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Whiplash and Backlash—Reflections on a Human Rights Approach to Environmental Protection

Dinah Shelton

KEYNOTE ADDRESS AT THE “ENVIRONMENT AND HUMAN RIGHTS” INTERNATIONAL LAW SYMPOSIUM HELD AT SANTA CLARA UNIVERSITY SCHOOL OF LAW
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In 1989, in collaboration with Alexandre Kiss on the book *International Environmental Law*,¹ I began to examine the links between environmental protection and international human rights law. By this point, some other scholars and activists had already observed the importance of implementing each of these two bodies of law in order to realize the aims of the other one. Principle 1 of the 1972 Stockholm Declaration both reflected this observation and stimulated further discussion, with its affirmation of 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,” a recognition that a certain environmental quality is a prerequisite for the enjoyment of internationally-guaranteed rights and freedoms.²

At first glance, the attention given to human rights at the Stockholm Conference may seem somewhat surprising; even more so, the proposal of the United States delegation to recognize the right to a safe and healthy environment as a human right.³ Human rights may have been firmly established as a matter of international concern by this point, but environmental protection was relatively new in both domestic and international law. As a result, global human rights instruments contain very few and only brief references to the environment.⁴ No

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1. ALEXANDRE CHARLES KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* (1991).
 2. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf.48/14/Rev.1, 3 (Nov. 1973).
 3. *Id.* at 51.
 4. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]. The ICESCR guarantees the right to safe and healthy working conditions (art. 7(b)) and the right of children and young persons to be free from work harmful to their health (art. 10.3). The right to health expressly calls on States Parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” (art. 12(b)) and “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” (art. 12(c)). See also U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 52 (Nov. 20, 1989) (referring to aspects of environmental protection in respect to the child’s right to health (art. 24 (1)), providing 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)), and ensuring parents and children are informed and educated on hygiene and environmental sanitation (art. 24(2)(e)); International Labour Organization, *Convention on Indigenous and Tribal Peoples*, No. 169, 72 I.L.O. Off. Bull. 59, 28 I.L.M. 1382 (June 27, 1989), reprinted in A Manual 93-98 (rev. ed. 2003) [hereinafter ILO Convention]. The ILO Convention contains numerous references to the lands, resources, and environment of indigenous peoples. See e.g., *id.* at arts. 4, 7, 13-19. It also requires governments to ensure that adequate health services are

mention of it is found in the Universal Declaration of Human Rights (UDHR), adopted exactly twenty years before the Swedish government proposed convening the Stockholm Conference. Nonetheless, the Swedish proposal came the same year—in 1968—that the UN held its first international conference on human rights in Tehran, whose own concluding declaration reaffirmed the universality and proclaimed the indivisibility of all human rights.⁵ This bridging of the Cold War divisions between civil and political rights, on the one hand, and economic, social, and cultural rights on the other hand, facilitated discussion of environmental protection from a human rights perspective at Stockholm.

Whiplash

Almost immediately following the Stockholm Conference, newly independent states began adding the right to a safe and healthy environment to their constitutional guarantees, and older states joined this rapidly spreading movement by amending their constitutions to provide in similar fashion for such a right. New constitutions in Eastern European, Latin American, and African countries declared a right to environmental quality that courts have found justiciable.⁶ The post-apartheid constitution of South Africa provides a good example in its guarantee that:

Everyone has a right
(a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit

available or provide resources to indigenous groups “so that they may enjoy the highest attainable standard of physical and mental health” (art. 25(1)) and to make known to the peoples concerned their rights and duties (art. 30(1)).

5. United Nations International Conference on Human Rights, Tehran, Iran, Apr. 22-May 13, 1968, *Proclamation of Teheran*, U.N. Doc. A/Conf.32/41 at 3-4 (Sept. 1968) (reaffirming that the UDHR is the common standard of achievement for all mankind and that “human rights and fundamental freedoms are indivisible”).
6. *See, e.g.*, A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum et al. eds., 2011) (art. 18 states that “Hungary recognizes the . . . individual’s right to a healthy environment”); Gyula Bandi, *The Right to Environment in Theory and Practice: The Hungarian Experience*, 8 CONN J. INT’L L. 439 (1993). In Latin America, Article 19 of the 1980 Constitution of Chile added a “right to live in an environment free of contamination,” and established that certain other individual rights may be restricted to protect the environment. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, §§ 1, 8, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum et al. eds., 2011). In 1988, the Supreme Court of Chile held that the constitutional-environmental provisions established a substantive enforceable right. *Coro Suprema de Justicia [C.S.J.] [Supreme Court]*, 23 julio 1988, “Pedro Flores y Otros c. Corporación Del Cobre (Codelco), División Salvador,” Rol de la causa: 12.753, F.S. 641 (Chile), summarized in James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT’L L. 365, 392 (2009).

of present and future generations, through reasonable legislative and other measures that

