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INTEGRATING ENVIRONMENTAL VALUES INTO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*By Richard Desgagné**

I. INTRODUCTION

Over the last two decades, the protection of the environment has become a necessity so widely recognized that environmental concerns have pervaded most fields of international law, including the international law of human rights. In 1976 the European Commission of Human Rights dismissed an application on the ground that "no right to nature conservation [was] as such included among the rights and freedoms guaranteed by the Convention and in particular by Arts 2, 3, or 5."[1] In 1993, however, the Commission found that the erection and operation of a waste and water treatment station near the domicile of the applicant was such a nuisance as to amount to a violation of her right to a private life.[2] This development in the case law of the European Commission reflects a growing awareness of the links between protection of human rights and protection of the environment.

The Stockholm Declaration on the Human Environment of 1972[3] first pronounced on the interrelationship between the enjoyment of human rights and the quality of the environment. Since then, the conceptions of this issue have taken many forms. One has been to add a "right to environment" to the human rights catalog. The Stockholm Declaration fell short of proclaiming such a right; it emphasized that the full enjoyment of human rights required the protection and improvement of the quality of the environment.[4] Subsequent international human rights instruments have also referred to the environmental quality aspect of the enjoyment of human rights. For instance, the Convention on the Rights of the Child provides that states are to take appropriate measures "[t]o combat disease and malnutrition, . . . taking into consideration the dangers and risks of environmental pollution."[5] The African Charter on Human and Peoples' Rights states that "[a]ll peoples have the right to a general satisfactory environment favorable to their development."[6] Among the conventional instruments, only the Protocol of San Salvador to the American Convention on Human Rights grants an individual human "right to live in a healthy environment."[7]

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[1] X. and Y. v. Federal Republic of Germany, App. No. 7407/76, 5 Eur. Comm'n H.R. Dec. & Rep. 161, 161 (1976). The applicant objected, for environmental reasons, to military uses of marshland.

[2] Lopez Ostra v. Spain, App. No. 16798/90 (report of Aug. 31, 1993, unpublished).

[3] Declaration on the Human Environment (June 16, 1972), *in* REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, UN Doc. A/CONF.48/14/Rev.1, sec. I (1972), *reprinted in* 11 ILM 1416 (1972) [hereinafter Stockholm Declaration].

[4] *Id.*, Principle 1 reads: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations."

[5] Convention on the Rights of the Child, Nov. 20, 1989, GA Res. 44/25, Art. 24, para. 2(c), UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), *reprinted in* 28 ILM 1448 (1989). *See also* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, ILO Convention No. 169, Art. 4, *reprinted in* 28 ILM 1382 (1989).

[6] African Charter on Human and Peoples' Rights, June 27, 1981, Art. 24, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 ILM 58 (1982).

[7] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Nov. 14, 1988, Art. 11, OAS TS No. 69, *reprinted in* 28 ILM 156 (1989). The Protocol has received only two ratifications.

The status of the "right to environment" in international law has stirred much doctrinal debate. Some authors have argued for an emerging right to environment; others have underlined the vagueness of the concept of "environment," even when modified by terms like "decent," "healthy" or "safe"; still others have questioned the concept of a "right to environment" altogether.[8] Although the vagueness of the terms "right to a healthy environment" and "right to a safe environment" is not an insurmountable obstacle to their interpretation and application to concrete situations, the texts that proclaim a "right to environment" are either nonbinding instruments or do not provide for implementation mechanisms. The recent Rio Declaration on Environment and Development may reflect the persistence of the doctrinal controversy by proclaiming merely that "[human beings] are *entitled* to a healthy and productive life in harmony with nature."[9] Notwithstanding that it may not be easily established, the proclamation of a right to environment in many instruments does demonstrate a "general acceptance of the links between human rights and environmental protection"[10] and that both are social values that should be promoted.[11]

A second approach to the interrelationship between human rights and environmental protection is based on the recognition that they have both common and different interests, and that in some respects they have conflicting objectives, while in others they may be mutually beneficial.[12] From a human rights perspective, the contribution that conservation and improvement of environmental quality can make to enhancing the quality of human life was enunciated already in the Stockholm Declaration. From an environmental perspective, the protection of human rights may contribute to protection of the environment since, as long as environmental damage can be translated into a violation of a protected human right, a claim to the protection of the environment may be asserted as a corollary to that right.[13] The fulfillment of certain political rights and procedural guarantees usually found in human rights instruments could also prevent measures likely to cause environmental harm. For example, the United Nations World Charter for Nature provided that "[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."[14] Conservation and improvement of the environment could thus be promoted through the application of certain procedural rights, such as the right to participate in decision making, the right to information enabling effective participation, and the right of access to a tribunal for the enforcement of one's rights and for injuries suffered.[15]

This article analyzes the case law relating to environmental protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms,[16] from both human rights and environmental perspectives. That is, it examines how the Commission and the Court have envisioned the link between the enjoyment of human rights and the quality of the environment, and how the rights protected by the Convention have been or could be asserted before its institutions to promote conservation of the environment. In general, the Convention institutions have recognized to a certain extent that the quality of the environment underlies the enjoyment of human rights, especially the right to a healthy life, but they have not established a minimum standard of environmental quality that should ensure the full enjoyment of human rights. On the other hand, the Court and the Commission have clearly stated that environmental protection is a legitimate public interest under the Convention, so that limitations on human rights for the purpose of environmental protection may be imposed. From an environmental perspective, the assertion of substantive human rights appears to offer a limited opportunity to promote the protection or improvement of the environment in general. On the other hand, procedural rights, such as the right to a tribunal and the right to information, can offer such an opportunity.

The discussion is divided into two main parts, dealing first with the human rights perspective, and second with the environmental perspective. We begin by analyzing the claims to environmental protection that have been submitted to the institutions of the Convention on the basis of the substantive guaranteed rights.

II. Environmental Protection: The Human Rights Perspective

A. Right to Environment as a Corollary Substantive Right

Neither the European Convention nor the European Social Charter[17] provides for a right to environment. The Commission has also ruled that such a right cannot be directly inferred from the Convention. Environmental issues have thus been raised incidentally, through the assertion of protected rights.[18] The quality of the environment

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Additionally, nearly 50 national constitutions include provisions related to environmental protection, formulated as a right to environment or as a duty of the state. For the most part, these provisions are intended to emphasize the importance of environmental preservation as a social value. There is often no implementation mechanism. However, a decision of the Philippine Supreme Court derived a right to a balanced and healthful ecology and a cause of action from section 16, Article II of the 1987 Constitution of the Philippines, which provides: "The State shall protect and advance the right of the people to a balanced ecology in accord with the rhythm and harmony of nature." Oposa v. Secretary of the Dep't of Env't & Natural Resources (July 30, 1993), *reprinted in* 33 ILM 173 (1994).

For the texts of constitutional and legislative provisions on environmental rights and duties, see Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity 297–327 (1989); Environnement et droits de l'homme 152 (Pascale Kromarek ed., 1987).

[8] *See generally* Gudmundur Alfredsson & Alexander Ovsiouk, *Human Rights and the Environment*, 60 Nordic J. Int'l L. 19 (1991); Günther Handl, Human Rights and Protection of the Environment: A Mildly "Revisionist View" (1992) (on file with author); Alexandre Kiss, *An Introductory Note on a Right to Environment*, in Environmental Change and International Law 199 (Edith Brown Weiss ed., 1992); Dinah Shelton, *Human Rights, Environmental Rights, and the Rights to Environment*, 28 Stan. J. Int'l L. 103 (1991); Melissa Thorme, *Establishing Environment as a Human Right*, 19 Denv. J. Int'l L. & Pol'y 310 (1991).

[9] Rio Déclaration on Environment and Development (June 14, 1992), UN Doc. A/CONF.151/5/Rev.1, Principle 1 (1992), *reprinted in* 31 ILM 874, 876 (1992) [hereinafter Rio Declaration]. *See* Dinah Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. Int'l Envtl. L. 75, 89–90 (1992).

[10] Shelton, *supra* note 9, at 81.

[11] Alexandre Kiss, *Le Droit à la conservation de l'environnement*, 2 Revue Universelle des Droits de l'Homme [RUDH] 445, 446 (1990).

[12] Shelton, *supra* note 8, at 106–11.

[13] Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 Yale J. Int'l L. 355, 359–68 (1993).

[14] World Charter for Nature, GA Res. 37/7, Annex, para. 24, UN GAOR, 37th Sess., Supp. No. 51, at 17, UN Doc. A/37/51 (1982). *See also* Rio Declaration, *supra* note 9, Principle 10, *quoted in* text at note 173 *infra*.

[15] Kiss, *supra* note 11, at 448; Shelton, *supra* note 8, at 117.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Eur. TS No. 5, 213 UNTS 221 [hereinafter European Convention].

[17] European Social Charter, Oct. 18, 1961, Eur. TS No. 35, 529 UNTS 89 [hereinafter Social Charter]. Proposals for the insertion of a right to environment in the Social Charter have been made without success since the early 1970s. In 1990 the Parliamentary Assembly of the Council of Europe recommended the drafting of a European charter and convention on environmental protection and sustainable development that would provide for a right to environment. This recommendation has not been accepted by the Committee of Ministers. Recommendation on the Formulation of a Draft European Charter and a European Convention on Environmental Protection and Sustainable Development, Eur. Parl. Ass., 42d Sess., Recommendation 1130 (1990), *reprinted in* 1 Y.B. Int'l Envtl. L. 484 (1990).

[18] The European system of human rights protection operates in the framework of the Council of Europe. Under Article 25 of the Convention, individuals, nongovernmental organizations and groups of individuals may submit petitions to the European Commission of Human Rights. Only the Commission and the contracting states subject to the Court's compulsory jurisdiction have access to the European Court of Human Rights.

be taken intentionally by the state or its agents in other circumstances than the ones specified.[34] Positive obligations may derive from the general terms of the first sentence of Article 2.[35] The duty of respect encompasses the obligation to prevent situations that might imperil human life and, eventually, the obligation to prosecute persons responsible for a loss of life. Prevention, however, is an obligation of wider scope than that afforded by the mere "right to be safeguarded against (arbitrary) killing"[36]—although the level of protection to be provided by the state is not unlimited.[37]

The protection ensured by Article 2 does not concern "threats" but "deprivations" of life;[38] nevertheless, the Commission has not precluded the protection of physical integrity if a threat is certain enough that life might be endangered.[39] In the *Soering* case, the Court also recognized that a potential violation may amount to an actual violation of a protected right when the injury is "foreseeable . . . and of a serious and irreparable nature."[40] Protection against potential interference might not be applicable to every right under the Convention,[41] but the "serious and irreparable nature" of any violation of the right to life suggests that protection from potential violations of this right can be derived from Article 2. In *Association X. v. United Kingdom*,[42] an association of parents whose children had suffered severe injury or died as a result of vaccinations alleged that

[34] *Id.* at 92; VELU & ERGEC, *supra* note 30, at 179–80. In contrast to Article 6 of the Political Covenant, *supra* note 26, and Article 4 of the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 UNTS 123, *reprinted in* 9 ILM 99 (1970) [hereinafter American Convention], which prohibits arbitrary deprivation of life in general, Article 2 exhaustively enumerates the conditions under which life may be taken.

[35] FAWCETT, *supra* note 32, at 31; Leighton Schwartz, *supra* note 13, at 362; Michalska, *supra* note 33, at 92; VELU & ERGEC, *supra* note 30, at 180. The Inter-American Court of Human Rights stated that the obligation to protect and ensure the guaranteed rights implies the duty

> to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. . . . States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

Velásquez Rodríguez Case, 4 Inter-Am. Ct. H.R. (ser. C), para. 166 (1988).

[36] Yoram Dinstein, *The Right to Life, Physical Liberty and Liberty, in* THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114, 115 (Louis Henkin ed., 1981).

[37] Lefeuvre, *supra* note 29, at 54. In X. v. Ireland, App. No. 6839/74, 7 Eur. Comm'n H.R. Dec. & Rep. 78 (1977), the applicant alleged that the authorities' refusal to give free medical services to her daughter constituted a breach of her daughter's right to life. The Commission, while leaving the question of the positive duties that might flow from Article 2 unanswered, noted that "[t]he applicant's daughter appear[ed] . . . to have received assistance from the local health authorities and her life ha[d] not been endangered." *Id.* at 79. In X. v. Ireland, App. No. 6040/73, 17 Y.B. EUR. CONV. ON H.R. 388 (1973), the Commission found that Article 2 could not be interpreted as imposing a duty on the state to provide a personal bodyguard, at least for an indefinite period of time. In Mrs W. v. United Kingdom, App. No. 9348/81, 32 Eur. Comm'n H.R. Dec. & Rep. 190, para. 12 (1983), the applicant alleged a violation of Article 2 after her husband was killed by the Provisional IRA. The Commission stated that Article 2 "may . . . indeed give rise to positive obligations on the part of the State. That, however, does not mean that a positive obligation to exclude any possible violence could be deduced from this article."

[38] VELU & ERGEC, *supra* note 30, at 182.

[39] In X. v. Austria, App. No. 8278/78, 18 Eur. Comm'n H.R. Dec. & Rep. 154, 156 (1980), the Commission wrote that Article 2 "does, however, primarily provide protection against deprivation of life only. Even assuming that physical integrity may be seen as protected by this Article an insignificant intervention such as a blood test does not amount to an interference prohibited by it."

[40] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), para. 90 (1989). The Court wrote:

> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article.

[41] In the Beldjoudi Case, 234–A Eur. Ct. H.R. (ser. A), paras. 66–67 (1992), the Court considered that a future, but certain, interference came under the scope of Article 8 (enforcement of a deportation order).

[42] App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32 (1979).

the British authorities had unjustifiably jeopardized the children's lives by not furnishing information on the risks of vaccination. In its decision on admissibility, the Commission declared that the state was obliged not only to refrain from taking life intentionally, but also to take adequate steps to safeguard it. After assessing the precautions taken by the Government, however, the Commission found that, in the circumstances, the state could not be held liable since the injuries had not been intended[43] and adequate measures had been taken. It concluded that the complaint under Article 2 was ill-founded.

Article 2 should be applicable when environmental hazards are created by activities of the state or entities under its jurisdiction.[44] In view of the fact that the obligation to respect the right to life encompasses avoidance of serious risks to human life, the source of such risks should not be relevant.[45] The state may have an obligation of abstention or of prevention, depending on the circumstances. The state's behavior regarding the level of risk that life would be lost must be assessed.[46] The measures of precaution or protection to be taken should then be determined in accordance with the magnitude of the risk involved.

Still, a threat to life must attain a certain level of certainty to come within the ambit of Article 2. In another case before the Commission, an applicant alleged that nuclear tests, the installation of launching pads for nuclear weapons, the storage of nuclear materials and the dumping at sea of nuclear wastes by the Federal Republic of Germany were endangering human lives. The Commission declared the complaint ill-founded on the ground that its examination of the submissions did not reveal any apparent violations of a guaranteed right, namely of Article 2.[47] Yet this case goes back to the early 1960s. A different view might be taken by the Commission thirty years later, at least at the admissibility stage.

In fact, most cases relating to the right to life were rejected at the stage of admissibility. It is certainly possible that the Commission's interpretation of the right to life will evolve in the future.[48] In another forum, the UN Human Rights Committee, a resident of Port Hope (Ontario) alleged that the storage there of a large quantity of nuclear wastes constituted a violation of Article 6 of the Political Covenant. The dump had been closed down, but more than two hundred thousand tons of wastes remained. The petition was finally rejected because local remedies had not been exhausted, but the Committee, before reaching that question, observed that the communication "raised serious issues regarding the duty of State parties to protect the right to life as provided by Art. 6(1)."[49] The European Commission, for its part, has extended the admissibility of claims concerning environmental pollution under Article 3 of the Convention.

[43] In X. v. Belgium, App. No. 2758/66, 12 Y.B. EUR. CONV. ON H.R. 174, 193 (1969), the Commission had interpreted the word "intentionally" strictly, but it later stated that the taking of life as a result of negligence might also pose an issue under Article 2. Stewart v. United Kingdom, App. No. 10044/82, 39 Eur. Comm'n H.R. Dec. & Rep. 162, para. 15 (1984).

[44] Leighton Schwartz, *supra* note 13, at 362; Ramcharan, *supra* note 25, at 13; Stefan Weber, *Environmental Information and the European Convention on Human Rights*, 12 HUM. RTS. L.J. 177, 181 (1991); Second Progress Report, *supra* note 21, at 22.

[45] Weber, *supra* note 44, at 181.

[46] Michalska, *supra* note 33, at 98.

[47] Dr S. v. Federal Republic of Germany, App. No. 715/60 (Aug. 5, 1960, unpublished); *see* Maguelonne Déjeant-Pons, *L'Insertion du droit de l'homme à l'environnement dans les systèmes régionaux de protection des droits de l'homme*, 2 RUDH 461, 464 (1991).

[48] Maguelonne Déjeant-Pons, *Le Droit de l'homme à l'environnement, droit fondamental au niveau européen dans le cadre du Conseil de l'Europe, et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, 4 REVUE JURIDIQUE DE L'ENVIRONNEMENT (forthcoming 1994) (manuscript at 6, on file with author).

[49] Port Hope Envtl. Group v. Canada, Communication No. 67/1980, 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 20, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1 (1990).

of Article 8, establishment of interference by a public authority, and consideration of the exceptions under the second paragraph.[66] The control exercised by the Convention institutions focuses on the legality of the measures,[67] the legitimacy of the aim pursued, and the proportionality of the interference to the aim. The test of proportionality is drawn from the requirement that the measure be "necessary in a democratic society." According to the Court, such a measure is neither "indispensable" nor "admissible," "useful," "reasonable" or "desirable," but it implies a "pressing social need" and "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."[68] States enjoy a certain margin of appreciation in determining the legitimacy of the aim pursued, as well as the required balance between the interests of the individual and the community, since, in the Court's view, states can more readily assess the necessity of the restrictions than the Court itself.[69]

As stated in the *Marckx* case,[70] positive duties essential to ensuring the effective protection of the right to private life may flow from the article. These duties extend to the adoption of measures aimed at preventing individuals from committing acts contrary to Article 8.[71] The second approach under Article 8 is then, first, to establish the applicability of Article 8 and, second, to determine whether the state has a positive obligation in the particular circumstances.[72] This determination is also grounded in a fair balance between the interest of the individual and the general interest.[73] Paragraph 2 of Article 8 does not apply in such cases since no interference is alleged, but to the Court this balance inheres in the foundation of the whole Convention.[74]

The scope of private life. Although the Commission and the Court have constantly declined to define the notion of "private life" precisely,[75] the general scope of the right to respect for one's private life has been stated to be "such that it secures to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. In principle whenever the State enacts rules for the behaviour of the individual within this sphere, it interferes with the respect for private life."[76]

[66] Connelly, *supra* note 64, at 570. As the second paragraph of Article 8 involves exceptions to the protected rights, it must be interpreted strictly. ANDREW DRZEMCZEWSKI, LE DROIT AU RESPECT DE LA VIE PRIVÉE ET FAMILIALE, DU DOMICILE ET DE LA CORRESPONDANCE TEL QUE LE GARANTIT L'ARTICLE 8 DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 17 (1985); Dimitrios Evrigenis, *Recent Case-law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights*, 3 HUM. RTS. L.J. 121, 131 (1982).

