11 The Benefits and Limitations of a Human Rights Approach to Environmental Protection

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11.1 Introduction

National constitutions throughout the world contain enumerated rights and freedoms for individuals residing within the State's territory or subject to its jurisdiction. In the twentieth century, the international community increasingly recognized that such constitutional guarantees sometimes prove inadequate or even illusory when military coups, armed conflicts, or repressive governments disrupt or deliberately ignore the rule of law and constitutional limits on the exercise of power. International and regional organizations created or reformed after the Second World War thus concluded that human rights must be considered a matter of international concern if individuals and groups are to be ensured their fundamental rights and freedoms.

The United Nations Charter contains human rights obligations binding on each member State, but the Charter does not list the guaranteed rights. This lacuna led the UN to begin almost immediately to draft an international bill of rights. The first step was the adoption on December 10, 1948, of the Universal Declaration of Human Rights, a text cited in virtually every subsequent human rights instrument and incorporated into the constitutions of many new states. The Declaration is today considered to define the term human rights as used in the UN Charter and is the standard by which each UN Member State is judged.

The Declaration was transformed into treaty law through the adoption in 1966 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Subsequent UN standard-setting has sought to protect particularly vulnerable groups (racial minorities, women, children, indigenous peoples, persons with disabilities) and prevent and punish particularly egregious human rights violations (slavery, torture, forced disappearances). The UN considers nine of its global treaties to be 'core' agreements. Each UN core treaty establishes

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its own monitoring body of independent experts elected by the participating states for a fixed term of office. The monitoring bodies receive periodic reports from states parties to the treaties and have (usually optional) jurisdiction to receive complaints by a State party or a victim against a State that has accepted the treaty and the complaints procedure.

The UN monitors the human rights performance of all its member States through Universal Periodic Review conducted by the UN Human Rights Council. The Council also appoints thematic working groups or rapporteurs to conduct studies or investigate particular human rights issues or problematic countries; and the Council maintains a complaints procedure that allows anyone to denounce a situation of gross and systematic violations of human rights. The studies authorized by the Council include the topic of human rights and the environment, undertaken by an Independent Expert appointed for a three year term in 2012.

Regional organizations reinforce the UN human rights program and offer something that does not exist at the global level: courts with jurisdiction to render binding judgments and award redress to victims of violations. In 1950, ten 'like-minded' governments adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and through it established the European Court of Human Rights. Today, due to a series of reforms and geographic expansion, the court has mandatory jurisdiction over the forty-seven Member States of the Council of Europe, allowing more than 800 million people the possibility of 'going to Strasbourg' after exhausting available local remedies.

The Organization of American States (OAS) serves as the body of regional cooperation in the Americas. The OAS adopted the American Declaration of the Rights and Duties of Man on May 2, 1948, simultaneously with concluding the constitutional Charter of the OAS, some six months before the adoption of the UN's Universal Declaration of Human Rights. In 1959 the OAS General Assembly created the Inter-American Commission on Human Rights (IACHR), a body of seven independent experts who serve one or two four-year terms. A decade later the OAS Member States adopted the American Convention on Human Rights (ACHR), which expanded the jurisdiction of the IACHR and created an Inter-American Court of Human Rights. Protection of socio-economic rights was added in 1988, with the adoption of the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), a treaty that expressly recognizes environmental rights.

In 1981, the then-Organization of African Unity (OAU) (now the African Union) adopted the African Charter on Human and Peoples' Rights (AfCHPR), now accepted by all 53 Member States, and therein created the African Commission of Human and Peoples' Rights. The Charter explicitly mandates the African Commission to 'draw inspiration from international law on human and peoples' rights.'[1] In 2004, a protocol establishing the

1 African Charter on Human and Peoples' Rights (Banjul, 27 June 1981) (1982) 21 ILM 58, Art. 60.

African Court on Human and Peoples' Rights, designed to 'supplement' the work of the Commission, entered into force; its first judges were elected in 2006.[2]

Other regional and sub-regional intergovernmental organizations around the world have begun to address human rights in recent years. These include initiatives in South-East Asia and the Arab-speaking world, as well as sub-regional bodies in Europe, the Americas, and Africa. The opportunities for civil society participation that the regional systems offer provides a bridge between the universality of human rights norms, on the one hand, and the cultural and political particularities of each region and State, on the other.