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁷

The South African Constitutional Court has explicitly relied on international environmental principles, like sustainable development, in giving substantive content to this Constitutional guarantee.⁸ Among the older constitutions, that of France was amended to add a Charter of the Environment in 2005,⁹ which affords French citizens the right to live in a “balanced environment, favorable to human health.”¹⁰ The French Conseil Constitutionnel has used the Charter to review legislative enactments,¹¹ finding that the Charter constitutes a “fundamental freedom” of constitutional value, allowing for the suspension of an administrative decision under French procedural law.¹²

States in the United States¹³ have not been immune from this development. State constitutions revised or amended from 1970 to the present have added

7. S. AFR. CONST., 1996, § 24.

8. Fuel Retailers Ass’n of Southern Africa v. Dir.-Gen. Env’tl. Mgmt., Dep’t of Agric., Conservation and Env’t, Mpumalanga Province, and Others, 2007 (10) BCLR 1059 (CC) (S.Afr.) (arising out of a decision by a provincial Department of Agriculture, Conservation and Environment to grant private parties permission to construct a filling station).

9. Loi 2005-205 du 1er mars 2005 relative à la Charte de l’environnement [Law 2005-205 of March 1, 2005 relating to the Charter of the Environment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 2, 2005, p. 3697 [hereinafter French Charter of the Environment], available at <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Charte-de-l-environnement-de-2004>. See generally Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT’L ENVTL L. REV. 73 (2008); David Marrani, *The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications*, 10 ENV. L. REV. 9 (2008); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL L. REV. 113, 113-14 (2005-2006).

10. French Charter of the Environment, *supra* note 9, at art. 1.

11. See, e.g., Conseil constitutionnel [CC][Constitutional Court] decision No. 2005-514DC, Apr. 28, 2005, Re. 305 (Fr.); Marrani, *supra* note 9.

12. Marrani, *supra* note 9, at 21-22.

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

environmental protection to their catalogue of basic rights.¹⁴ To mark the occasion of the first Earth Day in 1970, the Pennsylvania legislature amended the state constitution,¹⁵ with overwhelming approval by voters in the state,¹⁶ and added what is now Article I, section 27 to the state constitution:

Section 27. Natural resources and the public estate

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

The amendment and others like it were intended to elevate environmental protection as a fundamental value to a constitutional status above the states' legislative and regulatory norms, and to protect the environment beyond issues of human health.¹⁷ A second aim was to expand standing to sue to allow public interest litigation on behalf of the environment.¹⁸ Illinois, Massachusetts,¹⁹ and

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14. See ALA. CONST. art. VIII; CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI; ILL. CONST. art. XI; LA. CONST. art. IX; MASS. GEN. LAWS. ANN. CH. 6, § 179 (West 1973); MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. I, § 27; R.I. CONST. art. 1, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII; VA. CONST. art. XI, § 1. For discussions of these provisions, see A.E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 229 (1972); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 ENVTL. L. REP. 50028-29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: the Gift Outright*, 1984 ANN. SURV. AM. L. 13, 28-29; Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 126-27 (1990); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997).
 15. Franklin L. Kury, *The Pennsylvania Environmental Protection Amendment*, PA. B. ASS'N Q., Apr. 1987, at 85, 87.
 16. 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).
 17. The Pennsylvania Supreme Court has indicated that environmental litigants may sue for generalized harm because “[a]esthetic and environmental well-being are important aspects of the quality of life in our society” and because its constitution establishes a local government’s duty to protect its citizen’s “quality of life.” *Commonwealth, Pa. Game Comm’n v. Commonwealth*, Dept. of Env’tl. Res., 509 A.2d 877, 883-84 (Pa. Commw. Ct. 1986), *aff’d* 555 A.2d 812 (Pa. 1989).
 18. For example, Hawaii’s Constitution, article XI, section 9, is clear on the right and its justiciability: “Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings.” HAW. CONST. art. XI. See *Life of the Land v. Land Use Comm’n of the State of Hawai’i*, 623 P.2d 431 (Haw. 1981) (granting standing to an environmental organization which sought to challenge a reclassification of certain lands which were not owned by any of the organization’s members. The Supreme Court held that the plaintiffs’ “aesthetic and environmental interests” were “personal” rights guaranteed by art. XI, sec. 9 of the Constitution). See also *Richard v. Metcalf*, 921 P.2d 169 (Haw. 1996); *Kahana Sunset Owners*

Montana²⁰ all amended their constitutions in 1972 to provide in similar fashion for a right to a clean and healthful environment. The scope and content of this right has been a subject of litigation in most states with such provisions.²¹

The Supreme Court of Montana has made clear the substantive implications of a right to a specified environmental quality, concluding that:

[T]he right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.²²

In examining the drafting history of the amendment, the Court determined that the delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Instead, the “constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.”²³ Establishing a strict scrutiny standard of judicial

Ass'n v. County of Maui, 947 P.2d 378 (Haw. 1997).

19. Massachusetts' amendment provides:

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

MASS. CONST. art. XLIX.

20. Montana's Constitution, article II, section 3, guarantees all persons in this state the right to “a clean and healthful environment.” MONT. CONST. art II. Article IX, section 1, provides, in pertinent part, that “the State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” *Id* at art. IX.