[67] *See* Silver v. United Kingdom, 61 Eur. Ct. H.R. (ser. A), paras. 58–59 (1983). *Also* Mireille Delmas-Marty, *The Richness of Underlying Legal Reasoning, in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL PROTECTION 319, 324 (Mireille Delmas-Marty ed., 1992).

[68] Powell and Rayner v. United Kingdom, 172 Eur. Ct. H.R. (ser. A), para. 41 (1990).

[69] In Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A), para. 48 (1976), the Court observed:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities [were] in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.

[70] Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), para. 31 (1979). *See also* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), para. 33 (1979).

[71] In X. and Y. v. Netherlands, 91 Eur. Ct. H.R. (ser. A), para. 23 (1985), the Court stated that the duties under Article 8 "may involve the adoption of measures to secure respect for private life even in the sphere of the relations of individuals between themselves." The obligation was to provide penal protection for a mentally handicapped person who was a victim of sexual violence.

[72] Connelly, *supra* note 64, at 572.

[73] Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) (1986).

[74] *Id.*, paras. 37, 60.

[75] DRZEMCZEWSKI, *supra* note 66, at 8; Connelly, *supra* note 64, at 568.

[76] Deklerck v. Belgium, App. No. 8307/78, 21 Eur. Comm'n H.R. Dec. & Rep. 116, 124 (1981).

Private life encompasses, in the first place, a person's intimate life and physical well-being.[77] High levels of noise from airports have thus been considered as intervention in the sphere of private life. In *Arrondelle v. United Kingdom*,[78] the applicant's house was situated between the runway of an airport and a highway. The applicant complained that the intensity, duration and frequency of the aircraft and traffic noise had badly affected her health. Her application was declared admissible, but as the parties reached a friendly settlement, the Commission did not issue a decision on the merits.[79] In *Lopez Ostra v. Spain*,[80] mentioned above, after ascertaining the relationship between the emanations from the waste treatment station and their effects on the health of the applicant's family on the basis of medical reports, the Commission found that the fumes were enough of a nuisance to constitute interference with the protections of Article 8.

Apart from health and physical well-being, a certain quality of life is also assured through the protection afforded to the home. In *Powell and Rayner*, also concerning aircraft noise pollution, the Court ruled that there had been interference in the applicants' private sphere since "[i]n each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow airport."[81] In an earlier decision, the Commission had also considered that the quality of life was protected under Article 8. In *S. v. France*,[82] the applicant owned a house on the bank of the Loire River. On the opposite bank, less than three hundred meters away, a nuclear power station was constructed. She alleged that the erection of the station had transformed the rural surroundings of her home into an industrial environment with several negative consequences: complete alteration of the natural site, noise pollution, industrial light during the night, microclimatic modification and devaluation of the property. The applicant had obtained only partial satisfaction before the French administrative tribunals. The French Conseil d'Etat had found that she had not suffered any special or abnormal injury attributable to the view of the station, its permanent light or the cloudiness over the cooling towers, but that Electricité de France was liable for the noise nuisance. On the applicability of Article 8, the Commission observed that noise of a considerable magnitude could not only affect the physical well-being of individuals, but also prevent them from enjoying the amenities of their homes.[83] The disturbances caused by the noise were considered as interference even though adverse effects on the applicant's health had not been alleged.

The extent to which respect for the private sphere can encompass "quality of life" aspects outside the home is not clear. Elements of the larger environment have not been readily conceded to belong to the private sphere, even though they might enable a person to "freely pursue the development and fulfilment of his personality." In *X. v. Iceland*, the applicant complained that, under existing regulations, he was not permitted

[77] Louise Doswald-Beck, *The Meaning of the Right to Respect for Private Life under the European Convention on Human Rights*, 4 HUM. RTS. L.J. 283, 289 (1983). *See* X. and Y. v. Netherlands, *supra* note 71, para. 22.

[78] Arrondelle v. United Kingdom, App. No. 7889/77, 23 Y.B. EUR. CONV. ON H.R. 166 (1980).

[79] Arrondelle v. United Kingdom, Report of the Commission of 13 May 1982, 25 Y.B. EUR. CONV. ON H.R. 235 (1982). Friendly settlements usually consist of monetary compensation on an *ex gratia* basis. *See generally* Torkel Opsahl, *Règlement amiable des litiges dans le respect des droits définis dans la Convention européenne des droits de l'homme, in* 6 INTERNATIONAL COLLOQUY ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS, PROC. 972 (1988) [hereinafter 6 PROC.]. In Baggs v. United Kingdom, App. No. 9310/81, 44 Eur. Comm'n H.R. Dec. & Rep. 13 (1985), the applicant also complained about noise and vibration caused by air traffic. The Commission found that the annoyances were worse than in the *Arrondelle* case. The application was declared admissible and a friendly settlement was also reached.

[80] *Supra* note 2.

[81] *Powell and Rayner*, *supra* note 68, para. 40.

[82] App. No. 13728/88 (May 17, 1990), *reprinted in* 3 RUDH 236 (1991).

[83] *Id.* at 237.

complainant does not bear an excessive burden. Only when the justifiability of the interference with regard to its necessity in a democratic society is examined should such considerations be taken into account. The fact that many people suffer from the nuisances should not preclude a finding of interference. The only question should be whether the applicant's private life is affected.

The proportionality of the interference. In practice, the legitimacy of the aim pursued by the interfering measures is rarely questioned by the Commission or the Court.[95] The notion of "interests of the economic well-being of the country" is large enough to include many activities that can have adverse effects on the environment. Thus, the Commission has considered "the existence of large international airports, even in densely populated urban areas, . . . the increasing use of jet aircraft,"[96] the establishment of a nuclear power station[97] and the construction of a hydroelectric plant[98] as measures in the interests of the economic well-being of the country.

To determine whether a fair balance was struck between the interest of the individual and the general interest, especially when the measures are complex and technical, the Court and the Commission are inclined to examine the way the decisions were taken and then decide if it allowed the interests of the affected individuals to be taken into account. In *Powell and Rayner,* the Court was of the view that neither it nor the Commission should substitute its assessment for that of the Government regarding the optimal policy in such a difficult social and technical field as air traffic regulation.[99] Such matters involve a large margin of appreciation for states. The Court emphasized that some measures had been introduced to control aircraft noise after consultation with the people and interest groups concerned; that international standards, developments in technology and the varying levels of disturbance had duly been taken into account; and that successive governments had considered that the effects of aircraft noise were better dealt with by regulatory measures than by court settlements on the basis of a general criterion of reasonableness. The margin of appreciation of the British Government had not been exceeded.[100]

The margin of appreciation granted to states in balancing the interests of the country's well-being and the interests of the individual is thus relatively broad. Although Article 8 has traditionally been associated with economic and social rights,[101] the state's obligation to take positive measures to maintain or improve environmental quality and meet a standard compatible with respect for the right to private life is unlikely to be derived from Article 8. On this article, the Court has stated that,

> especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of the individuals.[102]

[95] Delmas-Marty, *supra* note 67, at 325.
[96] *Powell and Rayner, supra* note 68, para. 42.
[97] S. v. France, *supra* note 82.
[98] G. and E. v. Norway, *supra* note 85, at 36.
[99] *Powell and Rayner, supra* note 68, para. 44. In G. and E. v. Norway, *supra* note 85, at 36, the Commission, after carefully considering the need for the national authorities to construct a hydroelectric plant, found that "the interference could reasonably be considered as justified under Article 8, para. 2, as being in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country."
[100] *Powell and Rayner, supra* note 68, paras. 44–45.
[101] VELU & ERGEC, *supra* note 30, at 535.
[102] Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (ser. A), para. 67 (1985). *See also Rees, supra* note 73, para. 37.

The development of international environmental law may someday create a common European standard of protection, but the Commission and the Court are not likely to interfere with national policies that involve important economic choices.

The Right to the Peaceful Enjoyment of Possessions

The adoption of the First Protocol to the Convention ensured the protection of the right to property.[103] Although Article 1 of the Protocol refers to the "enjoyment of possessions," the Court stated that, "[b]y recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property."[104] The Court has drawn three distinct rules from this provision:

> The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[105]

Scope of the protection of peaceful enjoyment of possessions. The Commission has considered that virtually every kind of negative effect caused by environmental nuisances could indirectly amount to interference with the rights guaranteed by Article 1. It has assimilated such interference to a partial de facto confiscation of property.[106] For example, in *S. v. France*[107] the Commission observed that very considerable noise nuisances could greatly affect the value of a property, even making its sale impossible, and could therefore constitute a partial expropriation.[108] This confiscatory classification of environmental nuisances, however, means that the negative effects caused by the deterioration of the environment are not likely to be considered as interference unless the property declines in value. Such loss then becomes the exclusive criterion for bringing Article 1 into play and puts the "protection of the enjoyment of one's possessions" exclusively in an economic perspective.[109] In *Rayner v. United Kingdom,* the Commission thus stated that "[t]his provision is mainly concerned with the arbitrary confiscation of property and does not, in principle, guarantee a right to the peaceful enjoyment of possessions in

[103] First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Eur. TS No. 9, 213 UNTS 262. Article 1 reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[104] *Marckx, supra* note 70, para. 63. In the case law, ownership is defined in the extensive sense of general international law, that is, as "an acquired/vested right." The Commission has considered as "possessions" within the meaning of Article 1 not only rights *in rem,* but also intangible rights, corporation shares, commercial good will, etc. Wolfgang Peukert, *Protection of Ownership under Article 1 of First Protocol to the European Convention on Human Rights,* 3 HUM. RTS. L.J. 37, 43 (1981); VELU & ERGEC, *supra* note 30, at 676–77.
[105] Sporrong and Lönnroth v. Sweden, 52 Eur. Ct. H.R. (ser. A), para. 61 (1982).
[106] In Sporrong and Lönnroth, *id.*, paras. 60–63, the Court recognized that a confiscation de facto, where the effects of the measures taken are similar to a formal expropriation, could come under the scope of Article 1. However, there have been no such cases before the Court.
[107] *Supra* note 82 (operation of a nuclear power station). *Also Vearncombe, Herbst, Clemens and Speilhagen, supra* note 90 (noise nuisance from a military shooting range).
[108] S. v. France, *supra* note 82, at 237.
[109] Weber, *supra* note 44, at 181.

interest and that of the collectivity is related to the prolongation of a temporary situation; consequently, the state is given the option either of allowing the temporary situation to be modified or of offering monetary compensation.[130]

ENVIRONMENTAL REGULATIONS AS LIMITING PROTECTED RIGHTS

To ensure that the environment is effectively protected, governmental policies and new rules governing collective and individual behavior in relation to the environment have been widely adopted.[131] They may provide for claims to an environment of quality, but they also impose constraints on individual behavior, and thus impair the enjoyment of human rights.[132]

The restricted enjoyment of human rights as a result of environmental regulations is most likely to prompt claims related to the right to property. However, issues might also be raised under other protected rights, for instance, the right to respect for one's private life. In *Herrick v. United Kingdom*,[133] the applicant had transformed a former bunker, situated "among rising ground in one of the areas of outstanding natural beauty" of the island of Jersey, into a summer residence. The applicant was served with a notice requiring her to cease inhabiting the bunker, since its use was contrary to existing regulations. The court of appeal, upholding a decision of the lower court before which the applicant had instituted proceedings to have the notice declared void, confirmed that the applicant had acquired a limited right of use of the bunker prior to the entry into force of the regulations. The applicant alleged before the Commission that the restrictions on her right of use amounted to a violation of her right to respect for her private life.[134] But the Commission found that, even if there had been interference, it was justified for the protection of the rights of others: "The existence and operation of planning controls which delimit areas where domestic development may be extended is a legitimate control measure to protect the amenity value of rural areas and thereby protect the rights of others."[135]

In the majority of cases, however, environmental regulations were alleged to have put unreasonable limitations on the use of property. For instance, in *H. J. v. Sweden*,[136] an administrative decision had joined part of the applicant's agricultural property to a joint hunting area. The applicant was fined for having hunted and killed an elk on his own property in contravention of the bylaws of the hunters' association, i.e., those holding hunting rights. The Commission considered the inclusion of the applicant's property in the joint hunting area as a regulation of the use of property that interfered with the peaceful enjoyment of possessions. Nevertheless, it decided that the creation of the joint hunting area was a measure of general interest, not disproportionate to its aim: the promotion of game preservation and the common interests of licensed hunters.

[130] Fromont, *supra* note 112, at 226.

[131] Michele de Salvia, *Tutela dell'ambiente e la Convenzione europea dei diritti dell'uomo: Verso una ecologia del diritto?*, 3 RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO 432 (1989).

[132] The Stockholm Declaration, *supra* note 3, in Principle 1 makes clear that environmental protection imposes duties: "[man] bears a solemn responsibility to protect and improve the environment for present and future generations." *See* Kiss, *supra* note 11, at 445.

[133] App. No. 11185/84, 42 Eur. Comm'n H.R. Dec. & Rep. 275 (1985).

[134] The use was described by the court of appeal as an occasional shelter, not amounting to a residence. The bunker could be used in the summer as a place of rest or recreation during the day and, occasionally, as a place to sleep, but for no more than two consecutive nights.

[135] Herrick v. United Kingdom, *supra* note 133, at 280.

[136] App. No. 14459/88 (Feb. 19, 1992, unpublished).

The Legitimacy of Measures that Protect the Environment

The Commission has clearly recognized that environmental protection is a legitimate aim of general interest that may justify interference with the enjoyment of possessions. For instance, in *N. v. Austria*,[137] the applicant challenged the authorities' refusal to modify the zoning of a plot of agricultural land so as to permit its use for industrial purposes. The Commission noted that

> the planning restriction . . . was based on the Provincial Regional Planning Act which provides for the preservation of the landscape and settlement structure and for the maintenance and development of suitable conditions for agriculture and forestry. These are aims which are clearly in the general interest, and accordingly the applicable legislation can be justified under Article 1 para. 2 of the Protocol.[138]

Several aspects of environmental protection have been found to be consonant with the general interest: town and country planning,[139] the protection of natural sites,[140] the management of forests,[141] the preservation and management of game,[142] the alleviation of water pollution and sanitary problems,[143] and the prohibition of a nuclear power station.[144]

The Court has also recognized environmental protection as a legitimate aim in the general interest. In the *Fredin* case,[145] the applicants had obtained a permit to exploit a gravel pit. As an amendment to the law on nature conservation subsequently authorized the revocation of such permits, they complained that the revocation violated Article 1 of the First Protocol. The Court, though it examined the legitimacy of the aim pursued by the measure, concluded that "[t]he applicants did not contest the legitimacy of the aim of the 1964 Act, that is the protection of nature. The Court recognises for its part that in today's society the protection of the environment is an increasingly important consideration."[146]

On the state's margin of appreciation in assessing the proportionality of the restrictions to the aim of environmental protection, the Court was unequivocal:

> In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[147]

[137] App. No. 10395/83, 48 Eur. Comm'n H.R. Dec. & Rep. 65 (1986).

[138] *Id.* at 71.

[139] See cases cited in Déjeant-Pons, *supra* note 48, at 6.

[140] Herrick v. United Kingdom, *supra* note 133; Simili v. Belgium, App. No. 11965/86 (Dec. 12, 1988, unpublished) (Commission decision); *see* Déjeant-Pons, *supra* note 48, at 31.

[141] Denev v. Sweden, App. No. 12570/86, 59 Eur. Comm'n H.R. Dec. & Rep. 127 (1989).

[142] H. J. v. Sweden, *supra* note 136.

[143] Lundqist v. Sweden, App. No. 10911/84, 48 Eur. Comm'n H.R. Dec. & Rep. 191 (1986).

[144] Judgment of Dec. 16, 1983, Verfassungsgerichtshof (Austria), *reprinted in* EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 324 (1984), *mentioned in* VELU & ERGEC, *supra* note 30, at 684.

[145] Fredin v. Sweden, 192 Eur. Ct. H.R. (ser. A) (1991).

[146] *Id.*, para. 48. *See also* Pine Valley Developments Ltd v. Ireland, 222 Eur. Ct. H.R. (ser. A), para. 57 (1992).

[147] *Fredin*, *supra* note 145, para. 51. The Court concluded that revocation of the permit was not disproportionate to the object of the law since the applicants must have known, when they made their investment and began to work the pit, that their permit could be revoked; that the authorities never gave them assurances that they would be authorized to work the pit beyond the time limit; and that they had a period of four years in which to close down.

asserting a collective interest through a procedure that is primarily designed to protect individual rights, even if Article 1 had been found applicable.

Additional limitations stem from the solutions that can be imposed by the Commission and the Court. If financial compensation may solve the problem at the individual level (for example, by enabling the owner to leave the house situated in the worsened environment), no protection of the environment per se is ensured, and obviously prior compensation excludes any claim under Article 1 of the First Protocol.[157] Even at the individual level, compensation may not be appropriate where the applicant will not realize an improvement in his enjoyment of private life or possessions.[158] A requirement that the negative effects be exceptional would further limit the aim of environmental protection in general.

The Victim Requirement

The rules of legal standing to submit an application before the Commission also limit the environmental questions that can be brought to its attention. Under Article 25 of the European Convention, complaints may be submitted to the Commission by any person, nongovernmental organization or group of individuals.[159] However, the applicant must be a "victim of a violation of [his or her] rights"; in contrast, under Article 24 a contracting state may refer "any alleged breach of the provisions of the Convention" to the Commission. The quality of "victim" required for applications submitted by nongovernmental organizations means that the organization must allege to be personally affected by the contested measure. It cannot submit an application directed at a measure affecting its members.[160] A group of individuals can, however, claim to be jointly affected by a measure or activity.

The term "victim" refers to the "person directly affected by the contentious act or omission."[161] In the Court's view, Article 25 "does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention."[162] While the rights of the applicant must have been infringed in concrete terms,[163] the Court has stated on numerous occasions that the existence of damage or injury is not relevant. That applicants who suffer injury are victims is undeniable; but there may be a violation of the Convention without it.[164] (It may even be enough for the effects of a measure directed to a third party to be felt by the applicant.[165]) The notion of "victim" has also been expanded by resorting to the concept of "potential" or "even-

[157] Opsahl, *supra* note 79, at 972.

[158] Déjeant-Pons, *supra* note 48, at 16.

[159] Interstate applications have been rare; only a dozen have been submitted to the Commission. The great majority of the cases brought before the European Convention institutions have been individual applications. *See generally* Opsahl, *supra* note 79, at 966.

[160] VELU & ERGEC, *supra* note 30, at 797–98. *See* Nineteen Chilean Nationals & the S. Association v. Sweden, App. Nos. 9959/82 & 10357/83, 37 Eur. Comm'n H.R. Dec. & Rep. 87 (1984); Asociación de Aviadores de la República, Mata v. Spain, App. No. 10733/84, 41 Eur. Comm'n H.R. Dec. & Rep. 211 (1985); Association X. and 165 Liquidators and Court Appointed Administrators v. France, App. No. 9939/82, 34 Eur. Comm'n H.R. Dec. & Rep. 213 (1983).

[161] Klass v. Federal Republic of Germany, 28 Eur. Ct. H.R. (ser. A), para. 34 (1978); *Marckx, supra* note 70, para. 27. *See* Kersten Rogge, *The 'Victim' Requirement in Article 25 of the European Convention on Human Rights, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION. STUDIES IN HONOR OF G. WIARDA 539, 540 (Franz Matscher & Herbert Petzold eds., 1988).