11.2 The Environment as a Human Rights Issue

Environmental degradation became a matter of national and international concern beginning in the 1960s, some two decades after human rights emerged on the international agenda. Given the timing, there are few explicit references to environmental matters in the earlier-drafted international human rights instruments, which is cause for one of the limitations of to a human rights approach to this issue. The ICESCR contains a right to health in Article 12 that expressly calls on states parties to take steps for 'the improvement of all aspects of environmental and industrial hygiene.' The Convention on the Rights of the Child (20 November 1989) refers to aspects of environmental protection in Article 24, which provides that States Parties shall take appropriate measures to combat disease and malnutrition 'through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.' These two provisions are the only references to the environment in global human rights instruments.

Despite this lack of specific mention of the environment in human rights treaties, international awareness of the linkages between human rights and environmental protection has expanded considerably since the emergence of environmental protection as a legal issue. The anthropocentric definition of pollution in international and domestic law partly explains the linkage, as many texts provide that only those substances that are harmful to *human* health or other interests constitute pollution.[3]

2 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (June 1988).

3 Pollution of the marine environment, for example, is 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.' United Nations Convention on the Law of the Sea (1982), Art. 1(4).

The links between human rights and environmental protection were acknowledged in the widely-cited Principle 1 of the 1972 Stockholm Declaration.[4] Subsequently, in resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment. As this language suggests, many human rights tribunals and experts view environmental protection as a pre-condition to the enjoyment of several internationally-guaranteed human rights, especially the rights to life and health. In this sense, the General Assembly has called the preservation of nature 'a prerequisite for the normal life of man.'[5] The former United Nations Human Rights Commission, in appointing 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,[6] consistently recognized that environmental law violations 'constitute a serious threat to the human rights to life, good health and a sound environment for everyone.'[7] Other resolutions of the Commission referred explicitly to the right to a safe and healthy environment.[8] In recent years, the Human Rights Council has adopted resolutions on climate change as a human rights issue and the General Assembly has recognized the human right to safe drinking water and sanitation.

Another approach to the linkage of these issues considers certain human rights as essential elements to achieving sound environmental protection. This approach is well-illustrated by the Rio Declaration on Environment and Development, adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development. Principle 10 formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.' These procedural rights, con-

4 At the Stockholm concluding session, the preamble of the final declaration proclaimed that 'Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth […].' Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself. Principle 1 of the Stockholm Declaration established a further connection between human rights and environmental protection, declaring that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.'

5 GA Res. 35/48 of 30 October 1980.

6 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.

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

8 In Resolution 2001/65, entitled 'Promotion of the Right to a Democratic and Equitable International Order, the Commission affirmed that 'a democratic and equitable international order requires, *inter alia*, the realization of […] [t]he right to a healthy environment for everyone.'

tained in all human rights instruments, are thus adopted in environmental texts in order to have better environmental decision-making and enforcement.

Still other legal texts proclaim the existence of a right to a safe and healthy environment as a human right. The African Charter on Human and Peoples' Rights, Article 16, guarantees to every individual the right to enjoy the best attainable state of physical and mental health while Article 24 was the first international treaty to proclaim that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' The 1988 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights,[9] in its Article 11, similarly proclaims that 'Everyone shall have the right to live in a healthy environment and to have access to basic public services' and that the States Parties shall promote the protection, preservation and improvement of the environment. Also at the regional level, the preambles of European Union legal texts often state their aim as being 'to protect human health and the environment.'[10]

On the national level, more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment,[11] impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. Such provisions vary in the chosen description of the environmental quality that is protected. While many of the older provisions refer to a 'healthy' or 'healthful' environment, more recent formulations add references to ecology and/or biodiversity to the guarantee.