21. See, e.g., *City of Elgin v. Cnty of Cook*, 660 N.E.2d 875 (Ill. 1995); *Glisson v. City of Marion*, 720 N.E.2d 1034, 1041 (Ill. 1999); *Montana Env'tl Info. Ctr. v. Dep't of Env'tl Quality*, 988 P. 2d 1236 (Mont. 1999).

22. *Montana Env'tl Info. Ctr.*, *supra* note 21, at 1246.

23. The Montana Supreme Court further applied its constitutional provision in the case *Cape-France Enterprises v. Estate of Peed*, in which it held that “the protections and mandates of this provision apply to private action—and thus to private parties—as well” as to state action. 29 P.3d 1011, 1017 (Mont. 2001). Thus, “it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks.” *Id.* The court held that it would be a violation of the state's obligation under the constitution for it to grant specific performance of a contract for the sale of the land in question. See Chase Naber, *Murky Waters: Private Action and the Right to a Clean and Healthful Environment—An Examination of Cape-France Enterprises v. Estate of Peed*, 64 MONT. L. REV. 357 (2003); Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

review for any measure that would implicate the right to a clean and healthful environment is one of the most important practical consequences of taking a rights-based approach to environmental protection.

Other national courts have similarly given broad reading to constitutional guarantees, and have done so through reference to national and international environmental standards, thus incorporating them into human rights guarantees. In India, in a series of judgments between 1996 and 2000, the courts have issued orders to companies to cease operations that pollute the environment.²⁴ The Indian Supreme Court based closure orders on the principle that health is of primary constitutional importance.²⁵ Similarly, in Costa Rica, courts have stated that the rights to health and to the environment are necessary to ensure that the right to life is fully enjoyed.²⁶

More than 100 constitutions throughout the world currently guarantee a right to a clean and healthy environment,²⁷ impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources as a national goal. Such provisions vary in the chosen description of the environmental quality that is protected. While many of the provisions first adopted refer to a “healthy” or “healthful” environment, more recent formulations add references to ecological balance and/or protecting biodiversity to the guarantee.²⁸ The rapidity with which the new provisions have been adopted and invoked in judicial actions throughout the world attest to the public support for environmental rights, but also indicate concern for the continuing degradation of the environment, with its impact not only on present values but on future human security.²⁹

24. See, e.g., *M.C. Mehta v. Union of India & Others*, (1996) 8 S.C.C. 462 (India).

25. *Id.* See also *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420 (India).

26. *Presidente de la Sociedad Marlene S.A. v. Municipalidad de Tibas*, Sala Constitucional de la Corte Supreme de Justicia. Decision No. 6918/94 of 25 Nov. 1994 (Costa Rica).

27. Examples include Angola (“all citizens shall have the right to live in a healthy and unpolluted environment”); Argentina (“all residents enjoy the right to a healthy, balanced environment which is fit for human development . . .”); Azerbaijan (“everyone has the right to live in a healthy environment”); and Brazil (“everyone has the right to an ecologically balanced environment, which is a public good for the people’s use and is essential for a healthy life”). See CONSTITUIÇÃO DA REPUBLICA DE ANGOLA [CONSTITUTION] Jan 21, 2010, art. 39 (Angola); Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUTION OF THE AZERBAIJAN REPUBLIC, art. 39; CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 225 (Braz.).

28. The Quebec provincial charter, for example, provides “Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.” Québec Charter of Human Rights and Freedoms, R.S.Q., c. C-12, art. 46.1 (Can.).

29. See *KISS & SHELTON*, *supra* note 1, at 39-67.

Backlash

Strong civil society activism and public pressure helped produce the rapid changes in domestic law that occurred after Stockholm, but efforts to expand recognition of environmental rights in global and regional human rights law have been less successful. The 1981 African Charter on Human and Peoples' Rights was the first international treaty to proclaim that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."³⁰ The 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights³¹ followed this precedent in proclaiming in Article 11 that "Everyone shall have the right to live in a healthy environment and to have access to basic public services," and specified that the States Parties shall promote the protection, preservation, and improvement of the environment. Also at the regional level, the preambles to European Community directives often state their aim "to protect human health and the environment."³² Yet, the Council of Europe's Committee of Ministers has repeatedly rejected proposals from the Parliamentary Assembly to add a protocol to the European Convention on Human Rights that would provide a right to a safe and healthy environment to the regional guarantees.³³ The European Social Charter mentions only the right to a