[162] *Klass, supra* note 161, para. 33.

[163] SUDRE, *supra* note 86, at 206.

[164] Henri Delvaux, *La Notion de victime au sens de l'article 25 de la Convention européenne des droits de l'homme, in* ACTES DU CINQUIÈME COLLOQUE SUR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 35, 64 (1982); VELU & ERGEC, *supra* note 30, at 800. *See, e.g., Marckx, supra* note 70, para. 27.

[165] In Open Door and Dublin Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A), para. 44 (1992), two women were considered to be "victims" of a judicial injunction prohibiting family-counseling agencies from providing information on abortion facilities abroad.

tial" victim, enabling a person likely to fall under the legislation or the measures concerned to submit an application.[166]

To some writers, the notion of "victim" has been so liberally interpreted that it approaches an *actio popularis;*[167] nonetheless, a direct link between the environmental harm and the infringement of the applicant's protected right must be established. The notion of "potential victim," however, could broaden legal standing when the petition is presented by a group of individuals such as an association for nature conservation.[168]

Finally, it is now generally recognized that the protection of the environment requires a preventive approach.[169] Such an approach is surely not incompatible with the protection of human rights, but the control exercised by the Commission and the Court focuses on prior violations. Although the ultimate goal of a system to protect human rights is also to prevent violations, both the victim requirement and the limited applicability of the guaranteed rights to potential interference make it difficult to ensure the prevention of environmental damage through the assertion of protected human rights.

PROCEDURAL RIGHTS AS "ENVIRONMENTAL RIGHTS"

It has been argued that "the right to environment . . . can be interpreted, not as the right to an ideal environment . . . but as the right to have the present environment conserved . . . and improved in some cases."[170] The implementation of a right to environment could be ensured through procedural "environmental rights," defined as "the reformulation and expansion of existing human rights and duties in the context of environmental protection."[171] These procedural rights should be based on the goal of conserving the environment and the concept of the environment as a common resource whose quality affects each person. These rights should include a right to information about activities that may cause environmental harm for persons likely to be affected, a right to participate in the decision-making process when actions are likely to cause environmental harm, and a right of recourse before administrative or judicial agencies.[172] The availability of environmental information and public participation in decision-making processes in environmental matters have been discussed in international forums for a number of years. An emerging practice in this regard was formally recognized in the Rio Declaration:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[173]

[166] Delvaux, *supra* note 164, at 62–63; Rogge, *supra* note 161, at 540–41. It has mostly been applied where the personal status of the applicant was determined by legislation or where the applicant faced risks of criminal prosecution. Access has also been enlarged by resorting to the notion of "indirect" victim, where a violation of a person's rights injures a third party who has a specific and personal link to the direct victim.

[167] Delvaux, *supra* note 164, at 73.

[168] Déjeant-Pons, *supra* note 47, at 470.

[169] The preventive approach in international environmental law is illustrated, inter alia, by the precautionary principle. The principle aims at ensuring that activities posing a threat to the environment will be prevented, even if there is no conclusive scientific proof linking them to environmental damage. *See generally* James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment,* 14 B.C. INT'L & COMP. L. REV. 1 (1991).

[170] Kiss, *supra* note 11, at 201.

[171] Shelton, *supra* note 8, at 117.

[172] *Id.*

[173] Rio Declaration, *supra* note 9, Principle 10, 31 ILM at 878.

The Right to Information

The main elements of Article 10 of the European Convention are the right to receive and the right to impart information and ideas.[190] These rights can be viewed as the two faces of the right of expression, but they are autonomous[191] and their scope does not correspond exactly.[192]

The right to receive information. The right to receive information is not confined to the passive reception of information disseminated by various sources. Although Article 10 does not specifically enunciate a right to seek information actively,[193] most writers maintain that this right is guaranteed when the information was intended for the public in general or for the person seeking it in particular.[194] However, the right to seek information actively does not impose on public authorities any positive obligation to provide information they hold: "Traditionally, constitutional freedom to receive (and seek) information does not include a *general* 'democratic' right of access to administrative records or other information; this 'public' access depends on additional legislation . . . ."[195]

A right of access can nevertheless be derived from the right to receive information when the information is especially important for the person or group of persons seeking it.[196] At least, the Commission did not dismiss that possibility in certain circumstances. It noted that "it follows from the context in which the right to receive information is mentioned . . . that it envisages first of all access to general sources of information which may not be restricted by positive action of the authorities unless this can be justified under the second paragraph of Article 10." Continuing its argument, the Commission posed the assumption "that the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for his own position."[197]

In the *Sunday Times* case,[198] the Court underlined that the families of the victims of thalidomide "had a vital interest in knowing all the underlying facts and the various

[190] Article 10 reads:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[191] Giorgio Malinverni, *Freedom of Information in the European Convention on Human Rights and the International Covenant on Civil and Political Rights*, 4 HUM. RTS. L.J. 443, 447 (1983).

[192] Martin Bullinger, *Report on "Freedom of Expression and Information: An Essential Element of Democracy," in* 6 PROC., *supra* note 79, at 45, 56.

[193] It is specifically provided for in Article 13 of the American Convention, *supra* note 34, and in Article 19 of the Political Covenant, *supra* note 26.

[194] Bullinger, *supra* note 192, at 66; Malinverni, *supra* note 191, at 448–49. The latter cites two judgments of the Swiss Federal Tribunal on Article 10 of the European Convention: Judgment of Mar. 8, 1978, Arrêts du Tribunal fédéral suisse [ATF] 104 Ia 88 (1978); and Judgment of Sept. 17, 1982, ATF 108 Ia 275 (1982).

[195] Bullinger, *supra* note 192, at 70. *See also* SUDRE, *supra* note 86, at 162; VELU & ERGEC, *supra* note 30, at 608.

[196] Bullinger, *supra* note 192, at 71; Malinverni, *supra* note 191, at 450.

[197] X. v. Federal Republic of Germany, App. No. 8383/78, 17 Eur. Comm'n H.R. Dec. & Rep. 227, 228–29 (1980). The applicant claimed that the postal service had delivered important documents to his old address, so that they had reached him after substantial delay.

[198] Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) (1979). The House of Lords had granted an injunction to prohibit the publication of articles on the thalidomide affair. The European Court held this restriction on the freedom of expression to be in violation of the Convention.

possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary'."[199] The Court went on to say that imparting information and ideas about matters in the public interest is incumbent on the mass media.[200] However, they do not have privileged access to information held by public authorities.[201] The right to seek information is additionally limited by its availability. The state does not have a duty to gather information on subjects of general interest. One might attribute an obligation to governments or other public authorities to disseminate information on important matters as deriving from the effective practice of political democracy, but a corresponding individual right does not appear to fall within the realm of Article 10.[202]

In two recent judgments, the Court gave a strict construction to Article 10 regarding a right of access. In the *Leander* case,[203] the applicant was denied a public position with important national security implications because of information provided to the employer by a secret police register. He alleged a violation of Article 10 since he was denied access to the file. The Court stated unanimously that

> the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.[204]

In the *Gaskin* case,[205] the applicant had been a ward of the public until his majority and had lived in several successive foster families. When he reached his majority, he sought to institute proceedings against the local authority alleging child abuse. He was denied access to his personal file, which was held by the municipality. The Court, citing *Leander*, again held that "in the circumstances of the present case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual."[206]

These two decisions, however, may not completely rule out a right of access. They may indicate merely that, in the given circumstances, the applicants did not enjoy a right of access and the public authorities were not obliged to provide the information. But the Court has not indicated the circumstances that would give rise to such a right. It must be stressed that, in both cases, the information sought concerned the applicants themselves. Some writers have argued that a right of access could be granted when the information is of general significance.[207] Environmental information is usually of general importance or of interest to many people. It may concern activities likely to affect the environment, such as the storage of hazardous wastes and exploitation of natural resources.[208] However, restrictions on such a right could be justified under the second paragraph of Article 10, by invoking reasons of national security or the protection of the rights of others.

[199] *Id.*, para. 66.

[200] *Id.*, para. 65.

[201] In Sixteen Austrian Communes and Some of their Councillors v. Austria, App. Nos. 5767/72, 5922/72 & others, 17 Y.B. EUR. CONV. ON H.R. 338, 355, para. 4 (1974), on the claim that in their capacity as councilors, the applicants had a right of access to information that was not normally available to the general public, the Commission stated that "Article 10 does not accord to public officials a special right of information which is wider than that of other persons."

[202] Bullinger, *supra* note 192, at 70.

[203] Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) (1987).

[204] *Id.*, para. 74.

[205] Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) (1989).

[206] *Id.*, para. 52.

[207] Malinverni, *supra* note 191, at 450; VELU & ERGEC, *supra* note 30, at 608; Weber, *supra* note 44, at 180.

[208] Déjeant-Pons, *supra* note 47, at 468.

was to exclude any eventual claim and not simply to limit civil courts' jurisdiction, found that "[t]he applicant, therefore, [could not] invoke under English law a substantive right to compensation for the alleged noise nuisance."[224] The application of Article 6 was thus excluded. This interpretation is debatable. By considering Article 6 as precluding the existence of a right to bring action and not as a restriction on the jurisdiction of the courts to hear such claims, the Commission relinquished all control over the compatibility of such provisions with the Convention.[225] Curiously, while a state may refuse to recognize a right that is usually granted in other states without running afoul of Article 6, if an entitlement is classified as a privilege in a national legal system, as opposed to a right in other states, and it can be linked to a right of a civil nature, Article 6 is applicable.

The case law on the nature of "civil" rights and obligations is considerable and complex. Although the Court has never defined the notion, it is assimilated to "private" rights and obligations.[226] According to the Commission:

> [T]he concept of civil rights and obligations is not to be interpreted solely by reference to the respondent State's domestic law and . . . Article 6(1) applies irrespective of the parties' status, be it public or private, and of the nature of the legislation governing the matter in which the dispute is to be determined. It is sufficient that the action was "pecuniary" in nature and that the action was founded on an alleged infringement of rights which were likewise pecuniary rights.[227]

Most of the issues relating to Article 1 of the First Protocol fall within the sphere of application of Article 6. In the *Oerlemans* case,[228] a Dutch citizen alleged a violation of Article 6 on the ground that he could not challenge a ministerial order designating his land as a protected site. The Court considered that, without doubt, the right to use his property was "civil" in nature.[229] In *Zander v. Sweden,* where the contamination of the applicants' well was at stake, the Commission stated:

> As regards the character of the right at issue, the Commission notes that the right related to the environmental conditions of the applicants' property and that existence of environmental inconveniences or risks might well be a factor which affects the value of a property. Consequently the right at issue must be considered to be a civil right to which Article 6, para. 1 of the Convention applies.[230]

The right to obtain damages is also considered as a right of a civil nature falling under Article 6. In *Zimmerman and Steiner,*[231] the applicants' complaint concerned the length of proceedings before the Swiss Federal Tribunal in which they were seeking compensation for the injury caused by noise and air pollution emanating from an airport. The Court found Article 6 to be applicable.

The guarantees offered by Article 6. This right to a tribunal also implies concrete and effective access. In the *de Geouffre de la Pradelle* case,[232] part of the applicant's land had been designated as an area of outstanding beauty, which restricted its use. An application to the French Conseil d'Etat for judicial review of the decree was held inadmissible on the ground that it was not timely, the two months' period allowed by the law to challenge such decrees having expired. The applicant alleged before the Court that it had been hampered by the uncertainty of French law on the classification of decisions to designate places of interest. The Court decided that, "[a]ll in all, the system was . . . not sufficiently coherent and clear. Having regard to the circumstances of the case as a whole, the Court finds that the applicant did not have a practical, effective right of access to the *Conseil d'État.*"[233]

The right to a court of law for the determination and enforcement of one's rights also appears as a counterweight to the margin of appreciation of administrative authorities. Most cases raising environmental issues have involved the right to judicial review of administrative acts. When no judicial review is provided,[234] as in *Denev v. Sweden,*[235] the *Skärby* case[236] and the *Fredin* case,[237] there is a violation of Article 6. Article 6 does not, however, permit challenges to the validity of a law or its conformity with the national constitution. In *Braunerheilm v. Sweden,*[238] the owner of a plot of land objected to new legislation that permitted the granting of individual licenses to the public at large to fish in waters where he previously had an exclusive right to fish. The applicant alleged a violation of Article 6[239] because he could not challenge the legislation before the courts. Noting that exclusive fishing rights had been taken away by a law passed by parliament, the Commission observed that Article 6 was not intended to encompass judicial review of legislative acts.

IV. Conclusion

Not surprisingly, the numerous issues involving environmental protection raised in the European framework of human rights protection show that the quality of the environment is closely related to the effective enjoyment of human rights. Protection of the environment has been recognized as an important public interest and it appears, in this sense, to be a value protected by the Convention. However, one is struck by the discrepancy between the importance attached to environmental protection as a collective value and that attached to environmental quality as a private interest. The threshold for finding a violation on environmental grounds of the right to private life or the right to the enjoyment of one's possessions is high. Thus far, the Court and the Commission have not completely closed the circle of the interrelationship between the enjoyment of human rights and the level of environmental quality. Although they have recognized the importance of environmental protection, they have not integrated its collective and individual aspects. To infuse public environmental values into the content of protected rights, the Convention institutions should try to establish a minimum standard of environmental quality that should take into account not only the negative effects of environmental degradation on health, but also the nonmonetary value that individuals attach to the quality of their surroundings.

[224] *Id.* at 18, 21. The same provision was at stake in *Powell and Rayner.* As the Commission had dismissed the complaint under Article 6 as ill-founded, the Court did not formally rule on the point, although it seems to have approved the interpretation of the Commission. *Powell and Rayner, supra* note 68, para. 36.

[225] Hampson, *supra* note 222, at 288.

[226] Gérard Cohen-Jonathan & Jean-Paul Jacqué, *Activité de la Commission européenne des droits de l'homme,* 38 Annuaire Français de Droit International 663, 666 (1992).

[227] *Zander, supra* note 188, para. 38.

[228] Oerlemans v. Netherlands, 219 Eur. Ct. H.R. (ser. A) (1991).

[229] *Id.*, para. 47. No violation of Article 6 was found since, according to Dutch case law, the order could be challenged.

[230] *Zander, supra* note 188, para. 45 (Commission opinion).

[231] Zimmerman and Steiner v. Switzerland, 66 Eur. Ct. H.R. (ser. A) (1983).

[232] De Geouffre de la Pradelle v. France, 253–B Eur. Ct. H.R. (ser. A) (1992).

[233] *Id.*, para. 35.

[234] Vincent Coussirat-Coustère, *Jurisprudence de la Cour européenne des droits de l'homme en 1992,* 38 Annuaire Français de Droit International 629, 643 (1992).

[235] *Supra* note 141.

[236] Skärby v. Sweden, 180–B Eur. Ct. H.R. (ser. A) (1990).

[237] *Supra* note 145.

[238] *Supra* note 129, at 18.

[239] The applicant also alleged a violation of his right not to be deprived of property under Article 1 of the First Protocol. The Commission considered that there had been interference with the enjoyment of his possessions but, in the circumstances, the margin of appreciation of the state had not been exceeded, even though no monetary compensation had been offered.

negotiating positions are not easily changed. And, for EU delegations, vast amounts of time are consumed in coordinating positions.

Politicization

As noted previously, several resolutions passed on votes that split the Commission on North-South lines, including those on toxic wastes, the right to development and foreign debt. To these must be added some highly political resolutions introduced by Cuba aimed at U.S.-Cuban bilateral issues. One attacking the U.S. embargo (captioned "human rights and unilateral coercive measures") passed by twenty-four to seventeen (United States), with twelve abstentions.[93] A selectively phrased Cuban resolution extolling "universal freedom of travel and the importance of family reunification" passed by twenty-seven to nine (United States) (seventeen abstaining).[94] Cuba also was active in promoting a text by the Non-Aligned Movement demanding greater priority for developing countries in staffing the Human Rights Centre. This resolution passed by a vote of thirty-six to fifteen (United States) (two abstaining).[95] Yet another Cuban text sought a review of the Commission's rapporteurs and other human rights machinery; last-minute negotiations turned this into a consensus text.[96]

XII. Conclusion

The Commission's 1995 session was in general quite positive. The Commission took steps that should strengthen the international protection of human rights and improve its own future work. By considering three permanent members of the Security Council, it showed that no country is beyond its consideration. It also dropped obsolete agenda items and made modest institutional improvements.

At the same time, there was little innovation or fresh thinking at this session. And enormous effort had to be expended to deflect efforts by some to use the Commission to score short-term political points or to weaken its already-modest mechanisms for protecting human rights.

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[93] CHR Res. 1995/45 (Mar. 3).
[94] CHR Res. 1995/62 (Mar. 7).
[95] CHR Res. 1995/61 (Mar. 7).
[96] CHR Res. 1995/93 (Mar. 10).
* Of the Board of Editors. The views and opinions expressed are solely the author's and do not necessarily represent those of the U.S. Department of State.

The Chemical Weapons Convention Implementation Act: United States Control over Exports

I. Introduction

During 1994, the total sales value of chemicals exported from the United States exceeded $51 billion, up 15 percent over the previous year and resulting in the chemical sector outpacing all other sectors that finished the year with favorable trade balances.[1] Chemicals leaving the United States were shipped under the control provisions of both the Department of Commerce's Export Administration Regulations (EAR),[2] and the Department of State's International Traffic in Arms Regulations (ITAR).[3] Though this is something of an oversimplification, the EAR basically concerns itself with products that have civilian application, and the ITAR with products of use to the military. Currently, the Commodity Control List of the EAR,[4] overseen by Commerce's Office of Export Licensing within the Bureau of Export Administration, identifies fifty-four chemicals and ten toxins as intermediate agents and precursors to chemical weapons subject to export regulation.[5] The Munitions List of the ITAR,[6] administered by the Office of Defense Trade Controls of the State Department's Bureau of Politico-Military Affairs, identifies twenty-two chemicals as subject to regulation[7] and cautions that this listing is merely illustrative, as any "chemical agent," defined as "a substance having military application," is subject to export control.[8]

The proposals to Congress[9] put forward by the Clinton administration to implement obligations the United States may take on if it ratifies the Chemical Weapons Convention (CWC) of 1993[10] could change the nature of the current controls on exports of chemicals. The CWC's Annex on Chemicals references by specific chemical abstracts service (CAS) registry number over fifty toxic substances that are subject to the Convention's controls, including those on exports.[11] Of the referenced substances carrying CAS registry numbers, twenty-eight are not specifically mentioned in either Commerce's Commodity Control List or State's Munitions List.[12] Conversely, Commerce's list identifies thirty-four chemicals and eight toxins,[13] and State's list identifies eighteen chemicals[14] that are not identified by name[15] in the CWC Annex on Chemicals. Thus, current U.S. export controls regulate many chemical substances not required to be

[1] *See* William Storck, *Record Chemical Exports Boost Trade Surplus*, Chemical & Engineering News, Mar. 6, 1995, at 7 ($51.6 billion); Bureau of Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 829, table No. 1332 (1994) (for 1993, chemicals had a positive trade balance of $15.5 billion, with "agricultural products" following at a $13.8 billion positive figure).