The scope and the contents of environmental rights have been the subject of litigation in many states. The Supreme Court of Montana has provided the most detail about the substantive implications of a right to a specified environmental quality, indicating the value of Constitutional rights in preventing harm to the environment. In *Montana Environmental Information Center et al v. Department of Environmental Quality*[12] the plaintiffs contended that the Constitutional guarantees of environmental protections were violated when the legislature amended state law to allow discharges from water well without regard to the degrading effect that the discharges would have on the surrounding environment. The monitoring of well tests was also alleged to be inadequate because it was done without regard to the harm caused by those tests. The Montana Court concluded that because the right to a clean and healthful environment is a fundamental right in the State Constitution,

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

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

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

12 296 Mont. 207, 988 P.2d 1236 (1999).

> 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.

Human health does not need to suffer before the guarantee can be invoked.

> The delegates [to the Constitutional Convention] did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.[13]

Many lawyers concerned either with the environment or with human rights have concluded that this 'rights-based approach' to environmental protection offers stronger guarantees than do the legal approaches of environmental regulation, private litigation or market-based incentives, because human rights are generally seen as maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will. All legal systems establish a hierarchy of norms. Constitutional guarantees usually are at the apex and 'trump' any conflicting norm of lower value. Thus, to include respect for the environment as a constitutional right ensures that it will be given precedence over other legal norms that are not constitutionally-based.

In addition, the moral weight afforded by the concept of rights as inherent attributes that must be respected in any well-ordered society exercises an important compliance pull. Finally, 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.

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13 The Montana Supreme Court further applied its constitutional provision in the case *Cape-France Enterprises v. The Estate of Peed,* 305 Mont. 513, 29 P.3d 1011 (2001), in which it held that "'the protections and mandates of this provision apply to private action – and thus to private parties – as well" as to state action. Thus, "it would be unlawful for Cape-France, a private business entity, to drill a well on its property in the face of substantial evidence that doing so may cause significant degradation of uncontaminated aquifers and pose serious public health risks.'" The court held that it would be a violation of the state's obligation under the constitution for it to grant specific performance of a contract for the sale of the land in question. *See* 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); B. Thompson, 'Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions', 64 *Mont.L.Rev.* (2003), p. 157.

The danger of placing confidence in the regulatory process alone is illustrated by *Zander v. Sweden*,[14] 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. The permit for the dump was renewed and expanded, while the applicant's request for safe drinking water was denied.[15] The European Court of Human Rights found in favor of the individual who had no redress before domestic courts for the deterioration of his water supply.

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. National courts and international human rights tribunals elaborate on the often generally-stated rights whose implementation they monitor. The European Court of Human Rights, for example, has given indications of the quality of environment required to comply with the Convention's substantive guarantees,[16] especially as contained in Article 8 of the European Convention. Pollution need not reach the point of affecting health, if the enjoyment of home, private and family life are reduced and there is no fair balance struck between the community's economic well-being and the individuals effective enjoyment of guaranteed rights.[17]

The European Court often imports environmental norms in its human rights judgments. *Taşkin and Others v. Turkey*,[18] involved challenges to the development and operation of gold mine, which the applicants alleged caused environmental damage to the detriment of people in the region. In reviewing the applicable legal framework, the Court referred to the procedural rights set forth in Rio Principle 10 and the Aarhus Convention. In addition, however, the Court also quoted from a Council of Europe Parliamentary Assembly resolu-

14 *Zander v. Sweden*, Appl. No. 14282/88, Eur. Ct. Hum. Rts [1993] Ser. A, No. 279B. Concededly, it was the denial of judicial review of this decision that formed the basis of Lander's successful claim before the European Court. 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, Art. 6(1) because the applicants were entitled as of right to seek precautionary measures against water pollution.

15 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 Art. 6 was violated. The applicants had been unable to obtain judicial review by Swedish courts of the board's permitting decision.