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30. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, art. 24, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.
31. Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, OAS Treaty Series No. 69, 28 ILM 156 (1989), available at <http://www.oas.org/juridico/english/sigs/a-52.html>.
32. Council Directive No. 85/203, pmbl., 1985 O.J. (L 87) 28 (EC); Council Directive No. 80/779, pmbl., 1980 O.J. (L 229) 30 (EEC).
33. See, e.g., Eur. Parl. Ass., *Environment and Human Rights*, 24th Sitting, Rec. 1614 (June 23, 2003), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1614.htm> [hereinafter Recommendation 1614]. In 2010, the Ministers again rebuffed Parliament and refused to codify the human right to a healthy and viable environment into the European Convention on Human Rights. This time, the executive director of the United Nations Environment Program had sent a letter in support of including the right in a protocol. See Jan van de Venis, *A Human Right to a Clean and Healthy Environment in Europe. Dream or Reality?*, in ELNI REVIEW 27, 32 (no. 1, 2011), available at: http://www.elni.org/fileadmin/elni/dokumente/Archiv/2011/Heft_1/elni_issue_2011-01_van_de_Venis.pdf. In connection with the request and response, see Eur. Parl. Ass., *The challenges posed by climate change - Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*, 1088th Mtg. of Ministers' Deputies, Doc. No. 12298, Reply to Rec. 1885, 6 (June 19, 2010), available at http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=12468. For the positions taken by the internal steering committee, see also Council of Europe, Steering Comm. on Hum. Rts. (CDDH), *Comments by the CDDH on Rec. 1883 and on Rec. 1885*, 1077th mtg., (Feb. 24, 2010), available at <https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282010%294&Language=lanEnglish&Site=CM&BackColorInternet=D BDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

safe working environment.³⁴ Both the 2004 Arab Charter on Human Rights and the 2012 ASEAN Declaration include the right to a safe environment within the right to an adequate standard of living,³⁵ but neither system has strong institutions or monitoring procedures.

At the United Nations, the issue of a rights-based approach to environmental protection has encountered a political divide between developed and developing countries, especially on issues of transboundary environmental harm and climate change. Many of the resolutions of the General Assembly and the former Commission on Human Rights have been adopted by divided votes, even after language referring to “rights” has been removed. In resolution 45/94, for example, the UN General Assembly echoes the Rio Declaration that retreated from Stockholm in stating that “all individuals are entitled to live in an environment adequate for their health and well-being.”³⁶ The General Assembly has also called the preservation of nature “a prerequisite for the normal life of man,”³⁷ again avoiding a reference to human rights. The resolutions that have garnered consensus support take a piece of the problem and proclaim, for example, the right to safe drinking water and sanitation.³⁸

Advances have been made through the UN special procedures. The former United Nations Human Rights Commission appointed a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,³⁹ conferring a mandate that included investigating complaints about such trade.⁴⁰ In its resolutions on

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34. Council of Europe, European Social Charter art. 3, 529 U.N.T.S. 89, E.T.S. 35 (Oct. 18, 1961). Article 11 adds a more general right to health.
35. Arab Charter on Human Rights art. 38, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force March 15, 2008), *available at* <http://www1.umn.edu/humanrts/instreet/loas2005.html>; ASEAN Human Rights Declaration art. 28 (Nov. 18, 2012), *available at* <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.
36. G.A. Res. 45/94, ¶ 1, U.N. Doc. A/RES/45/94 (Dec. 14, 1990).
37. G.A. Res. 35/8, ¶ 8, U.N. Doc. A/RES/35/8 (Oct. 30, 1980).
38. G.A. Res. 54/175, ¶ 12(a), U.N. Doc. A/RES/54/175 (Dec. 17, 1999) (“The rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national governments and for the international community[.]”). Resolution 64/292 speaks to the importance of equitable, safe and clean drinking water and sanitation as an integral component of the realization of all human rights, and links the right to water to achievement of the Millennium Development Goals and the Plan of Implementation of the World Summit on Sustainable Development. The important first operative paragraph of the resolution “[d]eclares the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.” G.A. Res. 64/292, ¶ 1, U.N. Doc. A/RES/64/292 (July 28, 2010).
39. Comm'n on Hum. Rts. Res. 2001/35, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 71st mtg., U.N. Doc. E/CN.4/RES/2001/35 (Apr. 23, 2001).
40. *See Rep. 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*, E.S.C. Res.

this matter, the Commission consistently recognized that such acts “constitute a serious threat to the human rights to life, good health” and, significantly, “a sound environment for everyone.”⁴¹ The votes to create and maintain this rapporteurship have been divided; the proposal came from the African regional members and was opposed by the European Union members, the United States, and other developed countries. Despite this opposition, the Human Rights Council has continued the mandate.

Other special procedures have taken up environmental issues that are related to their mandates. The Special Rapporteur on the Right to Food includes the issue of safe drinking water.⁴² The Commission itself linked the issue of the right to food with sound environmental policies, noting that problems related to food shortages “can generate additional pressures upon the environment in ecologically fragile areas.”⁴³ There are other resolutions of the former Commission that refer explicitly to the right to a safe and healthy environment.⁴⁴

Efforts to produce an agreed text on human rights and the environment began in the UN Human Rights Commission in 1989, at the initiative of the African members unhappy with the outcome of negotiations for the Basel Convention on the Transboundary Movement of Hazardous Wastes. The Special Rapporteur appointed to study the topic, together with a group of experts, drafted a declaration on human rights and the environment that has remained in limbo since 1994, never debated or voted on by the Commission or the Council. In 2012 a new “independent expert” on the topic was appointed after pressure from small island states, concerned in particular with climate change and its impact on human rights. It remains to be seen if the UN’s political divisions on this issue can be overcome.