[2] *See* 15 C.F.R. §§770–799 (1995).
[3] *See* 22 C.F.R. §§120.1–128 (1994).
[4] *See* 15 C.F.R. §799.1, Supp. No. 1.
[5] *Id.*, items 1C60C, 1C61B.
[6] *See* 22 C.F.R. §121.
[7] *See id.* §121.7.
[8] *Id.*
[9] Chemical Weapons Convention Implementation Act of 1995, transmitted to Congress May 25, 1995, U.S. Arms Control & Disarmament Agency Doc. D/EX9502101–1. As of December 1995, neither House nor Senate bill numbers had been assigned.
[10] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), *reprinted in* 32 ILM 800 (1993). *See generally* 88 AJIL 323 (1994). The Senate is not expected to take up the Convention until February or March 1996. For hearings on the earlier proposed Implementation Act of 1994, H.R. 4849 and S. 2221, 103d Cong., 2d Sess. (1994), see *Chemical Weapons Convention (Treaty Doc. 103-21): Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. (1994); *Implementation of the Chemical Weapons Convention: Hearings Before the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. (1994); *Military Implications of the Chemical Weapons Convention (CWC): Hearings Before the Senate Comm. on Armed Services*, 103d Cong., 2d Sess. (1994).
[11] *See* CWC, *supra* note 10, Annex on Chemicals, 32 ILM at 821–24.
[12] Examples include O-ethyl N,N-dimethyl phosphoramidocyanidate (tabun), 77-81-6; and O-ethyl S–2–diisopropylaminoethyl methyl phosphonothiolate (VX), 50782-69-9. Five substances identified in the Convention, but without CAS registry numbers, are also subject to control. Of these, only N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides appears on the CWC and not the Commerce and State lists. As an illustration of the other four, dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl–2–chlorides and corresponding salts, which appear on the CWC, appear on the Commerce list as diethyl-N,N-dimethylphosphoroamidate, 2404-03-7. Some substances identified by CAS registry number in the CWC are *exempt* from the terms of the Convention. An example is O-ethyl S-phenyl ethylphosphonothiolothionate (fonofos), carrying number 944-22-9.
[13] For chemicals, see item 1C60C, *supra* note 5. An illustration is the chemical carrying CAS number 1341-49-7. For toxins, see item 1C61B, *supra* note 5. Botulinum toxins are an example.
[14] *See* 22 C.F.R. §121.7.
[15] This is a deliberate use of the notion of "identification by name." That a chemical substance on the Commodity Control List or the Munitions List is not identified by name in the CWC schedules is not an indication that it is not covered by those schedules. *See* note 16 *infra*.

under the Commodity Control List but not under the CWC.[17] At the same time, however, the CWC calls for export controls on other chemical substances not currently required by name or CAS registry number to be under regulation by the United States. O-isopropyl methylphosphonochloridate (chlorosarin) and carbonyl dichloride (phosgene) fall under the export controls of the Convention[18] but are not explicitly named[19] as regulated chemicals under either the Commodity Control List[20] or the Munitions List.[21]

In regard to the CWC's expansion beyond chemicals now covered by U.S. export controls, it must be observed that, even if account is taken of the broad authority of the Department of State to subject to control any "chemical agent" it deems "a substance having military application,"[22] nowhere in the ITAR, or in Commerce's EAR, are there specific limitations on the export of chemicals of the sort found in Schedules 1 and 2 of the CWC's Annex on Chemicals. The CWC provides that Schedule 1 chemicals, those with a high potential for military application and little or no peaceful use,[23] may be

[16] The CWC's Annex on Chemicals, *supra* note 11, under B, "Schedule of Chemicals," second introductory paragraph, 32 ILM at 822, indicates that the listed chemicals are considered to include others made of a different combination of chemicals. As a consequence, fewer than 34 chemicals listed in the Commodity Control List are not covered by the CWC. For instance, the former lists ethylphosphonyl difluoride, 753-98-0, which does not appear by name in the CWC. Nonetheless, given the language of the second introductory paragraph, *supra*, the substance may be covered under Schedule 1, B(9), alkyl (Me, Et, n-Pr or i-Pr) phosphonyl-difluorides. Twelve other chemicals seem to qualify for the same analysis. Thus, only 21 substances on the Commerce list are not in the CWC schedules.

[17] *See* item 1C60C, *supra* note 5, No. 9; CWC Annex on Chemicals, *supra* note 11, Schedule 2, B(11), 32 ILM at 823.

[18] *See* CWC Annex on Chemicals, *supra* note 11, Schedules 1, B(11) and 3, A(1), 32 ILM at 823, 824.

[19] This is a deliberate use of the notion of "explicitly named." However, the fact that a chemical substance appears on the CWC schedules but is not named in the Commerce and State lists does not mean that it has escaped U.S. export control. Nonetheless, what can be said about chlorosarin and phosgene would seem to be of general applicability. Although the Office of Defense Trade Controls has broad control authority, it is more likely to invoke it to restrict exports of chlorosarin than of phosgene. The former is a Schedule 1 (most highly restricted) precursor, the latter only a Schedule 3 precursor.

[20] Twenty chemicals mentioned in the CWC schedules are also listed in the Commodity Control List. An illustration is thiodiglycol, 111-48-8. In addition, 13 other chemicals fall within the schedules, not by explicit reference, but by virtue of the two sets of broad language appearing in the CWC Annex on Chemicals, *supra* note 11, under B, second introductory paragraph, and Schedule 2, B(4), 32 ILM at 822, 823, in combination with the scheduled items carrying no CAS registry number and listed in Schedule 2, B(5–6) and (10–12), 32 ILM at 823. Examples of these 13 include diethyl ethylphosphonate, 78-38-6; and diethyl methylphosphonite, 15715-41-0.

Toxins listed in the schedules and the Commodity Control List, with CAS registry numbers, are as follows: saxitoxin, 35523-89-8; and ricin, 9009-86-3. Twenty-nine other chemicals listed in the CWC schedules are not on the Commerce list. *See supra* note 12. Twenty-seven of the chemicals carry a CAS registry number. Five other chemicals without CAS numbers appear in the CWC schedules, but only N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides, Schedule 2, B(5), is mentioned in the CWC and not under current U.S. export law. Since the focus is on CWC chemicals not mentioned in the Commodity Control List, one must add to this list of 28 the chemical trichloronitromethane (chloropicrin), 76-06-2, Schedule 3, A(4), which appears on the Munitions List and not on the Commodity Control List.

[21] Only three chemicals listed in the CWC schedules are identified on the Munitions List. However, the Department of State, under the ITAR, has extensive authority to regulate the export of chemicals other than those listed. The regulations provide, in 22 C.F.R. §121.7, that a controlled " 'chemical agent' includes, but is not limited to," the chemicals appearing on the Munitions List. As indicated *supra* note 19, however, such authority is more likely to be exercised in regard to chemicals on Schedule 1 than those on Schedule 3. Of the 28 chemicals listed on the CWC schedules and not currently subject to U.S. export control, all but the five Schedule 3 chemicals (phosgene, cyanogen chloride, hydrogen cyanide, ethyldiethanolamine, and methyldiethanolamine) could therefore be subjected to export regulation. *But see* text *infra* at notes 22–30. If the State Department does not regulate the export of Schedule 2 chemicals, the five listed in Schedule 3 could be supplemented by four additional chemical substances (amiton, PFIB, BZ, and N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides).

[22] *See* text at and note 8 *supra*.

[23] *See* CWC Annex on Chemicals, *supra* note 11, under A, Guidelines for Schedule 1, para. 1, 32 ILM at 822

transferred to states parties only, and then for none other than pharmaceutical, medical, research or protective purposes.[24] Schedule 2 chemicals, as of three years after the Convention enters into force, may be transferred for any peaceful purpose, but only to other states parties.[25] While the Office of Export Licensing and the Office of Defense Trade Controls probably refuse to license exports of Schedule 1 chemicals destined for countries like those that have not signed the CWC, authorization to ship to signatory countries is not conditioned in the regulatory provisions on use for pharmaceutical, medical, research or protective purposes.[26] Indeed, shipments may be made to Canada without a licensed authorization, let alone agreement to some condition on end use.[27] Similarly, while the CWC's prohibition on shipments of Schedule 2 chemicals to nonparties three years after entry into force is clear,[28] a request to Commerce or State to export Schedule 2 chemicals appearing on their respective lists to countries not party to the CWC is not automatically to be rejected under the terms of either the EAR[29] or the ITAR.[30]

This essay examines the export control provisions of the proposed domestic legislation to implement the CWC. Undoubtedly, the prohibition on the development, production and use of chemical weaponry;[31] the declarations regarding production, processing and consumption of chemical substances;[32] the matter of on-site inspections of chemical industry facilities;[33] and the destruction of chemical weapons stockpiles[34] may all prove more riveting to some. Nonetheless, in view of the position the U.S. chemical industry occupies in international trade and the industry's contribution to the economic vitality of the nation, it would be a substantial oversight to ignore the way the proposed Chemical

[24] *See* CWC, *supra* note 10, Annex on Implementation, pt. VI, A, paras. 1 and 2(a), 32 ILM at 824, 853–54.

[25] *See id.*, pt. VII, C, paras. 31 and 32, 32 ILM at 859–60.

[26] The EAR requires, 15 C.F.R. §778.8(a)(1) & (3), with a few country exceptions, a validated license to export any of the chemicals listed under item 1C60C or 1C61B of the Commodity Control List. The specific nature of the end use of the chemical or toxin affects decisions to grant or deny requests for validated licenses. *Id.* §778.8(d)(2)(i); *see also id.* §§778.8(c) and 773.9. The EAR, however, says nothing about restrictions on end uses of chemicals listed in Schedule 1. *See id.* §§778.8, 772.6(a)(2), and 773.9. As for export under a general license, i.e., export to a country other than one for which a validated license is required, *see id.* §770.3 (requiring, in most cases, a general license), the EAR takes the same approach as with validated licenses. However, in most cases, a Shipper's Export Declaration identifying end use must be submitted to Customs Service officials. *See* ANDREAS F. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS 21 (1983).

The ITAR provides, 22 C.F.R. §123.1 (1994), that exports from the United States of defense articles, like chemicals, are to be made with prior licensed approval of the Office of Defense Trade Controls. The Customs Service is permitted, however, to allow exports of unclassified articles without a license whenever they are for end use in Canada. *See id.* §126.5. In every case, a Shipper's Export Declaration identifying end use must be filed with Customs, *see id.* §123.16(a), but there are no restrictions on end use in the ITAR. *See id.* §126.7.

[27] *See* note 26 *supra*.

[28] *See* CWC Annex on Implementation, *supra* note 24, pt. VII, C, para. 31, 32 ILM at 859.

[29] The EAR clearly allows chemicals of this sort to be exported to most nations only under a validated license. *See* item 1C60C, *supra* note 5. Exports to a few identified countries may be made under a general license, *see supra* note 26. Yet even if export is destined for a country for which a validated license is required, the most the regulation dictates is denial of a request if, "on a case-by-case basis," it is determined the commodities involved would make a "material contribution" to development or production of chemical weapons. *See* 15 C.F.R. §778.8(d)(1). The nonproliferation credentials of the country of destination are considered, *id.*, subpara. (2)(iii), but nothing indicates that mere nonparty status under the CWC precludes granting a validated license.

[30] *See* 22 C.F.R. §126.7. As with the Commodity Control List, while a license request may be denied if the country of destination is not a party to the CWC, that result is not automatically required.

[31] *See* CWC, *supra* note 10, Art. I(1)(a), 32 ILM at 804; Implementation Act, *supra* note 9, secs. 201 (§§227(a), 227B(a)(3)), and 203(a).

[32] *See* CWC, *supra* note 10, Art. III, 32 ILM at 806–07, and Annex on Implementation, *supra* note 24, *e.g.*, pt. IV(A), A, 32 ILM at 836; Implementation Act, *supra* note 9, secs. 301–302.

[33] *See* CWC Annex on Implementation, *supra* note 24, *e.g.*, pt. II, 32 ILM at 829–34; Implementation Act, *supra* note 9, secs. 401–407.

[34] *See* CWC, *supra* note 10, Art. I(2–5), 32 ILM at 804; and Annex on Implementation, *supra* note 24, *e.g.*, pt. IV(A), C, 32 ILM at 837–40.

The prohibition on transfers of Schedule 2 chemicals to nonparties, beginning three years after the CWC enters into force, is also made applicable to any "person" by virtue of section 203(b)(2). Again, the implication is clear that U.S. affiliates of foreign enterprises are as subject to the prohibition as indigenous U.S. entities, when engaged in exporting from the United States.[48] Schedule 3 chemicals,[49] and so-called unscheduled chemicals,[50] are not dealt with as explicitly by the Act. According to the terms of the CWC, Schedule 3 and unscheduled chemicals may be transferred to anyone, but only when for research, industrial, agricultural, medical, pharmaceutical or other peaceful purposes.[51] Section 201 of the Act, and in particular that section's addition of section 227 of chapter 11A to title 18 of the United States Code, contains the relevant parallel language. The prohibition on transfers in section 227(a) applies without regard to whether the exported chemical is scheduled or unscheduled. The prohibition affects only transfers of any "chemical weapon," defined in section 227D(2) to exclude toxic chemicals and their precursors when transferred for peaceful purposes. Thus, Schedule 3 and unscheduled toxic chemicals would seem available for free and open exportation from the United States, but only when exported for peaceful purposes.[52]

Continuing with the language of section 227(a) of chapter 11A of title 18, there is no reason to believe it establishes any different regime over domestic than over foreign entities operating in the United States, when it comes to the export of Schedule 3 or unscheduled chemicals shipped to recipients in other countries for purposes that happen not to be peaceful. As the prohibition on shipments for such purposes is made explicitly applicable to "whoever" knowingly undertakes them, the fact that it governs in the same way the conduct of U.S. nationals or enterprises, and foreign nationals or enterprises located in the United States, is amply demonstrated. While "whoever" is undefined by the Act, its breadth leaves no doubt that it is intended to encompass at least the same entities as fall within the ambit of "person" subject to regulation in connection with the export of Schedule 1 and 2 chemicals.[53]

Support for reading the reference to the term "whoever" in the added section 227(a), as well as the reference in section 203 to the term "person," so as to cover domestic or foreign entities making exports from the United States can also be found in the apposite

[48] As with section 203(b)(1), "person" is defined with reference to being "located in" the United States. It will be interesting to see whether the implementing regulations define "located in" and, if so, whether the definition will include those who merely employ a U.S. agent to take possession and arrange the export from the United States of regulated chemicals. *See* Section-by-Section Analysis, *supra* note 45, at 7254 (defining person broadly to "ensure that all possible entities within the United States" are covered).

[49] *See* "Schedules of Chemicals," *supra* note 16, 32 ILM at 824.

[50] The CWC, *supra* note 10, Art. I(1)(a), 32 ILM at 804, establishes obligations with regard to "chemical weapons." Weapons are defined in Article II(1)(a), 32 ILM at 804–05, as including "toxic chemicals and their precursors," not just those listed in the schedules. *See also* Annex on Implementation, *supra* note 24, pt. IX, 32 ILM at 862 (obligations with regard to "discrete organic compounds" containing phosphorus, sulfur, or fluorine).

[51] See CWC Annex on Implementation, *supra* note 24, pt. VIII, C, paras. 26–27, 32 ILM at 862, on Schedule 3 chemicals. Transfer rights regarding unscheduled chemicals are much less direct. CWC Article I(1)(a), 32 ILM at 804, prohibits transfers to anyone of "chemical weapons," defined in Article II(1)(a), *id.*, as toxic chemicals and precursors, except for peaceful purposes. Article VI(1), *id.* at 809–10, states the right to transfer toxic chemicals for peaceful purposes, "subject to the provisions of this Convention." Nowhere in the CWC is the transfer of unscheduled chemicals regulated.

[52] See also CWC Annex on Implementation, *supra* note 24, pt. VIII, C, para. 26, 32 ILM at 862, requiring exporter to obtain from recipient state certification that the chemical transferred will be used only for peaceful purposes and will not be retransferred, and identification of the end use and end user. No such obligations are found in the Implementation Act.

[53] On prohibiting exports by foreign entities located in the United States, as well as by domestic entities, see *Implementation of the Chemical Weapons Convention: Hearing Before the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. 38 (1994) (Statement of Donald A. Mahley, Acting Assistant Director, Bureau of Multilateral Affairs, U.S. Arms Control and Disarmament Agency) [hereinafter Mahley].

jurisdictional provisions of the Act. Paragraph (c)(1) of both the added section 227 and section 203 declares the United States to have jurisdiction if a prohibited activity "takes place in the United States," which is defined by the Act as including all places under U.S. "jurisdiction or control."[54] This jurisdictional assertion tracks subparagraphs (a) and (b) of Article VII(1) of the CWC, which requires that each state party prohibit activities violative of the Convention "on its territory" or in places either "under its jurisdiction as recognized by international law" or "under its control."[55] As the requirement in subparagraph (a) regarding activities on a state's territory or places under its jurisdiction deals with conduct engaged in by "natural and legal persons," it contemplates that a state party will exercise its authority to prohibit transgressions by its own nationals or business ventures, or by foreign nationals or business ventures, anywhere within the concerned area. The requirement in subparagraph (b) regarding the exercise of authority over places under one's control, which by definition includes areas over which one is the territorial sovereign or has jurisdiction, does not contain a similar reference. Nonetheless, as it contemplates the exercise of authority over such places, it must envision the authority's extending to everyone, regardless of status as natural or legal person, and regardless of one's national origin or sovereign loyalty.[56] Given this understanding, the fact that the jurisdictional provisions of the Implementation Act track Article VII(1) implies that the United States intends to assert jurisdiction over anyone, indigenous or foreign, who is within its territory and is involved in export activities regulated by the Act.

IV. Exports from Overseas by U.S. Citizens or Foreign-Based Affiliates of U.S. Enterprises

The jurisdictional provisions of paragraph (c)(1) of both the added section 227 and section 203 of the Act are important for an entirely distinct reason as well. They do not just support the view that anyone who is located in the United States is required to comply with the export controls established by the Act; they also indicate that, in certain situations, the United States will apply the terms of the Act to areas outside its sovereign land territory. This is the thrust of the language quoted above, which speaks of the extension of authority to places over which the United States has "jurisdiction or control,"[57] an extension envisioned by the CWC.[58] Though the Implementation Act does not declare which places, apart from U.S. aircraft and oceangoing vessels,[59] are to be included, the references seem sufficiently broad to pull in, for instance, locations on the U.S. continental shelf or platforms attached thereto, overseas military bases, and perhaps even areas occupied by U.S. military forces yet within the sovereign territory of another nation.[60] International law recognizes the right of a coastal state to assert jurisdic-

[54] Implementation Act, *supra* note 9, §§5(b)(3) and 227D(8) (as added by sec. 201 of the Implementation Act).

[55] 32 ILM at 810.

[56] This conclusion is strengthened by the fact that subparagraph (a) of Article VII(1), *see* CWC, *supra* note 10, 32 ILM at 810, as well as subparagraph (c), uses language indicating to whom jurisdictional reach applies. No such indication is present in subparagraph (b), suggesting it has a scope encompassing the entities herein referenced.

[57] *See supra* text at and note 54.