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

17 In *Powell & Raynor v. United Kingdom*, Eur. Ct.Hum.Rts [1990] Ser. A No. 172, the European Court found that aircraft noise from Heathrow Airport constituted a violation of Art. 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.'

18 *Taşkin and Others v. Turkey*, Appl. No. 46117/99, 2004 Eur. Ct. Hum.Rts. 621 (10 November).

tion on environment and human rights[19] that recommended that Member States ensure appropriate protection of life, health, family and private life, physical integrity and private property, taking particular account of the need for environmental protection, and that Member States recognize a human right to a healthy, viable and decent environment. Given this recommendation and the domestic Constitutional guarantees in Turkey, the Court found a violation despite the absence of any accidents or incidents at the mine, because the mine was deemed to present an unacceptable risk of harm. The case indicates that in some circumstances human rights litigation can prevent future harm and not just redress victims once the harm has occurred.

In the case of *Tatar v. Romania*, brought after a major gold mining accident contaminated the surrounding water, the Court again considered the procedural rights to information, public participation and redress, but it also assessed the government's substantive obligations pursuant to international environmental standards. The Court relied on UN findings about the causes and consequences of the accident, as well as determinations of the World Health Organization about the health consequences of exposure to sodium cyanide, placing heavy reliance on them in the absence of adequate domestic fact-finding. The Court referred to international standards on best practices for the mining industry and, significantly, quoted extensively from the Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development, and the Aarhus Convention.

Two of the Court's conclusions in the *Tatar* case were particularly important to the development of the law. First, the European Court declared that the 'precautionary principle' has become a European legal norm with applicable content, requiring the government to adopt reasonable and adequate measures capable of respecting the rights of individuals in the face of serious risks to their health and well-being, even where scientific certainty is lacking. Secondly, the Court recalled to Romania the obligation under Stockholm Principle 21 and Rio Principle 14 to prevent significant transboundary harm, in noting that both Hungary and Serbia were affected by the mining accident. These international environmental norms, the Court found, should have been applied by the Romanian government.

Enforcement of environmental rights involves courts in not only determining the mandated environmental quality, but also in assessing whether or not the government has taken the requisite actions to achieve that quality. Human rights tribunals have made clear that the state may be responsible whether pollution or other environmental harm is directly caused by the State or whether the State's responsibility arises from its failure to regulate adequately private-sector activities.[20] Human rights instruments require States not only

19 Parliamentary Assembly Recommendation 1614 (2003) of 27 June 2003.

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

to respect the observance of rights and freedoms but also to guarantee their existence and the free exercise of all of them against private actors as well as the State. Any act *or omission* by a public authority which impairs guaranteed rights may violate a State's obligations.[21] This is particularly important in respect to the environment, where most activities causing harm are undertaken by the private sector.

The European Court's jurisprudence requires at a minimum that the State should have complied with its domestic environmental standards.[22] The issue of compliance with domestic law is particularly important when there is a domestic constitutional right to environmental protection. The European Court will review governmental actions in the light of the domestic law.[23] Beyond ensuring that any domestic environmental rights are enforced, the European Court scrutinizes the domestic law to assess if the State has ensured a fair balance between the interests of the community and the rights of those affected. The Court accords each state considerable deference in this respect through its 'margin of appreciation' doctrine, because it has concluded that national authorities 'are in principle better placed than an international court to assess the requirements' in a particular local context to determine the most appropriate environmental policies and individual measures while taking into account the needs of the local community,[24] especially in a technical sphere like environmental protection.[25]

The committee hearing complaints under the European Social Charter also insists on compliance with domesitc and international environmental norms. A complaint lodged April 4, 2005, claimed violations of the Charter's right to health provisions[26] because the State had not adequately prevented negative environmental impacts nor had it developed an appropriate strategy to prevent and respond to the health hazards stemming from lignite mining. The complaint also alleged that there was no legal framework guaranteeing security and safety of persons working in lignite mines. The European Committee of Social Rights concluded that the government had violated the right to health[27] after examining the Greek National Action Plan for greenhouse gas emissions, which the Committee found was

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

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

23 *See*, e.g., *Okyay and Others v. Turkey*, Appl. No. 36220/97, 2005 Eur. Ct. H.R. 476, 12 July 2005 at 57, wherein applicants alleged the failure of Turkish authorities to enforce constitutional environmental rights and environmental laws. They explicitly argued that Art. 56 of the Turkish Constitution guaranteed them the right to life in a healthy and balanced environment.