Efforts to protect human rights and the environment in the face of

2001/55/Add.1, 56th Sess., U.N. Doc. E/CN.4/2001/55/Add.1 (Dec. 21, 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).

41. Comm’n on Hum. Rts. Res. 1999/23, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 54th mtg., U.N. Doc. E/CN.4/RES/1999/23 (Apr. 23, 1999); Comm’n on Hum. Rts. Res. 2000/72, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 66th mtg., U.N. Doc. E/CN.4/RES/2000/72 (Apr. 27, 2000).

42. Comm’n on Hum. Rts. Res. 2001/25, *The right to food*, 70th mtg., U.N. Doc. E/CN.4/RES/2001/25 (Apr. 20, 2001).

43. *Id.*

44. Comm’n on Hum. Rts. Res. 2001/65, *Promotion of a democratic and equitable international order*, 57th mtg., U.N. Doc. E/CN.4/RES/2001/65 (Apr. 25, 2001), available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4840 (the Commission affirmed that “a democratic and equitable international order requires, *inter alia*, the realization of . . . [t]he right to a healthy environment” for everyone).

unsustainable or destructive development projects have produced a backlash from governments, particularly in Latin America, in response to decisions of human rights bodies that condemn or call for suspending mega-projects and extractive industries. The widely reported reaction of the government of Brazil to the precautionary measures requested in the case of the Belo Monte dam were unprecedented in their hostility to a human rights monitoring body.⁴⁵ The Commission was faced with a request on behalf of some 60,000 indigenous peoples, including some uncontacted groups, imminently threatened with the loss of their ancestral lands, and potentially their lives, who alleged they had not been consulted, allowed to participate, and had no domestic redress. In this and other cases throughout the region, civil unrest, armed confrontations, and repressive government actions in collusion with private security companies retained by large multinational extractive industries, are common, with the result that both the environment and human rights are suffering severe deterioration.

The backlash is thus in part a consequence of the limits human rights guarantees place on projects the governments seek to undertake and of restrictions that may make foreign investment or other economic activities more costly. Companies and governments would prefer in many instances to decide upon and proceed with a project without the expense and delay occasioned by requirements of environmental impact assessments, public consultations and participation, and judicial review. The fact that these projects often have their greatest impact on minorities, the poor, and the marginalized makes human rights guarantees even more important, but also less politically acceptable to authorities. Added to the political and economic concerns of governments is the potentially expansive scope of liability for environmental harm, both long-term and transnational. This is perhaps the biggest reason for hesitancy among industrial states about approaching climate change from a human rights perspective.

Value-added

Despite the opposition and problems, a “rights-based approach” to environmental protection avoids many of the problems found in private litigation, as well as the limitations of environmental regulation and market-based incentives.⁴⁶ The danger of placing confidence in the regulatory process alone is

45. Rodrigo U. Yepes & Nelson C. Sanchez, *Human Rights: New Threats in the Hemisphere*, AMERICAS Q. (Fall 2012), available at <http://www.americasquarterly.org/human-rights-new-threats-in-the-hemisphere>.

46. See Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002) (discussing some of the problems of tort law and regulation in addressing environmental harm).

illustrated by the case of *Zander v. Sweden*,⁴⁷ where the applicants complained about contamination of their well water by cyanide from a neighboring dump site. The municipality initially furnished temporary water supplies, but later, adhering to the normal regulatory procedures, the town raised the permissible level of cyanide in the city water supply.⁴⁸ The permit for the dump was later renewed and expanded, while the applicant's request for safe drinking water was denied.⁴⁹ The European Court of Human Rights, to which these decisions were appealed, found in favor of the individual who had no redress before domestic courts.⁵⁰

Human rights law has become a prevalent approach today for several reasons. First—*faute de mieux*—because nothing else has worked. Second, human rights are seen as maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will. Human rights create a “trump” that should prevail over any conflicting norm that isn't another right. Third, the moral weight afforded by the concept of rights as inherent attributes that must be respected in any well-ordered society exercises an important compliance pull.

Finally, at the international level, enforcement of human rights law is more developed than are the procedures of international environmental law. The availability of individual complaints procedures has given rise to extensive jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed. Human rights, enshrined in international and constitutional law, thus set the limits of majority rule, as well as provide protection against dictatorial repression. The scope and contours of substantive as well as procedural rights are sometimes detailed in legislation, but they are also given content through litigation. International human rights tribunals, in particular, elaborate on the often generally-stated rights whose implementation they monitor.

What the Human Rights Tribunals Say

A trend towards a limited merger of basic principles of human rights law and

47. *Zander v. Sweden*, App. No. 14282/88, Eur. Ct. H.R. (ser. A No. 279B) (1993) Concededly, it was the denial of judicial review of this decision that formed the basis of Lander's successful claim before the European Court. *Id.* at 10. The Court, finding that the applicants had a right to clean water under Swedish law, held that the lack of judicial review violated the European Convention, Article 6(1), *id.* at 11, because the applicants were entitled as of right to seek precautionary measures against water pollution, *id.* at 8.

48. *Id.* at 3.