[58] *See supra* text at and note 55. *See also* Thomas Bernauer, The Projected Chemical Weapons Convention: A Guide to the Negotiations in the Conference on Disarmament 67–69 (1990).

[59] *See* Implementation Act, *supra* note 9, §227D(8)(A)–(C) (as added by sec. 201 of the Act) and §5(b)(3)(A)–(C).

[60] *See* Section-by-Section Analysis, *supra* note 45, at S7254. *See also* Krutzsch & Trapp, *supra* note 46, at 115–16; and Article-by-Article Analysis, *in* S. Treaty Doc. No. 21, 103d Cong., 2d Sess. 40 (1993) (transmittal of CWC to Senate).

arrange for a wholly unrelated third party to make exports to some other country and would have the affiliate in return transfer a portion of its own chemical production.[72]

This discussion raises the issue of whether instigating an export of a chemical with regard to which one has nothing but bare legal title provides a basis for an assertion of authority under the Act. The language of section 227(a), as added by section 201, and of section 203(a) and (b), speaks of the unlawfulness of certain "transfers" of chemicals, suggesting there is such a basis. While in perhaps the classic export transaction one who has possession of certain items turns them over to an independent freight forwarder for shipment to a purchaser, "transfer" is broad enough to snare a multitude of less-classic transactions.[73] "Transfer" indicates that regulatory authority can be asserted when shipments destined for one nation leave the United States or a third country. The term connotes the movement or passage of something from one person or place to another, brought about by someone's conduct. It does not appear to require either that physical possession be changed or that the export be made from a point within the United States or under U.S. jurisdiction or control. Movement from one state to another brought on as a consequence of a U.S. entity's exercise of rights of legal ownership seems to suffice.[74]

VI. Retransfers of Exported Chemicals

Historically, an item exported from the United States has remained subject to U.S. export control laws even when in the hands of a foreign entity located in a foreign country.[75] Retransfers or reexports have had to be in accordance with what prevailing export rules authorize. In the context of the proposed Implementation Act, the factual situations likely to raise the matter of authority over retransfers or reexports of toxic chemicals will most likely involve shipments by a foreign importer located in a foreign nation who initially receives chemicals from the United States or another country. Obviously, if the retransfer is of chemicals imported into a foreign nation from a country other than the United States, no basis for extending the Act's export controls exists. Maybe jurisdiction could be asserted over a U.S. entity having a hand in arranging or instigating such a transaction, but as long as the entity making the retransfer and the chemicals involved have no connection with the United States, there is no basis for regulatory authority.

If the chemicals that are being retransferred or reexported were initially imported from the United States, a definite link is present that may be thought to supply a basis for jurisdiction. To assure that chemicals subject to the controls of the Implementation Act do not fall into the possession of rogue nations, continuing jurisdiction is to be exercised by the initial supplying nation. The weakness of this position, however, is that little in the provisions of the Act gives it support.[76] As concerns the extraterritorial reach of the export controls, the jurisdictional provisions of the added section 227(a) and of section 203 refer to nothing more than, essentially, control over the activities of U.S. citizens located abroad. In fact, the whole thrust of the Act is toward deriving U.S. authority from the place where prohibited conduct occurs or the person engaged in

[72] Obviously, the foreign country from which chemical exports are made is in a position to exercise jurisdiction. Our concern, though, is with whether the Implementation Act envisions that the United States will exercise jurisdiction over the U.S. entity that has taken legal title to and arranged for the exports.

[73] On the many facets of the term "transfer," see *supra* note 46.

[74] On the broad construction in the CWC, see Krutzsch & Trapp, *supra* note 46, at 13.

[75] *See* 15 C.F.R. pt. 774 (1994).

[76] The only conceivable argument is based on the added §227(a)'s application of a prohibition on "knowing" transfers to "who[m]ever." *See supra* note 70.

such conduct. Nowhere is there any indication that authority can be connected with the origin of the regulated substances.

VII. Conclusion

It is difficult to know the exact configuration of a final U.S. control regime under the Chemical Weapons Convention until Congress enacts implementing legislation and the Department of Commerce's Bureau of Export Administration adopts a regulatory scheme. In the event an effort is made to track precisely the Clinton administration's proposals before the House of Representatives and the Senate, the ultimate configuration is sure to address several important dimensions of export trade in toxic chemicals and their precursors.

Exports from facilities in the United States by any individual U.S. citizen or business, or any foreign citizen located in the United States or U.S. affiliate of a foreign business, will have to be in conformance with applicable limitations, especially that regarding the country of destination. Shipments from overseas facilities by any entity located there will be subject to the same limitations if that place is under the jurisdiction or control of the United States. If the export is from an overseas location situated beyond the jurisdiction or control of the United States, individual U.S. citizens located overseas and engaged in the undertaking will also be obligated to meet those requirements, as will any entity, foreign or domestic, arranging from within the United States an export of a controlled chemical from an overseas location. Foreign entities, whether overseas affiliates of U.S. enterprises or foreign nationals or business ventures, will escape those requirements, even if the transaction involves a retransfer or reexport of toxic chemicals or precursors initially imported from the United States, or a shipment from production within the exporting country.

To date, the conventional wisdom has suggested that U.S. implementation of the obligations in the CWC could result in liberalization of the current export control regime on chemicals. Some commentators have speculated that adoption of domestic legislation similar to the administration's proposals may result in removing from control some chemicals currently subject to strict export regulation.[77] While certainly true, this view reflects only part of the picture. As noted at the outset, given the language of the EAR and the ITAR, it is also possible that some chemicals not under control now will be placed under control, and that the controls already placed on some chemicals will take on a more restrictive character. In light of the importance of the chemical industry to the overall health of U.S. export trade, one can hardly doubt the genuine significance of the export control dimension of the proposed Chemical Weapons Convention Implementation Act.

Rex J. Zedalis*

[77] *See* Office of Technology Assessment, *supra* note 47, at 41.

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Appreciation must be expressed to Robert C. Wade, Senior Chemist (ret.), Ventron Corp., a subsidiary of Morton International, for his consultative assistance on the portions of this commentary dealing with the chemical substances appearing in the various lists and schedules discussed herein.

AGORA: WHAT OBLIGATION DOES OUR GENERATION OWE TO THE NEXT? AN APPROACH TO GLOBAL ENVIRONMENTAL RESPONSIBILITY

DO WE OWE A DUTY TO FUTURE GENERATIONS TO PRESERVE THE GLOBAL ENVIRONMENT?

A common assumption underlying nearly every book or essay on the global environment is that the present generation owes a duty to generations yet unborn to preserve the diversity and quality of our planet's life-sustaining environmental resources. This duty is sometimes said to be an emerging norm of customary international law,[1] including the more recently treaty-generated custom of the "common heritage of mankind."[2] Professor Edith Brown Weiss lists three different approaches one might take in response to an asserted environmental obligation to future generations: the "opulent" model, which denies any such obligation and permits present extravagance and waste; the "preservationist" model at the other extreme, which requires the present generation to make substantial sacrifices of denial so as to enhance the environmental legacy; and the "equality" model —favored by Professor Weiss—which says we owe to future generations a global environment in no worse condition than the one we enjoy.[3]

I. PARFIT'S PARADOX OF FUTURE INDIVIDUALS

International law scholars appear to have overlooked the startling thesis put forth by Derek Parfit in 1976.[4] I will state his thesis in a somewhat stronger form than he did.[5] Let us picture the people who will be living 100 years from now:[6] they will be specific, identifiable persons. We can claim that we currently owe an environment-preserving obligation to those particular as-yet-unborn persons. Parfit's paradox arises when we seek to discharge that postulated obligation. Suppose that we undertake a specific environmental act of conservation. (For example, we help to pass a law requiring catalytic converters on all automobiles in our state. We will thus have succeeded in intervening in the environment—making the environment slightly different from the way it would have been but for our action. Our intervention will reduce the amount of air pollution that otherwise would have taken place, and increase the utilization of energy and resources in the manufacture of catalytic converters.

Yet this slight difference resulting from our intervention in the environment will affect the ecosphere in the years subsequent to our intervention. In particular, it will affect the conditions under which human procreation takes place. The particular sperm and egg cells from which any human being develops is a highly precarious fact; the slightest difference in the conditions of conception will probably result in fertilization of the egg by a different sperm. (Hence, when the environment is disrupted even a slight amount, a different future person will probably be conceived. According to Parfit's thesis, our intervention in the environment will make a sufficient impact to assure that different sperm cells will probably fertilize the egg cells in all procreations that take place subsequent to our environmental intervention. Different people will be born from those who would have been born if we had not intervened in the environment.

To be sure, in the first few years following our environmental intervention, there is very low probability that many subsequent human conceptions will be affected. But as years go by, the effect of our single environmental intervention increases exponentially[7] until it is a virtual certainty that 100 years from now all human conceptions will have been affected a little bit from our single act of environmental intervention, and that this little effect will actually result in fertilization of egg cells by sperm cells different from those that would have fertilized those egg cells in the absence of our act. Parfit's conclusion is that every single person alive 100 years from now will be an entirely different individual from the person he or she would have been had we not intervened in the environment.

This fact creates a paradox in our attempt to discharge our moral obligation to future generations. How can we owe a duty to future persons if the very act of discharging that duty wipes out the very individuals to whom we allegedly owed that duty? Our attempted environmental altruism will prevent the birth of the precise beneficiaries of our altruism.

It is no answer to argue that the entirely new set of individuals who will replace those we wipe out will themselves greatly benefit from our intervention. For although they may be the beneficiaries of our environmental intervention, we could not have owed a *duty* to them because they were not probable persons at the time we claimed that we had a duty. Any present duty that we have to future generations can only be a duty to particular future persons who are awaiting their turn to be born. If in exercise of such an alleged duty we commit an act of environmental intervention that denies

[1] Professor Weiss regards it as an obligation *erga omnes* that has some support in customary international law. *See* Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 540–44 (1984).

[2] *See* D'Amato, *An Alternative to the Law of the Sea Convention*, 77 AJIL 281, 282–83 (1983).

[3] E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989).

[4] Parfit, *On Doing the Best for Our Children*, in ETHICS AND POPULATION 100 (M. Bayles ed. 1976); Parfit, Overpopulation: Part One (ms. 1976), *referred to in* Parfit, *Future Generations, Further Problems*, 11 PHIL. & PUB. AFF. 113 (1982) [hereinafter *Future Generations*].

[5] My restatement takes into account chaos theory: *see infra* text at notes 9–11. Parfit originally assumed large-scale environmental interventions, yet his thesis is in fact applicable to *any* environmental intervention.

[6] In saying this, I do not assume that the human race will necessarily survive the next 100 years. Acts of cosmic stupidity are always possible: self-obliteration by nuclear war, depletion of the ozone layer, and so on.

[7] According to chaos theory. *See infra* text at note 10.

able *reason*—the reason of self-interest. True, she adds, those acts will operate to change the conditions of future human procreation in such a way that the class of persons she represents will change its members' identities each time we act. But she accepts this result as inevitable. On the other hand, she strenuously objects to any of our acts of environmental intervention that are motivated solely by a sense of obligation to her clients. That is not a good reason to act, she argues, because in so acting we will gratuitously destroy her clients. Our attempt to be altruistic to her clients will result in their destruction. "We don't need friends like you," she might conclude. "My clients would rather live in whatever environment is left to them than not be born at all."

Perhaps we can shift the ground of contention to argue that Parfit's thesis should be disregarded because our obligation to act to preserve the environment stems from a generic notion of "future generations" and not because we have any particular future individuals in mind. In other words, can we say that we do not care which persons inherit the earth so long as whoever inherits it inherits a habitable planet in no worse condition than the one we enjoy? Of course we can *say* all this, and in a rather rough way we probably think it and act upon it. But the argument, upon inspection, simply glosses over the problem. Future generations are not an abstraction; they consist of individuals. The particularity of the individuals is apparent when we consider how lucky it is for anyone to be born. The odds of your being born instead of one of your many potential siblings are comparable to the odds of winning the Pennsylvania Lottery in the recent drawing when the first prize was over $100 million. The point is that the winner of the lottery would not be equally content to have any other person win the lottery; similarly, you and I would not be content if a different person had been born instead of us. We may have been lucky to have been born at all, but we are not ready to relinquish that luck simply on the ground that large numbers and vanishingly small probabilities are involved. The fact that *somebody* will be born does not mean that the person lucky enough to be born is indifferent about who it is.[13] Future generations cannot be indifferent about whether it is *they* or other persons who will enjoy the fruits of the earth. If we feel we owe an obligation to *them*, we, too, cannot be indifferent about the question. We cannot discharge our obligation to them if in the process of doing so we deprive them of life.

III. Given Parfit's Paradox, Do We Have Environmental Obligations?

At first blush, Parfit's thesis appears to set us back. It seems to justify Professor Weiss's "opulent" model in a way that most of us would instinctively find morally repulsive. Although I believe that Parfit's thesis is unassailable, I do not think it is retrogressive. Instead, it may help us to clear the ground of unnecessary conceptual confusion and proceed on a firmer footing.

[13] *Cf.* Leslie, *No Inverse Gambler's Fallacy in Cosmology*, 97 Mind 269 (1988).

I suggest that we begin by noticing that the notion of obligation to future generations is typically located within the developing concept of international human rights. The general argument starts with the claim that human rights are more important than any other value in international law, including the rights of states. And it continues by claiming that future generations also have a human right—the right to inherit an environment no worse than the one we enjoy.

The foregoing are relatively uncontroversial assertions. But if we look closely, we see that the entire concept of "human rights" is species chauvinistic. This form of chauvinism is illustrated by the following quotation from Judge Richard Posner: "Animals count, but only insofar as they enhance wealth. The optimal population of sheep is determined not by speculation on their capacity for contentment relative to people, but by the intersection of the marginal product and marginal cost of keeping sheep."[14] Posner purports to derive these conclusions from his principle of wealth maximization, which for him constitutes the bedrock *moral* justification for all law.[15] He characterizes "wealth" solely in human terms; the sheep's own wealth, of course, is not to be maximized or even taken into account. Since a sheep's own capacity for enjoying life has *by definition* nothing to do with maximizing human wealth, it becomes for Posner *morally and legally irrelevant.*

One of the most articulate opponents of "animal rights" is R. G. Frey, whose species chauvinism is explicit when he writes:

> [I]t is the sheer richness of human life, and in what this richness consists, which gives it its superior quality. Some of the things which give life its richness we share with animals; there are other things, however, which can fill our lives but not theirs. For example, falling in love, marrying, and experiencing with someone what life has to offer; having children and watching and helping them to grow up; working and experiencing satisfaction in one's job; listening to music, looking at pictures, reading books . . . . By comparison with animals, our lives are of an incomparably greater texture and richness . . . .[16]

Few persons would quarrel with this statement if Professor Frey has in mind the lowest forms of animal life such as insects and mollusks. But what about whales or chimpanzees? Some whales possess a brain six times bigger than the human brain; Dr. John Lilly has claimed that they are more intelligent than any man or woman.[17] According to Dr. Kenneth Norris, whales see and taste through sounds, and possess many other faculties of which we are only vaguely aware.[18] Chimpanzees, monkeys and gorillas take obvious pleasure in raising their young, and exhibit the same gamut of emotions in the process as do humans. They seem to understand human sign language

[14] R. A. Posner, The Economics of Justice 76 (1983).

[15] "Wealth maximization provides a foundation not only for a theory of rights and of remedies but for the concept of law itself." *Id.* at 74.

[16] R. G. Frey, Rights, Killing, and Suffering 109–10 (1983).

[17] J. Lilly, Man and Dolphin (1961).

[18] *Cited in* D. Day, The Whale War 154 (1987).

blessed with the intelligence to figure out how to survive in an environment where we are not physically the strongest, fastest or best-protected animals. That same intelligence can be stretched to include a world-based empathy for the environment, "beneficent" in Parfit's sense.

We should not limit our actions to those we are able to determine now as directly or indirectly benefiting ourselves or our descendants. Rather, we should cultivate our natural sense of obligation not to act wastefully or wantonly even when we cannot calculate how such acts would make any present or future persons worse off.[25] There is good evidence that customary international law—with various fits and starts and setbacks—is moving generally in this direction, perhaps responding to a deep and inarticulate sense that human beings are not in confrontation with, but rather belong to, their natural environment. That such law is currently given the label "human rights" should not constrict our understanding of what it is or where it is going.

ANTHONY D'AMATO*

OUR RIGHTS AND OBLIGATIONS TO FUTURE GENERATIONS FOR THE ENVIRONMENT

> This we know: the earth does not belong to man: man belongs to the earth. . . . Whatever befalls the earth, befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself.
>
> *Chief Seattle*†

We read every day about the desecration of our environment and the nismanagement of our natural resources. We have always had the capacity o wreck the environment on a small or even regional scale. Centuries of rrigation without adequate drainage in ancient times converted large areas of the fertile Tigris-Euphrates valley into barren desert. What is new is that ve now have the power to change our global environment irreversibly, with profoundly damaging effects on the robustness and integrity of the planet nd the heritage that we pass to future generations.

In Fairness to Future Generations argues that we, the human species, hold he natural environment of our planet in common with all members of our

[25] This would be a pure example of deontological ethics in Kant's sense. For a brief discus- on and references, see D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 51, 772–73 (1983) ("a deontological theory of ethics says that some acts are morally obliga- ry regardless of their consequences for human happiness").

* Of the Board of Editors.

† Letter from Chief Seattle, patriarch of the Duwamish and Squamish Indians of Puget ound, to U.S. President Franklin Pierce (1855). Although the letter appears in numerous thologies, the original has never been located.

species: past generations, the present generation, and future generations.[1] As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.

There are two relationships that must shape any theory of intergenerational equity in the context of our natural environment: our relationship to other generations of our own species and our relationship to the natural system of which we are a part.[2]

The human species is integrally linked with other parts of the natural system; we both affect and are affected by what happens in the system. The natural system, contrary to popular belief, is in many ways a hostile one. Deserts, glaciers, volcanoes, tsunamis can bring havoc to our species. Moreover, the natural environment can be toxic to our species, as through the natural toxicity of some plants and animals or the dramatic release of toxic clouds of carbon dioxide from Lake Nyos in the Cameroon, which killed 1,700 people. On the other hand, the natural system makes life possible for us. It gives us the resources with which to survive and to improve human welfare.

Our actions affect the natural system. We alone among all living creatures have the capacity to shape significantly our relationship to the environment. We can use it on a sustainable basis or we can degrade environmental quality and the natural resource base. As part of the natural system, we have no right to destroy its integrity; nor is it in our interest to do so. Rather, as the most sentient of living creatures, we have a special responsibility to care for the planet.

The second fundamental relationship is that between different generations of the human species. All generations are inherently linked to other generations, past and future, in using the common patrimony of earth.[3]

To define intergenerational equity, it is useful to view the human community as a partnership among all generations. In describing a state as a partnership, Edmund Burke observed that "as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who

[1] E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989).

[2] The field of human ecology studies this relationship. *See* READINGS IN MAN, THE ENVIRONMENT, AND HUMAN ECOLOGY (A. S. Boughey ed. 1973) (good selection of readings in human ecology); R. & P. WATSON, MAN AND NATURE (1969) (thoughtful essay).

