a human rights approach to environmental protection would be ineffective in preventing serious environmental harm.

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

The human rights treaties provide a "framework" containing the basic guarantees on which international, national and local laws and policies are elaborated.

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

So we have four approaches. There are challenges with each that require research and legal action from lawsuits to new instruments. The litigation will not always, or perhaps even often, result in immediate success, but is useful and perhaps even indispensable. The December 2005 Inuit petition to the Inter-American Commission on Human Rights led to the first hearing on human rights and climate change and the possible future appointment of a special rapporteur on human rights and the environment. Beyond litigation, there is a need for consideration of new problems and potentially new legal instruments articulating new rights. Can there be a state without a territory? Already, in Kiribati people ask whether they will still have their citizenship if they have

no territory – will they still have an EEZ if there is no land? Will they have a right to access other territory? How does the Responsibility to Protect apply in the environmental context? We should begin to consider the need to elaborate a legal instrument on population movements and perhaps on ecological intervention in cases of natural disasters where the government lack resources to aid its own people, but rejects outside help.

In conclusion, human rights and environmental protection both ultimately seek to achieve the highest quality of sustainable life for humanity within the global ecosystem. Potentially conflicting differences of emphasis still exist, because the essential concern of human rights law is to protect individuals and groups within a given society, while the purpose of environmental law is to sustain all life and ecological processes by balancing the needs and capacities of present generations with those of the future. Nonetheless, these two fundamental objectives of society are as interdependent as are the economies and communications networks of the world today. They must be integrated and addressed in a holistic manner that is sustainable and just, using all the legal techniques of the past and present as they may be modified to protect the future.

Thank you.