49. The European Court did not actually have to reach a conclusion on the substance of this decision, because it found that the applicant's procedural right of access to justice under Article 6 was violated. The applicants had been unable to obtain judicial review by Swedish courts of the board's permitting decision. *Id.* at 11.

50. *Zander v. Sweden*, *supra* note 47, at ¶ 29.

environmental protection can be seen. Human rights tribunals have given effect to various human rights linked to environmental protection by reference to international environmental principles, standards, and norms.⁵¹ In addition, the tribunals have emphasized the importance of government enforcement of national environmental rights provisions. As a general matter, the European Court of Human Rights has stated that the scope of rights guaranteed by the European Convention (which does not mention the environment) is affected by the “growing and legitimate concern both in Europe and internationally in relation to environmental offenses.”⁵²

In the Western Hemisphere, as discussed next, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights have insisted on everyone’s right to an environment at a quality that permits the enjoyment of all guaranteed human rights. In the cases presented to these institutions, applicants have asserted violations of the rights to life, health, property, culture, and access to justice, but some of them have also cited to guarantees of freedom of religion and respect for culture. The general approach of the IACHR to environmental protection has been to recognize that a basic level of environmental health is not linked to a single human right, but is required by the very nature and purpose of human rights law:

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is

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51. See *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R.1 (2004). The European Court referred to environmental laws, in particular the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and the Convention on the Protection of the Environment through Criminal Law despite the fact that the majority of member States, including the respondent State, had neither signed nor ratified the two Conventions.
52. See *Mangouras v. Spain*, 2010-V Eur. Ct. H.R. 317, 352 (2010) (referred to a Grand Chamber June 5, 2009). Increased concern with the environment has also proved important in cases where states have taken measures to protect the environment and the actions are resisted on the grounds that they interfere with the right to property. In *Fredin v. Sweden* the applicant argued that nature protection was an inadequate reason to revoke a license to extract gravel on his property, and therefore was a violation of Article I, Protocol 1. 192 Eur. Ct. H.R. (ser. A) at 14 (1991). The Court found no violation, noting that the protection of the environment is an increasingly important consideration. *Id.* at 11. The Court similarly found no violation of the same provision in *Pine Valley Developments Ltd v. Ireland*, where permission to carry out construction in a green belt area was revoked on grounds of environmental protection. 222 Eur. Ct. H.R. (ser. A) (1992). The most difficult and contentious cases in this respect have concerned travellers or gypsies, whose lifestyle may bring them into contact with modern land use planning. The European Court has repeatedly refused to override local zoning restrictions, especially the creation of green belts, in order to ensure a permanent home for this minority group. See *Buckley v. U.K.*, 1996-IV Eur. Ct. H.R. 1271 (1996); see also *Smith v. U.K.*, App. No. 25154/94, 33 Eur. H.R. Rep. 712 (2001); *Lee v. U.K.*, App. No. 25289/94, 33 Eur. H.R. Rep. 677 (2001); *Chapman v. U.K.*, 2001-I Eur. Ct. H.R. 41; *Beard v. U.K.*, App. No. 24882/94, 33 Eur. H.R. Rep. 442 (2001).

the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.⁵³

Similarly, using environmental standards, the European Court (the “Court”) has given some indications of the quality of environment required to comply with the European Convention’s substantive guarantees. In its first major decision involving environmental harm as a breach of Article 8’s guaranteed right to private life and the home, the European Court held that severe environmental pollution may affect individuals’ “well-being” to the extent that it constitutes a violation of the Article.⁵⁴ The pollution need not reach the point of affecting health, if the enjoyment of home, private, and family life are reduced and there is no fair balance struck between the community’s economic well-being and the individual’s effective enjoyment of guaranteed rights.⁵⁵

The Court further explained the *Lopez Ostra* standard in *Fadayeva v. Russia*,⁵⁶ noting that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The requisite effects or interference need not reach the level of proven injury to health, however; it is enough if there are serious risks posed.⁵⁷ In *Fadayeva*, the applicant succeeded on her claim because she was made more vulnerable to various diseases, even though quantifiable harm to her health was deemed not proved.⁵⁸ In addition, the Court found that her quality of life at her home was adversely affected.⁵⁹

In deciding the merits of admissible cases, the Court has cited to environmental instruments that refer to environmental quality. In *Taşkin v. Turkey*,⁶⁰ the Court referred to Rio Principle 10 and the Aarhus Convention, as they set forth procedural rights.⁶¹ In addition, the Court also quoted from a Parliamentary

53. Inter-Am. Comm’n H.R., Rep. on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1, 92 (1997) [hereinafter Report on Ecuador].

54. *Lopez Ostra v. Spain* (No. 303C), Eur. Ct. H.R. (ser. A) at 16-19 (1994).

55. *Powell & Rayner v. U.K.* (No. 172), Eur. Ct. H.R. (ser. A) at 15 (1990) (finding that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified as “necessary in a democratic society” for the economic well-being of the country and was acceptable under the principle of proportionality because it did not “create an unreasonable burden for the person concerned;” the latter text could be met by the State, if the individual had “the possibility of moving elsewhere without substantial difficulties and losses”).