[3] Professor D'Amato criticizes existing theories of equity for depending on "an articulate link to the improvement of the *human* condition" (i.e., as anthropocentric), rather than on a moral relationship with nature itself. It is certainly true that *In Fairness to Future Generations* is concerned with equity among generations of the human species. But it is equity with regard to the care and use of the planet, which is explicitly rooted in the recognition that the human species is part of the natural *system*. This implies great respect for the natural system of which we are a part, but it does not imply that all other living creatures are or should be treated equally. Rather, the human species, as a part of this natural system, has a special obligation to maintain the integrity of the planet, so that all generations will be able to enjoy its fruits.

and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations. This principle is called "conservation of options." Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of "conservation of quality." Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of "conservation of access."

These proposed principles constrain the actions of the present generation in developing and using the planet, but within these constraints do not dictate how each generation should manage its resources.

These principles of intergenerational equity form the basis of a set of intergenerational obligations and rights, or planetary rights and obligations, that are held by each generation. These rights and obligations derive from each generation's position as part of the intertemporal entity of human society.

Planetary rights and obligations are integrally linked. The rights are always associated with obligations. They are rights of each generation to receive the planet in no worse condition than did the previous generation, to inherit comparable diversity in the natural and cultural resource bases, and to have equitable access to the use and benefits of the legacy. They represent in the first instance a moral protection of interests, which must be transformed into legal rights and obligations.

Planetary rights and obligations coexist in each generation. In the *inter*generational dimension, the generations to which the obligations are owed are future generations, while the generations with which the rights are linked are past generations. Thus, the rights of future generations are linked to the obligations of the present generation. In the *intra*generational context, planetary obligations and rights exist between members of the present generation. They derive from the *inter*generational relationship that each generation shares with those who have come before and those yet to come. Thus, intergenerational obligations to conserve the planet flow from the present generation both to future generations as generations and to members of the present generation, who have the right to use and enjoy the planetary legacy.

Intergenerational rights of necessity inhere in all generations, whether these be immediately successive generations or ones more distant. There is no theoretical basis for limiting such rights to immediately successive generations. If we were to do so, we would often provide little or no protection to more distant future generations. Nuclear and hazardous waste disposal, the loss of biological diversity and ozone depletion, for example, have significant effects on the natural heritage of more distant generations.

Intergenerational planetary rights may be regarded as group rights, as distinct from individual rights, in the sense that generations hold these rights as groups in relation to other generations—past, present and future.[9] They exist regardless of the number and identity of individuals making up each generation. When held by members of the present generation, they acquire attributes of individual rights in the sense that there are identifiable interests of individuals that the rights protect. However, those interests derive from the fact that those living now are members of the present generation and have rights in relation to other generations to use and benefit from the planet. The remedies for violations of these rights will benefit other members of the generation, not only the individual.[10]

Developments in international law outside the field of the environment make acceptance of intergenerational rights a natural and desirable evolution. Indeed, international human rights law—the genocide convention, and the prohibition against racial discrimination, to cite two examples—are arguably directed as much to the protection of future, as to present, generations. The extinction of, for example, an entire people is more odious in law than the murder of an equal number of people constituting a minority of each of several groups. Similarly, discrimination denies an "equal place at the starting gate" not only to the generation of the suppressed group but (by implication) also to future generations. Provisions in other human rights agreements refer to rights of children and of the elderly, and to education and training, which are implicitly temporally oriented.

One might still ask whether it is not preferable to speak only of planetary obligations toward future generations without corresponding intergenerational rights. Can intergenerational obligations exist without rights?[11] While rights are always connected to obligations, the reverse is not always true. Theoretically, an obligation need not always entail a right. For example, a moral obligation of charity does not give those who benefit a right to charity. The legal positivist Hans Kelsen hesitated to find a legal right connected to certain legal obligations.

[9] For a thoughtful analysis of group rights in relation to goods that are enjoyed together, see J. Waldron, Can Communal Goods Be Human Rights? (paper delivered at Conference on Development, Environment and Peace as New Human Rights, Oxford University, Oxford, England, May 28–31, 1987).

[10] The temporal dimension may offer a theoretical basis for unifying those human rights that we now consider to be group or social rights and for so-called new human rights. Group rights, such as cultural rights, have a temporal dimension since the community inherently extends over time. Theoretically, rights to development, to food, to health, and to the environment can be seen as intergenerational, or intertemporal, in that they are rights of access of each generation to use and benefit from our natural and cultural resources. *See* E. BROWN WEISS, *supra* note 1, at 114–15.

[11] Bryan Norton, a philosopher, argues that if one accepts the conceptual model of rights as limited to individual rights (which he does), it is preferable to recognize general obligations toward the integrity of environmental systems rather than to discuss environmental protection in the framework of rights, since this framework cannot encompass such categories as future generations, whose individual members are still contingent. Norton, *Environmental Ethics and the Rights of Future Generations*, 7 SOC. THEORY & PRAC. 319, 337 (1981).

uals until they are born, and hence it is necessary and appropriate to speak of future generations qua generations as having rights in relation to the planet.

Professor D'Amato correctly points out that the composition of future generations cannot be known in advance, in part because it is affected by actions of the present generation. Indeed, he does not make his own case as strongly as he might. For example, we do not need to limit ourselves to ascribing these effects to subtle changes in the biochemistry of conception, as Professor D'Amato does in his amusing excursion into the dynamics of egg and sperm.

Virtually every policy decision of government and business affects the composition of future generations, whether or not they are taken to ensure their rights under the guidelines enunciated above. Decisions regarding war and peace, economic policy, the relative prosperity of different regions and social groups, transportation, health, education—all influence the demographics and the composition of future generations by affecting the lives and fortunes of the present generation: who will succeed and prosper, who will marry whom, who will have children, and even who will emigrate.

In Fairness to Future Generations takes the view that our planetary obligations to future generations are owed to all the earth's future human inhabitants, whoever they may be. This opens the possibility that these decisions, too, deserve to be scrutinized from the point of view of their impact on future generations. Professor D'Amato's approach reflects an unnecessarily constrained view of human rights law that would shut off a useful and broadly acceptable theoretical underpinning to sustainable resource development. (The possibility that intergenerational equity may place limits on our actions is an important new area of human rights research.)

Such limitations should be applied very narrowly, lest the rights of future generations develop into an all-purpose club to beat down any and all proposals for change. But surely long-term environmental damage is a good place to begin. Future generations really do have the right to be assured that we will not pollute ground water, load lake bottoms with toxic wastes, extinguish habitats and species or change the world's climate dramatically —all long-term effects that are difficult or impossible to reverse—unless there are extremely compelling reasons to do so, reasons that go beyond mere profitability.

Professor D'Amato invokes chaos theory to justify his contention that any environmental intervention will produce different individuals in the future than would otherwise have been produced. But he overlooks the most important implication of chaos theory for the environment and for future generations: namely, that systems do not proceed on orderly, linear paths of change, but rather that they will abruptly change.[15] This can be demonstrated on a home computer, using a very simple program. It has been suggested that there may be key breaking points in our global environmental system, beyond which systems will reorganize and substantially change their properties.[16] If we are concerned about future generations, it is important to try to predict these breaking points. More importantly, the best tool that we could give future generations to respond to abrupt changes and reorganizations is a robust planet, which requires conserving a diversity of resources so that future generations have greater flexibility in designing responses.

[15] For catastrophe theory, see R. THOM, MATHEMATICAL MODELS OF MORPHOGENESIS (1983); for the theory of complex systems, see I. PRIGOGINE & I. STENGERS, ORDER OUT OF CHAOS: MAN'S NEW DIALOGUE WITH NATURE (1984). For a concise review of the influence of chaos theory, see *Chaos Theory: How Big an Advance?*, 245 SCIENCE 26 (1989).

Professor D'Amato proposes that there is a "preverbal sense of morality" that tells us not to waste resources, degrade the environment or wantonly kill animals. But, if anything, history in the last few centuries suggests that our natural instincts are self-indulgent. We have desecrated environments, wasted resources and slaughtered animals purely for pleasure or for modest personal gain. It may be that the human species carries both a selfish gene and an altruistic one, as the sociobiologists tell us,[17] but it is hardly sufficient to rely on the generous gene to build a theory of morality to overcome the selfish genes, without more.

In Fairness to Future Generations relies on a fundamental norm of equality among generations of the human species in relation to the care and use of the natural system. But it recognizes that we are part of the natural system and that we, as all other generations, must respect this system. We have a right to use and enjoy the system but no right to destroy its robustness and integrity for those who come after us.

Whether we rely on a beneficent "preverbal sense of morality" toward the planet and its resources or on theories rooted in the welfare of the human condition and the ecological system of which people are a part, there is a shared recognition that the present generation has an obligation to care for the planet and to ensure that all peoples can enjoy its services.

EDITH BROWN WEISS*

OUR RESPONSIBILITY TO FUTURE GENERATIONS

In recent years, lawyers have begun to join ecologists in debating whether there are—or should be—obligations to protect the interests of future generations.[1] This legal debate was preceded by a philosophical one, dating back to the early 1970s, on the emergence of a new or "ecological" ethic

[16] G. Gallopin, President, Fundación Bariloche, discussion with author, June 1986. This is consistent with the scientific paradigms in the theories of catastrophe and of the dynamics of complex systems far from equilibrium.

[17] *See, e.g.*, J. & J. BALDWIN, BEYOND SOCIOBIOLOGY (1981). Sociobiologists assert that there are four types of inherent behavior that explain all our social behavior: selfish, altruistic, cooperative and spiteful. Humans act so as to try to ensure that their genes will be carried forward into succeeding generations. *Id.* at 49–50.

* Of the Board of Editors.

[1] For the German-speaking context, see P. SALADIN & C. A. ZENGER, RECHTE KÜNFTIGER GENERATIONEN (1988).

for being able to cope with the problems ("People have always found a way; they'll make it this time, too").

Even if there is global consensus that the human species is to survive, do Parfit's paradox and/or chaos theory compel a different approach to that objective, as Professor D'Amato tells us? Professor D'Amato's argument seems to be that if we act in the interest of future generations, we will deprive the concrete individuals to be born of their identity, which, he suggests, is the most serious infringement of the interests of future generations.

Professor D'Amato is right in saying that if we care for, and act in the interest of, future generations, the individuals who will be born will not be the same as they would have been if we had not done so. They will certainly have a different identity. However, it is neither logically compelling nor acceptable that identity, as defined by Parfit (and Professor D'Amato), be the sole and decisive criterion for our behavior toward future generations.

The reasoning behind the identity and chaos arguments seems to be that man should not interfere with historic events so as to preserve all options for posterity. What is overlooked is that man always interferes with history, even when he is not aware of, and taking care of, future generations. "Identity" in Parfit's (and Professor D'Amato's) sense in any event results from what man is doing today. The identity of future individuals is always constituted by the behavior of the preceding generations. Intervention is an inescapable fact of life. The only question is whether the interventions are conscious, deliberate and concerned, or not.

If we follow the identity/chaos arguments, future persons will have an identity we need not envy. And for many, the problems will not be raised because they will not be born at all.

II. Rights of or Duties toward Future Generations?

If we accept that there is a responsibility to future generations, the question arises whether there are—should be—"only" duties of present generations. Professor Weiss, like others,[14] argues strongly in favor of rights of future generations, for which she offers a theoretical rationale; she also believes that rights of future generations would have "greater moral force" than obligations of present ones.

I do not have any difficulty in following Professor Weiss's concept of rights of future generations, though it transcends the traditional understanding of rights, which ordinarily has reference to the individual. I also share the view that rights of future generations have "greater moral force" than mere obligations of present generations. However, I should like to suggest that the whole controversy should not be concentrated on the issue of rights of, or duties toward, future generations. This is really not the major problem, and it should therefore not consume all our time, energy and imagination. The major problem is what we have to do today to meet our responsibility to future generations—what the concrete obligations are —and how we can fulfill these obligations under the present circumstances

[14] P. Saladin & C. A. Zenger, *supra* note 1.

of the international community. This remains the major problem even if we recognize rights of future generations because, as Professor Weiss rightly observes, rights are always connected to obligations.

Consequently, I prefer to emphasize the need to work, now, toward a global consensus on what those obligations entail. Specifically, the consensus should encompass a duty of our present generation to preserve nature and the environment so as to enable future generations to live on the same standard as we claim today. As soon as we reach this consensus—which should not really be difficult—we should apply all our powers of reasoning to define its fundamental implications. What we need are basic principles for acting in the interest of future generations.

We cannot simply rely on the assumption that our way of dealing with nature and the environment will turn out to be harmless. Nor can we expect that future generations will develop the knowledge and technology necessary to cope with all the problems they inherit from us. Therefore, today we must take true preventive action, or more precisely, precautionary action,[15] which will ensure that natural resources are used sparingly and that degradation of the environment is reduced to a minimum. After two decades of experience with environmental protection, we know that we will not be successful if we only make marginal corrections or take sporadic protective measures. The objective of true preventive environmental protection will only be achieved if we change, fundamentally and on a global level, our way of running the economy. This, in turn, will be achieved only if we change our basic system of values. Economic growth is not per se an indicator of progress, nor is wealth necessarily an indicator of prosperity.

The most difficult challenge to all efforts to define and achieve "intergenerational equity" will turn out to be that we have failed to achieve equity within our own generation. The economic development of states continues to be fiercely unequal. Inequality of development is also reflected in the state of the environment; the environmental problems of many developing countries are far more serious than those of industrialized countries. Thus, we face a twofold challenge: we have to meet the "old" responsibility to achieve equity within the present generation and we have to be concerned about the future of humankind. These duties are linked to each other; poverty in the countries of Africa, Asia and Latin America is one of the most serious threats to future generations. One could also put it this way: without equity within the present generation, we will not be able to achieve equity among generations.

The inequities of the present imply that we cannot solve the problems of the future simply by postulating a global collective sacrifice. For many countries, restrictions would not be possible and would even deteriorate the economy and, thus, the environment. Many countries need development for the very reason that it is an essential prelude to finding long-term solutions to environmental problems. As a result, we also require a new order for the use of nature and the environment by the members of the

[15] *See* Gündling, *The Status in International Law of the Principle of Precautionary Action*, Int'l J. Estuarine & Coastal L. (forthcoming).

Committee. Thus, the challenge before the Council will be to carve out for itself a constructive and innovative role as the parent organ of the new Committee. In the longer term, the Committee would benefit from being accorded a steadily increasing degree of autonomy.

PHILIP ALSTON & BRUNO SIMMA*

REVISION OF ILO CONVENTION NO. 107

Meeting for 10 days in Geneva last September, a group of 15 experts convened by the International Labour Office recommended substantial changes in ILO Convention No. 107, which for nearly 30 years has been the only binding international instrument on the rights of indigenous and tribal peoples. Noting the importance placed on the right to self-determination by indigenous peoples, the experts concluded that the Convention's original emphasis on integration[1] "no longer reflects current thinking" and should be replaced by the principle of affording these peoples "as much control as possible over their own economic, social and cultural development."[2] The Organisation's Board of Governors approved the experts' report in November, and placed the revision on the agenda for the 1988 General Labour Conference.

Following closely on the heels of the decision by the United Nations Commission on Human Rights to authorize the drafting of a declaration on the rights of indigenous peoples, the ILO action reflects growing international awareness of the special character and assertiveness of indigenous organizations, as well as the increasing recognition of collective human rights in international law.[3]

The Convention

Emerging from the same pan-American "indigenist" movement that produced the Inter-American Indian Institute,[4] Convention No. 107 was intended to address the growing isolation and marginalization of Indian groups in the wake of national development, which its drafters conceived of as a product of racism and racial discrimination.[5] Hence, it urged states to ensure that indigenous and tribal peoples participate in and benefit from development, rather than being merely displaced by projects. It also promoted their inclusion in education and other public benefits, without adverse discrimination. Sharing decision-making power with these "less advanced" groups, however, was taken no farther than "collaboration" with their leaders, and respect for their customs was encouraged only to the extent compatible with "the objectives of integration programmes."[6]

On the crucial issue of land rights, the original Convention did relatively little to restrict state power. Indigenous groups' "ownership, collective or individual, over the lands which [they] traditionally occupy" was recognized,[7] but so, too, was states' power to resettle communities "in the interest of national economic development."[8] Convention No. 107's chief safeguard against the widespread destruction of indigenous communities was the requirement that states provide displaced peoples with substitute lands of "at least equal [quality,] suitable to provide for their present needs and future development."[9] The impossibility of so doing in industrializing, heavily populated states was ignored.

Although the major initiative for the Convention came from the Americas, it also attracted the interest of several African and Asian states. They regarded their analogous problems, however, as "tribal" rather than "indigenous"; hence, the Convention was drafted carefully to include "tribal populations" "whose social and economic conditions are at a less advanced stage than . . . other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations";[10] as well as those "which are regarded as indigenous on account of their descent from the populations which inhabited the country . . . at the time of conquest or colonisation and which . . . live more in conformity with the social, economic and cultural institutions of that time than with [national] institutions."[11] That is, the Convention had as its objects "tribal" groups that were segregated culturally or legally from national society, whether or not this had arisen from the historical circumstances of colonization.

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[1] See especially Article 2(1) of the Convention, calling on governments to develop "co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919–1981, at 858 (1982) [hereinafter Convention].

[2] ILO Doc. APPL/MER/107/1986/D.7, at 32.

[3] Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AJIL 369 (1986). For parallel activities in other international bodies, see UNESCO, Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San José (Costa Rica), UNESCO Doc. SS 82/WS.32 (1981); WORLD BANK, TRIBAL PEOPLES AND ECONOMIC DEVELOPMENT: HUMAN ECOLOGIC CONSIDERATIONS (1982).

[4] *See* Barsh, *The IX Inter-American Indian Congress*, 80 AJIL 682 (1986).

[5] G. BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW (Occasional Paper No. 37 of the Royal Anthropological Institute of Great Britain and Ireland, 1978); Swepston & Plant, *International standards and the protection of the land rights of indigenous and tribal populations*, INTERNATIONAL LABOUR REV., No. 1, 1985, at 91; Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 81–84 (1983).

[6] *See especially* Arts. 5, 7(2) and 13(1) of the Convention, *supra* note 1.

[7] *Id.*, Art. 11.

[8] *Id.*, Art. 12(1).

[9] *Id.*, Art. 12(2).

[10] *Id.*, Art. 1(a).

[11] *Id.*, Art. 1(b). Compare the working definition prepared by the UN Centre for Human Rights, in UN Doc. E/CN.4/Sub.2/AC.4/1983/CRP.2 ("Ideas for the definition of indigenous populations from the international point of view").

The Need for Change

The meeting of experts had little difficulty agreeing with S. K. Jain, Deputy Director of the International Labour Office, that "the world has changed since Convention 107 was adopted." As Kombo Ntonga Booke of Zaire's national trade union association put it, "the Convention has been overtaken by events," especially decolonization. Even Mexico's Fernando Yllanes Ramos, a draftsman of the original text, could say that "it would be mad for any State to ratify Convention 107 now when it is out of date." In fact, there had been no new ratifications since 1971.[12]

Not only was the Convention outmoded, but the peoples it was designed to protect were being subjected, in the words of Deputy Director Jain, to "unprecedented pressures which threaten their cultural identity and even their very existence." Viewed by many states as merely "an obstacle to development" or as a security risk along sensitive frontiers, added the Director of the Office's International Labour Standards Department, T. Sidibé, indigenous peoples were "losing their land at an accelerated pace." Newly independent states' preoccupation with "asserting their own unity," Yllanes Ramos observed, was contributing to increasingly polarized and potentially violent situations. Dr. Juan Ossio Acuña of Peru's Indian Institute agreed: to avoid conflict, "States *must* recognize the demands put forward by these groups."