24 *Giacomelli*, *supra* note 21, Para. 80.

25 *Fadayeva v. Russia*, 2005-IV, 49 EHRR 295, Para. 104.

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

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

inadequate in the light of the State's obligations under the Kyoto Protocol and the principle requiring use of the 'best available techniques.'[28] While the Committee found that Greek regulations on information and public participation were satisfactory, the evidence showed 'that in practice the Greek authorities do not apply the relevant legislation satisfactorily' and very little had been done to organize systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out.

11.3 Litigation Hurdles: Causality, Evidence and Precaution

Assessing risk is an important issue in litigating substantive environmental rights. Some human rights procedures limit standing to 'victims' of violations and there must be a sufficient threat for the applicants or petitioners to qualify as victims.[29] The precautionary principle has begun to play a role in bringing more risks within the ambit of human rights litigation.

The *Taşkin* case described above was one based on risk, stemming from the use of cyanide in gold extraction. The Court referred to the various reports that had been done on site which highlighted the risks. Domestic judicial findings also demonstrated the threat to the environment and lives of the neighbouring population. The Court found Article 8 to be applicable 'where the dangerous effects of an activity to which the individuals *are likely to be exposed* have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for purposes of Article 8 of the Convention.'[30] The Court held that this broad reading was necessary to ensure the effectiveness of Article 8.

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

The problem of fact-finding and lack of expertise is frequently said to be a hurdle to giving substantive content to environmental rights. This has not proved to be a high hurdle

28 According to the Committee, '[t]he Greek National Action Plan for 2005-2007 (NAP1) provides for greenhouse gas emissions for the whole country and all sectors combined to rise by no more than 39.2% until 2010, whereas Greece was committed, in the framework of the Kyoto Protocol, to an increase in these gases of no more than 25% in 2010. When air quality measurements reveal that emission limit values have been exceeded, the penalties imposed are limited and have little dissuasive effect. Moreover, the initiatives taken by DEH (the public power corporation operating the Greek lignite mines) to adapt plant and mining equipment to the 'best available techniques' have been slow.

29 *See Bordes and Temeharo v. France*, Comm. No. 645/1995, CCPR/C/57/D/645/1995, 30 July 1996. The risk of harm from nuclear radiation due to nuclear testing by France in the South Pacific deemed too remote for the victims to qualify as victims.

30 *Taşkin, supra* note 19 at Para. 113 [emphasis added].

thus far in human rights litigation, because in most cases brought thus far domestic fact-finding has already revealed the risks or the consequent harm. This was the case in *Oneryildiz v. Turkey*,[31] *Taşkin* and *Fadayeva.*[32] In the last-mentioned case, concerning pollution from a steel factory, a government decree had recited statistics on the increases in respiratory and blood diseases linked to air pollution, as well as the increased number of deaths from cancer.[33] The government had also determined by legislation the safe levels of various polluting substances, many of which were exceeded in the security zone where the applicant lived. The mayor of the city said the steel plant was responsible for more than 95% of industrial emissions into the town's air,[34] while a State Report on the Environment indicated that the plant in question was the largest contributor to air pollution of all metallurgical plants in Russia. The two statements came close to eliminating questions about causality.[35]

In the end both parties agreed that the applicant's place of residence was affected by industrial pollution caused by the steel plant, but they disagreed over the degree and effects of the pollution. The government claimed that the disturbance caused by the pollution was not so severe as to raise an issue under Article 8. The applicant and the European Court disagreed. The Court elaborated on its test for finding that environmental conditions are sufficiently severe to be encompassed within the guarantees of Article 8:

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

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31 European Court of Human Rights, 2004-XII, 41 EHRR 325. The case concerned a methane explosion at a waste disposal site. The government had been warned for two years before the explosion about the risk posed by the site and the threat this posed to the lives of those living nearby. The government was held responsible for the loss of life and property damage that resulted from the explosion.