56. *See Fadayeva v. Russia* (No. 55723/00), 2005-IV Eur. Ct. H.R. 16 (2005).

57. *Id.* at 21.

58. *Id.*

59. *Id.*

60. *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 185 (2004).

61. *See id.* at 201-02 (demonstrating that Rio Principle 10 and the Aarhus Convention refer to public

Assembly resolution on environment and human rights that addressed the substantive issues in the case, calling on member states to recognize a human right to a healthy, viable, and decent environment.⁶² Given this recommendation and the Turkish constitutional guarantees, the Court found a violation with respect to the operation of a gold mine, despite the absence of any accidents or incidents with the mine.⁶³ The mine was deemed to present an unacceptable risk.⁶⁴

The European Court's judgment delivered on January 27, 2009 in the case of *Tătar v. Romania* also involved a gold mine, but one where a severe accident had occurred, resulting in high levels of sodium cyanide and heavy metals being released into local freshwaters.⁶⁵ The contaminated water passed into the Tisza River in Hungary and eventually into the Danube, causing pollution as far as the Black Sea. After two Romanians, father and son, were unable to achieve any accountability or redress through Romanian administrative and penal procedures, they brought an action in the European Court, alleging violations of their rights under the European Convention. As in other cases, the Court made note of the right to a healthy and balanced environment under the Romanian Constitution and of the domestic law implementing this right. It focused in large part on the procedural rights to information, public participation, and redress, but it also considered the substantive obligations of the government under international environmental standards. The Court relied on United Nations Environment Programme findings about the causes and consequences of the accident, as well as World Health Organization determinations about the health consequences of exposure to sodium cyanide, placing heavy reliance on them in the absence of adequate domestic fact-finding. The Court referred to international standards on best practices for the mining industry and quoted extensively from the Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development, and the Aarhus Convention. It also included an excerpt from the International Court of Justice's *Gabcikovo Nagymaros* judgment about environmental protection, resolutions of the Parliamentary Assembly, and legal texts of the European Union.

access to information and encourage public participation in decision-making); *see also id.* at 206 (stating that procedural aspects include whether and how extensively individuals' views were considered during the permit decision-making process).

62. *See, e.g., id.* at 202 (quoting Recommendation 1614, *supra* note 33). *See also* Okyay v. Turkey, 2005-VII Eur. Ct. H.R. 125, 138 (2005) (quoting Rio Principle 10 and Recommendation 1614, *supra* note 33).

63. *See generally* Taşkin v. Turkey, *supra* note 60.

64. *See id.* at 207.

65. *Tătar v. Romania*, App. No. 67021/01, Eur. Ct. H.R. (Jan. 27, 2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search *Tătar v. Romania* under Case Title).

Two of the Court's conclusions in the *Tătar* case further developed the law. First, the European Court declared that the precautionary principle has become a legal norm with content to be applied within Europe. This means the government must take action to adopt reasonable and adequate measures capable of respecting the rights of individuals against serious risks to their health and well-being, even where scientific certainty is lacking. Second, the Court recalled to Romania the obligation under Stockholm Principle 21 and Rio Principle 14 to prevent significant transboundary harm, noting that both Hungary and Serbia were affected by the mining accident. It is the first time the Court has made reference to this obligation.

As these cases make clear, human rights tribunals hold the state responsible whether pollution or other environmental harm is directly caused by the State, or whether the State's responsibility arises from its failure to properly regulate private-sector activities.⁶⁶ Human rights instruments require States not only to respect the observance of rights and freedoms, but also to guarantee their existence and the free exercise of all rights against private as well as State actors. Thus, any act or omission by a public authority that impairs guaranteed rights may violate a state's obligations.⁶⁷ This is particularly important in respect to the environment, where most activities causing harm are undertaken by the private sector.

In a country report on Ecuador, the IACHR referred to the responsibility of the government to implement the measures necessary to remedy existing pollution and to prevent future contamination that would threaten the lives and health of its people. This responsibility includes addressing risks associated with hazardous development activities, such as mining.⁶⁸ Governments must regulate industrial and other activities that could potentially result in environmental conditions so detrimental that they create risks to health or life.⁶⁹ Furthermore, the government must enforce the laws that it enacts, as well as any constitutional guarantee of a particular quality of environment.⁷⁰ The Commission was clear: "Where the right

66. See *Moreno Gómez v. Spain*, 2004-X Eur. Ct. H.R. 327, 341(2004); *Giacomelli v. Italy*, 2006-XII Eur. Ct. H.R. 345, 363 (2005); *Surugiu v. Romania*, App. No. 48995/99 (Apr. 20, 2004), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-983348-1015188>.

67. *Velasquez-Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 155 (July 29, 1988) (concerning disappearance of civilians perpetrated by the Honduran army); *Godinez-Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 152-53 (Jan. 20, 1989).

68. Report on Ecuador, *supra* note 53, at 94.

69. *Id.* at v.