Indeed, "the growth of indigenous organizations" over the past 10 years, Sidibé stressed, had become "a significant factor" in the reassessment of the Convention. "The Convention is mistrusted by those it is intended to protect," admitted Deputy Director Jain; in Dr. Ossio's view, this should not be underestimated in an age when "indigenous groups are winning attention internationally." "Unless we achieve the support of indigenous peoples," noted Guy Adam of the Canadian Labour Congress, "any revised Convention will be a dead letter." The ILO should thus be working "*with* the people," observed P. O. Molosi, of Botswana's Ministry of Local Government, "not *for* the people."

These comments underscored the low level of indigenous representation at the meeting of experts,[13] as Norway's Einar Hogetveit remarked. Nevertheless, it was a "precedent," according to Sidibé, that nongovernmental

[12] After the meeting of experts, Iraq ratified the Convention. Previously, it had been ratified by 14 Latin American states (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay and Peru); 6 African states (Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia); 4 states in Asia (Bangladesh, India, Pakistan and the Syrian Arab Republic); and 2 in Western Europe (Belgium and Portugal). On the basis of the criteria in the World Bank's study, *supra* note 3, it is estimated that these states (not including Iraq) administer some 100 million indigenous and tribal people.

[13] Representatives of two NGOs, the World Council of Indigenous Peoples and Survival International, were invited to serve as experts. In addition, there were "observers" from several indigenous NGOs in consultative status with ECOSOC (the Four Directions Council, the Consejo Indio de Sud América, the National Aboriginal and Islander Legal Service Secretariat), as well as several nonstatus indigenous organizations from Australia and India, and nonindigenous NGOs with expertise in this field.

organizations were participating at all in a meeting of this kind. "The real experts are the indigenous peoples themselves," said Hayden Burgess of the World Council of Indigenous Peoples. Chairman Rudolfo Stavenhagen of the College of Mexico agreed: "We should ask why the indigenous organizations do not have the right to participate when we are considering [their] rights"; for "[i]f we are to move towards full participation, we should start right here." In fact, as the meeting progressed, there was little objection to including indigenous "observers" fully in the debate.

Integration versus Self-Determination

As stated in its Preamble, the original Convention aimed at "facilitating" indigenous populations' "progressive integration into their respective national communities." The meaning and propriety of "integration" preoccupied the meeting of experts from the start. "There has been a consistent worldwide movement away from the notion of integrationism," observed Sidibé, as governments become "increasingly willing" to recognize indigenous "self-determination" and these peoples' "right to make their own decisions about the extent to which they should be integrated." Although "integration" originally had been proposed "without any malice, to ensure the survival of these communities," added Yllanes Ramos, it came to be associated with "destruction and absorption," or even, in the words of UNESCO's observer, Pierre Condé, "ethnocide [which] is a gross violation of human rights."[14]

All of the experts agreed with William Gray of Australia's Department of Aboriginal Affairs that indigenous peoples should enjoy the right "to retain their unique identity." Where they disagreed was over the extent to which power sharing would be necessary to make this right effective. Some experts spoke in terms of *participation* in existing institutions, such as Gray and Molosi.[15] Most, however, joined the call of the World Council of Indigenous Peoples for "*control* over their social and economic conditions." Condé, for example, spoke of the "right to [have] democratically constituted assemblies of their own choice."

Although UN Assistant Secretary-General Kurt Herndl and Ted Webster of the World Health Organization, among others, emphasized the *right to self-determination*, there was some resistance to including it in a revised convention, particularly among experts representing employers' organizations.[16]

[14] In the multiethnic, multitribal and entirely indigenous states of Africa, observed Djibrilla Diaroumeye of Niger, "who is going to integrate whom?"

[15] Dr. Ossio of Peru, arguing that cultural diversity should never be extinguished "in the name of equality," referred to the right to "take a more active part in national life," and to "more equality among groups" within the national political system.

[16] "In Brazil the self-determination of indigenous populations is not acceptable," argued Dr. José Antunes de Carvalho of that country's National Confederation of Industry, because "they cannot survive without the protection of the public authorities; but this does not rule out consultation."

"The object of our group is to make [the revision] more relevant but also likely to be widely acceptable," warned Martin Freeman of Canada. Molosi similarly advocated "a balance between what is absolutely desirable and what is workable." On the other hand, Hogetveit argued that while the presence of the term "self-determination" might discourage ratification, it should be used out of respect for the wishes of indigenous peoples. He and Gray proposed defining self-determination, for the purposes of the revision, as "internal," following the advice of the Martínez Cobo report.[17] "Self-determination will be the only way we will tackle the problem," according to Molosi, but he suggested using a substitute or ellipsis. "The exact word may not be necessary."

The Peoples Concerned

The discussion of self-determination led to the question of redefining the legal object of the Convention. Indigenous experts maintained that the use of the term "populations" was demeaning and should be replaced with "peoples." Condé pointed out that the term "peoples" was current usage at UNESCO. Freeman argued, however, that the change in terminology would be dangerous, since it implied the right to self-determination.[18] Once again, Hogetveit asserted that there was no real danger so long as it was clear from the instrument as a whole that no right to form new independent states was intended. The chairman, "as a sociologist," observed that the term "peoples" implies some degree of social organization, unity and culture, as opposed to a mere mass of individuals, but Carvalho stressed that the problem was one of law, not sociology.[19]

There was far greater agreement on the need to retain both "indigenous" and "tribal" groups as objects of the Convention, on the ground that they are not necessarily the same. "Indigenous" depends on historical circumstances, explained E. Mompoint of the UN Centre for Human Rights, citing the Martínez Cobo study,[20] while "tribal," according to Ntonga, refers to a particular kind of social structure.[21] All Africans, the experts from that region concurred, are both indigenous and tribal, but it remained true, as the FAO observer stressed, that larger ethnic groups had exploited smaller ones and that "these injustices did not end with the attainment of political freedom" but had been perpetuated through the use of state power. Since colonial boundaries were established arbitrarily, Diaroumeye added, "We often find that peoples are a minority on one side of the border and a majority on the

[17] Study of the Problem of Discrimination Against Indigenous Populations, Final Part, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 580–81.

[18] He nonetheless admitted that Canada's Constitution Act 1982, §35 (sched. B of UK Canada Act 1982, ch.11), refers to "the aboriginal peoples of Canada."

[19] Nevertheless, the term "peoples" was used throughout the report of the meeting.

[20] Study of the Problem of Discrimination Against Indigenous Populations, note 17 *supra*, paras. 379–80.

[21] Without, he was quick to add, implying a less advanced stage of development. Carlos Escudero of the World Bank described his agency's classification of "tribal" as "isolated, low-energy economies such as hunting, gathering, fishing, and shifting agriculture."

other." In addition, there remained highly isolated and disadvantaged groups, such as nomadic tribes, that clearly merited protection.

Land Rights and Development

"If there is no economic basis," Condé emphasized, "the concept of cultural development has no meaning." By the same token, noted Dr. Arze Quintanilla of the Inter-American Indian Institute, economic development would simply perpetuate inequality unless based on consent and respect for indigenous technologies. In every region of the world, stated O. A. Sabry of the FAO, landlessness was most severe among indigenous and tribal groups, a situation demanding not only the protection of existing uses but a commitment of financial and institutional aid. It was also important, the Chairman said, to recognize that land represents "social space—social and cultural identity" to indigenous peoples. For this reason, Gray concluded, relocating indigenous communities threatened by development, as contemplated by Article 12 of the Convention, was inadequate. "In the name of the national interest tremendous abuses have been committed," resulting in "a great deal of mistrust" on the part of indigenous peoples.

It was therefore necessary not only to reaffirm indigenous peoples' collective ownership of land, Gray proposed, but also to restrict state power to acquire land "except where clearly necessary and there are no alternatives, as established by some public inquiry which guarantees the right of the indigenous population to participate in that inquiry."[22] It was equally important to establish mechanisms for the "restitution" of lands lost in the past or, as the Chairman suggested, the meaningful inclusion of indigenous communities in agrarian reform. There was only a single dissenting voice, that of Yllanes Ramos of Mexico, who argued unsuccessfully that "no one will ratify" if indigenous peoples have the right to block development.

Recommendations

In their final report, the experts agreed that "the Convention's integrationist approach is inadequate and no longer reflects current thinking"[23] and that a revised version should be brought before the International Labour Conference "as early as possible." "[N]oting that the indigenous representatives present unanimously stressed the importance of self-determination in economic, social and cultural affairs as a right," the report recommended that the revision assure indigenous and tribal peoples "as much control as possible over their own economic, social and cultural development." The experts also endorsed the Australian proposal for a *procedural* restriction on state power over indigenous lands, i.e., if indigenous consent cannot be obtained, submission of the matter to a public review, involving indigenous representatives, to ascertain its necessity and examine alternatives.

[22] There was general agreement that "land" should include water and the use of the sea, as well as controlling access to—if not actual ownership of—the subsoil.

[23] ILO Doc. APPL/MER/107/1986/D.7, at 32.

Above all, it was unanimously agreed that future activities of the ILO must "ensure the participation of indigenous and tribal representatives," not merely as an expression of self-determination but as a matter of utilizing indigenous expertise. In this respect, the Office's experiment with giving NGOs equal standing at an expert meeting was successful, in the eyes of ILO members as well as the indigenous participants. "I came wondering what I was doing at this meeting," Adam of Canada confessed on the final day, "but perhaps we are all becoming experts by attending this meeting, and we will be experts when we leave."

RUSSEL LAWRENCE BARSH*

ELECTION OF THE REGISTRAR AND DEPUTY-REGISTRAR OF THE ICJ

On February 19, 1987, the International Court of Justice elected Eduardo Valencia-Ospina to the post of Registrar to succeed Santiago Torres Bernárdez, who had resigned for personal reasons several months before the expiry of his term of office. Mr. Valencia-Ospina had served as Deputy-Registrar since April 1984. He had previously served in the Office of Legal Affairs of the UN Secretariat. In accordance with Article 22 of the Rules of Court, he was elected for a term of 7 years.

Mr. Valencia-Ospina is of Colombian nationality and is the first Registrar of the Court from Latin America.

On the same day, the Court elected Bernard Noble to the post of Deputy-Registrar to succeed Mr. Valencia-Ospina. Mr. Noble, of British nationality, had been a First Secretary of the Court since 1967. In accordance with Articles 22 and 23 of the Rules of Court, he was also elected for a 7-year term.[1]

PROFESSOR CHARNEY TO CHAIR AJIL EDITORS' NOMINATING COMMITTEE

Professor Jonathan I. Charney will chair the Nominating Committee for editors of the *American Journal of International Law*, to be elected at the Annual Meeting of the Society in April 1988. Members of the Society wishing to propose names to the committee may do so by letter to Professor Charney: School of Law, Vanderbilt University, Nashville, Tennessee 37240. To be eligible for consideration, letters must include a formal résumé for each name proposed.

* Four Directions Council, Seattle.

[1] This report is based on ICJ Communiqué No. 87/3, Feb. 20, 1987.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

REVIEW ESSAY: THE CASE OF THE VANISHING TREATISES

Where have all the treatises gone?

In an evocative 1981 essay,[1] Christopher D. Stone sets out the thesis that "law scholarship, lacking any unifying sense of place and purpose, is fragmented and drifting."[2] In support of this baleful proposition, he notes that when he entered Yale Law School in 1959, "the most eminent scholars were predominantly treatise writers: Bogart, Casner, Corbin, J. W. Moore, Pound, Powell, Prosser, Scott, Williston, and many others." "Not so today," Stone laments.[3] Not for the modern legal scholar the broad brush with which to paint, in bold strokes, a vivid picture of an entire field. Instead,

> few today aspire to the mastery of any body of law in particular. The brightest . . . have as their principal interest some body of scholarship outside the law. They have discovered in, say, economics or social-choice theory, some lance of insight with which they are prepared to take a tilt at the law—any body of legal rules should do—in some way it has not been tilted at before.[4]

That lament might equally be sounded for a far broader range of synoptic writing. Where, today, in literary criticism, are the equivalents of the young T. S. Eliot, the prospective successors to John Bayley? Gone into semiotics, perhaps.

The plight of the treatise generally seems relatively benign, however, when compared with the near extinction of its international law version. Some fields of American legal scholarship, particularly constitutional law, do continue to generate a few important schematic works that more or less fit the treatise category.[5] International law does not, which is the more startling because that area of the law used to be a particularly fertile source of the genre.[6]

The disappearance of the American international law treatise has also had the incidental effect of making U.S. courts, in their search for international legal norms, extraordinarily dependent on the American Law Institute's *Restatement of U.S. Foreign Relations Law* and causing the writing of that reference work by a group of scholars to take on some of the intensity of a legislative drafting process.

[1] Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981).

[2] *Id.* at 1149.

[3] *Id.* at 1150.

[4] *Id.* at 1150–51.

[5] *See, e.g.*, B. SCHWARTZ, CONSTITUTIONAL LAW (1979).

[6] *See, e.g.*, W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964). A rare recent exception to decline is M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980), and earlier volumes in the Public Order series (Yale).

standard rate of interest for Tribunal awards has not met with complete success. Post-*Sylvania* decisions have not all followed the standard discussed in this case.[13]

The portion of the decision dealing with legal fees raises questions as well. While the Chamber opines that a successful party should, in most cases, receive its attorneys' fees, it proceeded to award less than 20 percent of the amount claimed. This result suggests that parties appearing before the Tribunal must still expect to bear a large portion of their attorneys' fees.

[13] *See, e.g.*, International Schools Services, Inc. and Iranian Copper Industries Co., AWD 194-111-1 (Oct. 10, 1985) (Chamber 1) (awarding interest payment of 10%).

CURRENT DEVELOPMENTS

Indigenous Peoples: An Emerging Object of International Law

The Working Group on Indigenous Populations, an organ of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, ended its fourth annual session last August by distributing seven "draft principles" to governments and nongovernmental organizations (NGOs) for comment as the first step in preparing "a draft declaration on indigenous rights, which may be proclaimed by the General Assembly."[1] For the first time since indigenous organizations took their concerns to the international level in 1977, a formal commitment has been made to the development of new law, probably in time for the "cinquecentennial" in 1992 of the "discovery" of the Americas and a proposed international indigenous year.[2]

Over the past 4 years, most governments have accepted the inevitability of a declaration, as evidenced by the increase in the number and rank of governmental observer delegations and the decrease in defensive statements. While only Norway, the Netherlands and Denmark expressed more than "interest" in the working group at the 1982 session of the Commission on Human Rights, many affected governments, such as Australia, Canada and the United States, as well as China, Syria, Cyprus, the Gambia and the German Democratic Republic, praised and encouraged its work at the 1985 session. Seven Latin American and Eastern European countries abstained from voting on the working group's first mandate in 1982.[3] By contrast, the most recent change in the mandate, strengthening the group's drafting role, was quickly adopted without a vote.[4]

Several governments took advantage of the working group's third and fourth sessions to unveil recent initiatives in promoting indigenous land rights and cultural development. Australia committed itself to observing "five principles" in recognizing indigenous land rights at the third session and reaffirmed them, under fire from aboriginal groups, at the fourth. Canada asserted its willingness to negotiate the terms of Indian self-government at both sessions. Argentina used the fourth session to announce new land-

[1] Report of the Working Group on Indigenous Populations on its Fourth Session, UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The full text of the draft principles is set out in the text at note 47 *infra*.

[2] Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 633.

[3] Commission on Human Rights Resolution [hereinafter cited as Comm'n Res.] 1982/19 (Mar. 10). Brazil called for the vote and abstained, together with Poland, the USSR, Bulgaria, the Byelorussian SSR, Cuba and the Philippines. Cuba has subsequently taken an interest and now has a member on the working group.

[4] Comm'n Res. 1985/21 (Mar. 11).

to constitutionalize its 1840 treaty with the Maoris.

Development of the Indigenous Concept

The United Nations system first addressed itself formally to indigenous issues in 1949, when the General Assembly invited the Sub-Commission to study the condition of indigenous Americans in the hope that "the material and cultural development of these populations would result in a more profitable utilization of the resources of America to the advantage of the world."[5] The United States objected strenuously, which resulted not only in the termination of the inquiry, but also in the temporary suspension of the Sub-Commission itself.[6] However, this initiative was prompted more by the Cold War and the prospective development of the South American interior than by studied concern for the welfare of indigenous communities.

Chiefly responding to reports of labor discrimination in Latin America, the International Labour Organisation adopted Convention No. 107, Indigenous and Tribal Populations, in 1957. The Convention starts from the premise that the "social, economic or cultural situation [of indigenous peoples] hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population" and from "sharing fully in the progress of the national community of which they form part." Emphasizing the "protection and integration" of indigenous peoples, the Convention obliges state parties to develop "co-ordinated and systematic action for their progressive integration," through "collaboration" rather than "force or coercion." Criticism of the Convention as paternalistic has led the ILO Secretariat to schedule a revision; a representative committee of experts was to be appointed by November 1985, and a meeting of experts held in September 1986.

Convention No. 107 nevertheless contains the first, and to date the only, binding standards on indigenous land rights. It does not merely recognize "the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy." It also recognizes their customary laws regarding land use and inheritance, and their right to be compensated in money or in kind for lands appropriated by the national government for development purposes.[7] Moreover, Convention No. 107 makes the first attempt at defining indigenous populations, referring to "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation" and their tendency to "live more in conformity with the[ir own] social, economic and cultural institutions."[8]

[5] GA Res. 275 (III) (May 11, 1949).

[6] 11 UN ESCOR (397th mtg.) at 191, UN Doc. E/SR (1949).

[7] Arts. 11–13, Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919–1981, at 858 (1982).

[8] *Id.*, Art. 1(b).

international acceptance of a definition has proved elusive and will be discussed further below.

In 1971 the Sub-Commission appointed Mexican Ambassador José R. Martínez Cobo to conduct a thorough study of "discrimination against indigenous populations." The final part of the report, which contains its conclusions and recommendations, though only completed in 1983,[9] has already been accepted as authoritative. The Sub-Commission called it "a reference work of definitive usefulness"[10] and directed the working group to rely on it in setting standards.[11] This part of the report was warmly received by members of the working group as well.

The Martínez Cobo report concludes that existing human rights standards "are not fully applied" to indigenous peoples and, moreover, are "not wholly adequate" to the task. Consequently, a declaration leading to a convention is required.[12] Most important, the special rapporteur was persuaded that "self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."[13] "In essence," the report states, self-determination

> constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.[14]

In addition, the report concludes that "indigenous peoples have a natural and inalienable right to keep the territories they possess and claim the lands which have been taken from them," and it proposes detailed standards for the reconciliation of land claims.[15]

Three international conferences have also drawn attention to indigenous rights. The international NGO Conference on Discrimination against Indigenous Peoples of the Americas, held at Geneva in 1977, was the first to attract indigenous representatives. Its final report emphasized "the right of indigenous peoples and nations to have authority over their own affairs," and it set forth a draft declaration of principles calling for the recognition of indigenous peoples as subjects of international law.[16] The World Conference to Combat Racism and Racial Discrimination, which was held at Geneva in 1978, "endorse[d] the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own lan-

[9] UN Doc. E/CN.4/Sub.2/1983/21/Add.8.