32 *Fadayeva v. Russia*, *supra* note 26. *See also Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, Nos. 53157/99, 53247/99, 53695/00 and 56850/00, judgment of 26 October 2006, also involving the same steel plant built during the Soviet era.

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

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

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

Causality was an issue on the applicant's health claims. Her medical records indicated problems, but did not attribute them to any specific causes. The doctors stated, however, that her problems would be exacerbated by working in conditions of vibration, toxic pollution and an unfavorable climate.[36] The applicant also submitted an expert report[37] which linked the plant specifically to increased adverse health conditions of persons residing nearby. The Court found that the medical evidence did not establish a causal link between the pollution at her residence and her illnesses, but accepted that the evidence, include submissions by the government, was clear about the unsafe excessive pollution around her home. The Court also made reference to the expert report and the findings of the domestic courts. The Court noted that Russian legislation defined the maximum permissible concentrations as 'safe concentrations of toxic elements.' Therefore, exceeding these limits produced a presumption of unsafe conditions potentially harmful to health and well-being of those exposed to it. This presumption, together with the evidence submitted, led the court to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the steel plant. Alternatively, even if that harm could not be quantified, the pollution 'inevitably made the applicant more vulnerable to various illnesses' and affected her quality of life at home.[38]

The analysis raises the question of what evidence is sufficient to raise the presumption the Court creates in the *Fadayeva* case. It should not be limited to legislative findings, because as *Zander v. Sweden* indicates, safe levels may be changed to accommodate economic interests without necessarily being based on sound science. The World Health Organization (WHO) and other scientific bodies have determined through epidemiological studies what constitutes safe levels of concentration of toxic, carcinogenic, mutagenic and other hazardous substances.[39] Reliable evidence from such studies can and should be introduced to demonstrate presumed harm when such levels are exceeded, even if local legislation permits higher concentrations.

In the Greek case on lignite mining,[40] the European Social Charter Committee relied on what it called 'ample and unambiguous scientific evidence' that lignite-caused air pollution has a harmful effect on human health and life, without specifying the health risks. Despite the beneficial impacts of lignite use in providing energy independence, access to electricity at a reasonable cost and economic growth, the Committee found that the government's actions violated the State's national and international obligations to combat

36 *Fadayeva v. Russia*, *supra* note 26 at Para. 45.

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

38 *Id*., Para. 88.

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

40 *Marangopoulos Foundation for Human Rights v. Greece*, *supra* note 27.

pollution that caused health problems. It pointed to the right to environment in the Greek constitution, as well as national environmental protection legislation and regulations, noting that these were not applied and enforced in an effective manner. In sum, Greece had not stuck a reasonable balance between the interests of persons living in the lignite mining areas and the general interest and there was thus a violation of the right to protection of health under the Charter.

11.4 Limits of the Rights-Based Approach

Although the cases discussed herein reveal that human rights jurisprudence now encompasses risk as an element of harm sufficient to bring cases within the jurisdiction of human rights tribunals, most cases still are brought after environmental damages has already occurred. The requirement in the European Court that applications be brought by 'victims' of a violation serves to exclude many cases where prevention of future harm is sought. Some human rights tribunals like the IACHR do have the power of initiative to promote as well as protect human rights, but the courts must respond to the cases brought before them. Moreover, the European Court's jurisprudence on 'just satisfaction' is extremely limited. If the court finds a violation, it often simply issues a declaratory judgment. Although the court may choose in its discretion to go beyond a declaratory judgment, and afford some compensation, costs and fees to a litigant, it does not always do so and never issues order to a government to halt the violation. Thus, Ms. Fadayeva is given the money to move away from the polluting steel factory, but the factory continues to pollute.