70. In the Report on Ecuador, *supra* note 53, the Commission heard allegations that the government had failed to ensure that oil exploitation activities were conducted in compliance with existing legal and policy requirements. The Commission's on-site delegation also heard that the government of Ecuador had failed to enforce the inhabitants' constitutionally protected rights to life and to live in an environment free from contamination. The domestic

to life, to health and to live in a healthy environment is already protected by law, the [American Convention on Human Rights] requires that the law be effectively applied and enforced.”⁷¹ The state must also comply with and enforce the international agreements to which it is a signatory, whether these are human rights instruments or ones related to environmental protection. “[T]he 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.”⁷²

In the case of the *Saramaka People v. Suriname*,⁷³ the Inter-American Court set forth three safeguards it deemed essential to ensure that development is consistent with human rights and environmental protection, at the least where indigenous and tribal peoples are concerned. First, the state must ensure the effective participation of the members of the group, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within their territory. Second, the state must guarantee a reasonable benefit from any such plan. Third, the state must ensure that no concession will be issued unless and until independent and technically capable entities, with the state’s supervision, perform a prior environmental and social impact assessment.⁷⁴ The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21(2) of the Inter-American Convention.⁷⁵

Conclusions

National and international tribunals increasingly are being asked to consider the link between environmental degradation and internationally guaranteed

law of Ecuador recognizes the relationship between the rights to life, physical security, and integrity and the physical environment in which the individual lives. The first protection accorded under Article 19 of the Constitution of Ecuador, the section that establishes the rights of persons, is of the right to life and personal integrity. The second protection establishes "the right to live in an environment free from contamination." Accordingly, the Constitution invests the State with responsibility for ensuring the enjoyment of this right, and for establishing by law such restrictions on other rights and freedoms as are necessary to protect the environment. Thus, the Constitution establishes a hierarchy according to which protections that safeguard the right to a safe environment may have priority over other entitlements. *Id.* at 78-86.

71. *Id.*

72. *Id.* at 89.

73. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

74. *Id.* at ¶ 129.

75. *Id.* at ¶ 138 (quoting Organization of American States, American Convention on Human Rights art. 21(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”)).

human rights. In some instances, the complaints brought have not been based upon a specific right to a safe and environmentally sound environment, but rather upon rights to life, property, health, information, family, and home life. Underlying the complaints, however, are instances of pollution, deforestation, water pollution, and other types of environmental harm. International petition procedures thus allow those harmed to bring international pressure to bear, when governments lack the will to prevent or halt severe pollution that threatens human well-being. Petitioners have been afforded redress, and governments have taken measures to remedy the violation. Petition procedures at the least can help to identify problems and encourage a dialogue to resolve them. In addition, the emphasis given to rights of information, participation, and access to justice can encourage an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Even where there is a guaranteed right to environment, that right must still be balanced against other rights should there be a conflict. Human rights exist to promote and protect human well-being, to allow the full development of each person, and the maximization of the person's goals and interests, individually and in community with others. This cannot occur without basic healthy surroundings, which the state is to promote and protect.

Adjudicating cases under broadly-worded standards is not new for judges, however, neither is it uncommon for them to be faced with adjudicating highly technical matters. Courts must regularly and on a case-by-case basis define what constitutes "reasonable," "fair," or "equitable" conduct. With the adoption of constitutional environmental rights provisions and increasing acceptance of the links between environmental degradation and the violation of other human rights, national and international tribunals struggle to give substance to environmental rights without overstepping the judicial function. In general, courts have taken the view that such enactments serve to place environmental protection in a position superior to ordinary legislation. Over time, courts tend to create a balancing test to avoid too readily undoing the deliberative decisions reached by the political branches of government.

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

involves evaluating ecological systems, determining the impacts that can be tolerated, and what is needed to maintain and protect the natural base on which life depends. Environmental quality standards, precaution, and principles of sustainability can establish the limits of environmental decision-making and continue to give specific content to environmental rights in law.

Both national and international courts have used environmental law and science to give content to the level of environmental protection required by human rights law. This approach can involve reference to World Health Organization standards on acceptable emissions levels, incorporation of the precautionary principle to judge the adequacy of measures taken by a government, or reference to environmental treaties and declarations. The breadth of the search for standards depends in part on whether or not there is a textual guarantee of environmental quality and if there is, on the descriptions of that quality. Other issues will undoubtedly be raised in future litigation and debated in academic journals, especially as the predicted consequences of global climate change are increasingly felt. Responsibility for acting and for failing to act will no doubt be the subject of extensive debate in the coming years.

As for the role of lawyers representing companies and investors, it is important to note the centrality of these issues in providing counsel. The growing insistence of tribunals on the rights of information, public participation, and benefit-sharing for those persons potentially affected by proposed projects should lead lawyers to advise their business clients of the wisdom of early compliance with these requirements. Nearly all cases of conflict over land use in Latin America arise from mining, hydroelectric projects, and other major development done without consultations with the local communities. These communities are not opposed to investment or development, but they know and insist upon their rights, even if the government is unwilling or unable to protect them. Failure to respect these rights has led to costly suspensions or closures of projects, as well as to the loss of life. Corporate social responsibility is good business as well as good law.