A second limitation in most States and human rights tribunals is that the environmental injury must harm humans. To make a claim under ECHR Article 8, an individuals' home life must be directly affected; harm to the surrounding environment, even protected areas, is not sufficient. According to the European Court, Article 8(1) extends only to protection against 'a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment.'[41] Thus, Article 8 has been useful primarily when the environmental harm consists of pollution. Issues of resource management and nature conservation or biological diversity are more difficult to bring before the Court. A 1974 opinion of the European Commission on Human Rights indicates the present limits of the human rights approach. In rejecting an application alleging a violation of the applicant's right of privacy and family life insofar as it concerned a dog, the Commission stated:

> The Commission cannot however accept that the protection afforded by Art. 8 of the Convention extends to relationships of the individual with his entire

41 *Kyrtatos v. Greece*, Appl. No. 41666/98, 40 EHRR 390 (2005) (finding no violation of Art. 8 due to the destruction of a protected wetland adjacent to the applicant's property).

> immediate surroundings, in so far as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationships within the private sphere. No doubt the dog has had close ties with man since time immemorial. However, given the above considerations this alone is not sufficient to bring the keeping of a dog into the sphere of the private life of the owner.[42]

In the application of human rights law, the issue of a right to an environment of a certain quality is complicated by both temporal and geographic elements absent from other human rights protections. While most human rights violations affect only specific and identifiable victims in the present, environmental degradation may cause harm to many currently living, and future generations of humanity as well. A right to environment thus implies significant, constant duties toward persons not yet born, a concept human rights tribunals have difficulty applying.

The right to a healthy environment also implies a potentially vast territorial scope of state obligations. Presently, human rights instruments typically 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 depletion of the tropical rain forest can contribute to global warming that threatens the entire biosphere.

Finally, as noted earlier, most environmental harm is caused by the private sector being inadequately regulated by the government, either because of gaps in the law or, more often, because the law is not enforced. Often, private economic intersts have considerable political power or links to the government. Governments may encourage foreign investment or engage in major development projects that cause serious environmental degradation and human rights violations. The reaction of such governments to decisions of human rights bodies that call for halting, modifying or delaying destructive investment and development projects can be strongly negative and can result in decreased funding, changes to the rules and composition of the tribunals, or at the least may have a chilling effect on decisions and judgments in environmental rights cases.

42 Eur. Comm'n H.R., Case 68/25/74, 5 D. & R. 86.

11.5 Conclusions

Despite the limitations indicated, national and international tribunals increasingly are being asked to give effect to the link between environmental protection and internationally-guaranteed human rights. In some instances, the complaints brought have not been based upon a specific right to a safe and environmentally-sound environment, but rather upon rights to life, property, health, information, family and home life. Underlying the complaints, however, are instances of pollution, deforestation, water pollution, and other types of environmental harm. International petition procedures thus allow those harmed to bring international pressure to bear when governments lack the will to prevent or halt pollution that threatens the environment and human well-being. Petitioners have been afforded redress and governments have taken measures to remedy the violation. Petition procedures at the least can help to identify problems and encourage a dialogue to resolve them. In addition, the emphasis given rights of information, participation, and access to justice can encourage an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Even where there is a guaranteed right to environment, it still must 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 nor is it uncommon for them to be faced with deciding 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.

There remain many questions to be addressed, including issues about the scope of the guaranteed rights, the scope of state responsibility, accountability of non-state actors, and procedural mechanisms to give effect to or monitor compliance with environmental rights. These issues will undoubtedly be raised in future litigation and debated in academic journals. In both contexts, contributions from scientists, especially the medical profession, and other relevant disciplines will be necessary to ensure that the law and policy reflects knowledge about the environment and the consequences of pollution.