[10] Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution [hereinafter cited as Sub-Comm'n Res.] 1984/35A, 4th preambular para. (Aug. 30).

[11] Sub-Comm'n Res. 1985/22, para. 4(a) (Aug. 29).

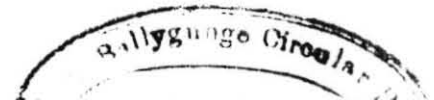
[12] UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 624, 625, 628.

[13] *Id.*, para. 580.

[14] *Id.*, para. 581.

[15] *Id.*, para. 513.

[16] The report of the conference is reprinted in the November 1977 issue of the *American Indian Journal.*



guage, and also recognize[d] the special relationship of indigenous peoples to their land and stresse[d] that their land, land rights and natural resources should not be taken away from them."[17] Finally, a second international NGO meeting, the Conference on Indigenous Peoples and the Land, was convened at Geneva in 1981. That conference called for the establishment of a United Nations working group on indigenous peoples so that "indigenous nations and peoples [could] submit their complaints and make their demands known."[18]

Establishment of the Working Group

Following the lead of the two NGO conferences, the Sub-Commission recommended the establishment of a pre-sessional Working Group on Indigenous Populations, and the Commission and ECOSOC approved.[19] The working group first met in August 1982 with members from Norway, Yugoslavia, the Sudan, Panama and Syria.

The original mandate of the working group consisted of two parts: (1) "to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, . . . to analyze such materials, and to submit its conclusions to the Sub-Commission"; and (2) to "give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world." No one at the time was quite certain how the second element would be pursued, i.e., whether the working group was to draft an instrument for consideration by the General Assembly, or was simply to develop a body of principles for its own use as a data-gathering body. Governments agreed with Chairman Eide that standard-setting discussions would be premature.

In 1984, however, Australia, Canada and several indigenous organizations expressed concern that the working group was merely compiling data uncritically. The Sub-Commission thereupon "request[ed] the Working Group henceforth to focus its attention on the preparation of standards on the rights of indigenous populations," and accordingly "to consider in 1985, the drafting of a body of principles on indigenous rights based on relevant national legislation, international instruments and other juridical criteria."[20] The Commission approved this new emphasis in the working group's charge and urged the group "to intensify its efforts to develop international standards based on a continued and comprehensive review of developments . . . and of the situations and aspirations of indigenous populations throughout the world."[21]

[17] UN Doc. A/CONF.92/40, at 14 (1978).

[18] The report of the conference was published by the World Federation of Democratic Youth (1981).

[19] Sub-Comm'n Res. 2 (XXXIV) (Sept. 8, 1981); Comm'n Res. 1982/19 (Mar. 10); ECOSOC Res. 1982/34 (May 7).

[20] Sub-Comm'n Res. 1984/35B (Aug. 27).

[21] Comm'n Res. 1985/21 (Mar. 11).

A further refinement was made in 1985, when the Sub-Commission

> endors[ed] the Plan of Action adopted by the Working Group for its future work . . . as well as its decision to emphasize in its forthcoming sessions the part of its mandate related to standard-setting activities, with the aim of producing, in due course, a draft declaration on indigenous rights which may be proclaimed by the General Assembly.[22]

It is now clear that the working group's immediate goal will be a declaration, and that the group will become more like a drafting committee, its data-gathering function serving as an aid to drafting rather than an end in itself.

Regional Scope and Definition

The term "indigenous" has emerged in practice over the years and (like "peoples") has no accepted definition. Its existence, in fact, is an accident of history. During Fourth Committee debates on decolonization 30 years ago, Belgium observed that the Covenant of the League of Nations called on states to protect "indigenous populations."[23] Belgium argued that such groups must be included in the concept of "non-self-governing territories" under the United Nations Charter.[24] "Similar problems existed wherever there were underdeveloped ethnic groups," the Belgian representative maintained, "in America as well as in Asia or Africa."[25] American states, however, insisted that the Indians had been assimilated and were "an integral part of the nation."[26]

The matter was never formally resolved. Thus, General Assembly Resolution 1541 (XV) speaks ambiguously of territories that are "geographically separate and distinct ethnically and/or culturally," without specifying whether the separation must be liquid or solid. In practice, however, chapter XI has been accepted as chiefly applicable to overseas colonization.[27] Situations involving enclaves or "internal" colonization have continued to be considered, but as problems of "indigenous populations," not of "peoples" or "minorities." Accordingly, the Martínez Cobo study falls under the category of "discrimination" rather than the other side of the Sub-Commission's mandate, "protection of minorities."[28]

Definition was the first substantive issue debated in the working group. India insisted on distinguishing between cases of recent immigration, such as the Americas, and situations in Asia involving historical coexistence and political integration. The Yugoslav member of the working group, Ivan Toševski, agreed that definition must precede standard setting, a practice

[22] Sub-Comm'n Res. 1985/22 (Aug. 29).

[23] Article 22 of the Covenant of the League of Nations uses the terms "peoples not yet able to stand for themselves" and "indigenous population" interchangeably.

[24] UN CHARTER, ch. XI.

[25] 7 UN GAOR C.4 (253d mtg.) at 22–23, UN Doc. A/C.4/SR.253 (1952).

[26] *Id.* at 55.

[27] *See generally* Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 84–90 (1983).

[28] Similarly, the Sub-Commission's agenda refers to "Discrimination against indigenous populations." *See* Sub-Comm'n Res. 1984/35B, para. 11 (Aug. 30).

he had applied in his own Working Group on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. Indigenous observers, however, argued that definition would be inappropriate without more broadly representative indigenous participation: a few groups from North America and Australia had no right to speak for Latin American or Asian peoples. While skeptical of the notion of "separate development," Australia and Canada supported the call for indigenous "self-definition."

The working group resolved to defer its consideration of definition, only noting the importance of both "objective" criteria such as "historical continuity" and "subjective" factors including self-identification.[29] Yet at the second session in 1983, Asian and Latin governments again urged that attention be given to definition. So Chairman Eide asked the Secretariat to submit a discussion draft based on the Martínez Cobo study. The draft defines as "indigenous" groups "having a historical continuity with pre-invasion and pre-colonial societies, [which] consider themselves distinct from other sectors of the societies now prevailing in those territories."[30] Culture, language, ancestry and occupation of the land all constitute evidence of continuity. "An indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of [their] members (acceptance by the group)."

While indigenous populations, so defined, are difficult to distinguish from peoples or colonies (except for the absence of the "blue water" factor), most governments appeared satisfied that adequate limits had been drawn. At the working group's third session in 1984, Australia praised this "flexible" approach based on self-definition and group acceptance, and Eide, now serving as spokesman for the Norwegian Government, relied on the Secretariat's working definition to distinguish indigenous populations from minorities. "Indigenous populations existed in the area prior to [its] settlement by those groups which are presently dominant, and their way of life, [including] their use of resources and thereby also their cultural traditions, is distinct from that of the presently dominant group." Canada observed that groups sharing "communal and spiritual relationships with the land, and reliance on traditional pursuits for subsistence," could be found everywhere in the world; it hoped that none would be "excluded arbitrarily from consideration simply because they are not traditionally identified as indigenous."

The question of definition was also raised, inescapably, during discussion of renewed proposals for a United Nations Voluntary Fund for Indigenous Populations. Indigenous observers argued that financial aid and diplomatic good offices were most needed to increase indigenous representation from Latin America and Asia. Privately, the United States insisted on language that would plainly include the Soviet Union's tribal peoples, while India threatened to block any resolution unless it was limited expressly to "the Americas, Australia and the Arctic regions." In the end, a compromise was reached that referred to the need "to secure a broad geographical representation"[31] and to involve indigenous groups "in all parts of the world."[32]

The issue of regional scope nonetheless reemerged in 1985 at the working group's fourth session. The United States complained that "unfortunately large areas of the world remain unrepresented" because they are "either unable, or, more importantly, are not permitted to be present." Bangladesh countered that "indigenous" refers only to "those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations." "The entire population" of Bangladesh was autochthonous, by comparison, and all had "coexisted" prior to the fomentation of ethnic divisions by British administrators. Indonesia described its own history similarly, and India maintained that "ethnically speaking, most of the existing tribes in India share their origins with the neighbouring non-tribal population." In Indian law, "tribal" referred to "underdeveloped," rather than colonized, groups and entitled them to a "system of positive discrimination."[33]

The USSR, India and China have also maintained that there are no "indigenous" peoples in Asia, only minorities, and that, as Soviet Ambassador V. Sofinsky told the Sub-Commission in 1985, "indigenous" situations only arise in the Americas and Australasia where there are "imported" populations of Europeans. This attempt to reassociate indigenousness with classic colonialism was picked up, interestingly, by Mexico, which told the working group's fourth session that the marginalization of Indians "began with colonialism, and thereafter [continued] with internal colonialism and the expansion of a capitalist agricultural economy." It was virtually impossible, the Mexican observer concluded, to distinguish between indigenous populations and "peoples" entitled to self-determination.

Indigenous groups continue to oppose definition, contending that it is their concern, rather than that of states. They also understand that a superpower confrontation over classification of the Soviet Union's tribal peoples could neutralize the working group. Nevertheless, some have argued repeatedly that "indigenous" populations should be considered "peoples" in the sense of chapter XI of the Charter. "Those peoples we call indigenous are nothing more than colonized peoples who were missed by the great wave of global decolonization following the second world war," the Mikmaq delegation told the first session,[34] "particularly where independence was

[29] UN Doc. E/CN.4/Sub.2/1982/33, para. 42.

[30] UN Doc. E/CN.4/Sub.2/AC.4/1983/CRP.2. The author was A. Willemsen-Diaz, who also wrote most of the Martínez Cobo report.

[31] Sub-Comm'n Res. 1984/35C, final operative subpara. (d) (Aug. 30).

[32] Comm'n Res. 1985/21 (Mar. 11), and 1985/38 (May 30). Although this traditionally has been an issue between the United States, on the one hand, and the USSR and India, on the other, at the working group's fourth session the Holy See pointedly referred to "indigenous peoples of all continents."

[33] For an academic version of India's position, see, e.g., Sinha, *A Special Deal for Tribals in India: A Historical Appraisal*, TRIBE, No. 4, 1970, at 1 (published by Tribal Research Institute).

[34] A point also raised, inter alia, in UN Docs. E/CN.4/Sub.2/AC.4/1983/CRP.3, and E/CN.4/Sub.2/1985/NGO/9, and in a recent intervention on the question of minorities summarized in UN Doc. E/CN.4/Sub.2/1985/SR.15, paras. 18–23.

granted, not to the original inhabitants of a territory, but to an intrusive and alien group newly arrived." The United States and Brazil countered that Indians participate in national institutions to an extent that constitutes "integrated." The United States emphasized its 1934 Indian Reorganization Act, under which tribes ratified charters of local self-government and elected local officers.[35]

At the same time, indigenous groups have reacted vigorously to any suggestion that they are simply a special case of "minorities." In consequence, Jules Deschênes, the Sub-Commission's rapporteur on the definition of minorities, deferred to future deliberations of the Working Group on Indigenous Populations and suggested that "we should not attempt to deal with the question of indigenous populations" in discussing the rights or identity of minorities.[36] Argentina and Norway, however, still referred to "indigenous and other minorities" at the working group's fourth session, and the British member of the Sub-Commission questioned whether distinguishing indigenous groups from minorities was meaningful in Europe.[37]

Members of the working group expressed their views on this question for the first time at the fourth session. Yugoslav member Toševski argued that international law recognizes only "peoples" and "minorities"; "indigenous" groups, he said, must be one or the other. The working group was exceeding its authority by developing a new category of collective rights, he continued, and it should probably leave the matter to the working group on minorities, which he chairs. This prompted the Cuban member, Miguel Alfonso Martínez, to remind the working group of its mandate from ECOSOC, which admits of no doubt about the general acceptance of "indigenous" as an evolving, albeit as yet undefined, legal category. The Chinese member, Gu Yijie, recalled the "working definition," which, she observed, bears more relation to "peoples" than "minorities." "Historically speaking," she explained, "the concept of indigenous populations is associated with colonialism and aggression by foreign nations or powers," which result in the dispossession and isolation of those populations. Minorities reflect "different historical backgrounds" and must be treated separately.

Although the terms "indigenous populations" and "indigenous peoples" have sometimes been used interchangeably by observers at the working group, "populations" has generally been used in reports and resolutions to avoid any implicit recognition of the right to self-determination. The term "peoples," however, dominates the Sub-Commission's resolution on the fourth report of the working group.[38] The distinction between "indigenous" and "colonized," which stemmed in large part from the efforts of Asian states to distinguish their situations from those of the Americas, is clearly breaking down.

[35] For two views of the reorganization program, see Barsh, *When Will Tribes Have a Choice?*, in RETHINKING INDIAN LAW 43 (National Lawyers Guild, Committee on Native American Struggles ed., 1982); and Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 AM. ANTHROPOLOGIST 279 (1984).

[36] UN Doc. E/CN.4/Sub.2/1985/31, paras. 32–38.

[37] UN Doc. E/CN.4/Sub.2/1985/SR.14. [38] Sub-Comm'n Res. 1985/22 (Aug. 29).

The problem of indigenous populations can be viewed as either discrimination or assimilation, i.e., as lack of equality or forced equality with the population of the administering state. The ILO took the first view in Convention No. 107 and encouraged states to remove all institutional obstacles to the complete integration of indigenous communities. Similarly, the Committee on the Elimination of Racial Discrimination has routinely sought to determine whether indigenous populations are accorded equal access to health, education and employment, and equal rights of land ownership.[39] The Human Rights Committee established pursuant to the International Covenant for Civil and Political Rights has dealt with indigenous peoples as "minorities" under Article 27 of the Covenant;[40] their "members have only been endowed with specific rights designed to secure the existence and survival of the community concerned,"[41] and not with any right of self-determination or autonomy.

At the working group's first session, Brazil continued in this vein by arguing forcefully for the "protection" and gradual "integration" of Indians. At the second session, Brazil suggested that indigenous autonomy was a form of racial discrimination that would invariably lead to oppression and injustice. At the heart of the Brazilian thesis was the belief that individual freedom can be realized only in multi-cultural states where different ethnic groups compete and counteract one another's prejudices through the majoritarian democratic process. "A group that was given an opportunity to participate in the life of [such] a State could not be said to have been denied the right to self-determination." The United States concurred that access to the electoral process in a multi-cultural democracy is all the self-determination that anyone needs.

Indigenous advocacy has gradually overcome this view. While "the just struggle of indigenous peoples is closely tied to the struggle of peasants for land and of workers for better living conditions" throughout the developing world, as Mexico explained at the working group's fourth session, most governments now agree with New Zealand that "policies and programmes which allow people to determine their place in society, and the place of their culture and traditions in that society," are preferable to assimilation. Some form of separate institutional existence for indigenous communities, albeit more or less within the framework of the territorial state, has become a relatively respectable concept. Even Brazil's ambassador was able to concede

[39] See, e.g., the Committee's discussion of Brazil, paras. 253–255 of its 1983 report, 38 UN GAOR Supp. (No. 18), UN Doc. A/38/18 (1983), and of Ecuador in paras. 206 and 210 of its 1982 report, 37 UN GAOR Supp. (No. 18), UN Doc. A/37/18 (1982).

[40] See, e.g., the discussion of Indian self-government in Canada's most recent periodic report, UN Doc. CCPR/C/1/Add.62, at 94 (1983).

[41] UN Doc. CCPR/C/SR.590 (1985) (discussion of draft general comment). Interestingly, however, the Committee noted the use of the phrase "aboriginal peoples" in Canada's Constitution Act 1982, §35 (sched. B of UK Canada Act 1982, ch. 11), and "asked whether [this] did not cast a new light on the applicability of Article 1 of the Covenant." UN Doc. CCPR/C/25/CRP.1/Add.6 (1985).

the principle of indigenous autonomy, short of independence, at the working group's fourth session, and only Argentina was still describing the legislation regarding its Indian groups in terms of "facilitat[ing] their social integration and development."

General agreement has also developed on the need for a special instrument that goes beyond existing legal standards. "Experience has shown that the special problems facing indigenous populations cannot be adequately solved by existing international norms of human rights," Norway told the working group's fourth session. "There is a clear need for a new set of norms in this area," beginning with a declaration, and "possibly followed by a convention." Canada concurred: "We see aboriginal rights as something extra that our aboriginal peoples enjoy flowing from original occupancy"; thus, any new instrument must "go beyond fundamental rights" and focus on "special needs and rights."[42] Argentina similarly called for "a more systematic implementation of existing human rights instruments, as well as complementary international agreements yet to be made." Australia supported the concern of indigenous observers that special rights not mean lesser rights, and it urged the working group to "harmonize with and build upon fundamental human rights set out in [existing] instruments."

Governmental observers, however, continued to stress that the circumstances and aspirations of indigenous communities "can differ considerably from country to country," as Australia told the Commission in 1982. New Zealand made the same point at the working group's fourth session and warned that "a very careful focus indeed is necessary to translate wider standards into effective local practice." "If it is to be a truly international instrument," Canada agreed, a declaration "must have relevance to all indigenous groups throughout the world," taking account of "differing historical backgrounds and differing relationships with governments." This meant dealing only with "the most fundamental rights," rather than attempting to cover every possible problem. Argentina and Mexico echoed this concern for "differences in national realities."

The working group has come to accept that both governments and indigenous organizations expect "progress," as Chinese member Gu Yijie observed at the fourth session. Kwesi Simpson of Ghana agreed that "[a] general consensus is now emerging that the time has come for concrete action to begin," including "some preliminary draft . . . ideas and concepts that might eventually be incorporated into a Declaration." Although a declaration might eventually lead to a convention, Simpson suggested that the working group "draw inspiration from the influence which the Declaration on the Granting of Independence to Colonial Countries has had on the decolonization process." "Thanks to this Declaration," he said, "millions of people the world over now live in freedom and independence. Similarly I believe that the liberation of and the restoration of basic rights to indigenous populations and peoples will be hastened if we succeed in drawing up an appropriate declaration." A declaration alone, if well crafted and supported by governments, could achieve as much as a binding instrument.

There were words of caution as well. Canada warned that "[o]verly ambitious targets could jeopardize the early acceptance by the international community of a document which must reflect the circumstances and needs of all concerned." Most governments, however, were satisfied with assurances that they would be invited to comment at each step in the drafting process. Indeed, from the outset Asian and Latin American governments have objected more to the fact-finding than the standard-setting side of the working group's mandate. Brazil tried to persuade the Commission in 1982 that governments' efforts would be "more legitimately employed in trying to solve problems of indigenous populations" than in making reports to UN bodies. At the second session of the working group, Chairman Eide promised governments that it would not be allowed to become a "chamber of complaints." "The role of the Working Group is not to pass judgment," he explained, "but to understand the problems of indigenous populations so as to develop standards for their protection."

Some governments nonetheless considered Eide too liberal in admitting the statements of indigenous representatives, and he was not reelected to the Sub-Commission in 1984. Although his Greek successor, Erica-Irene Daes, has been perceived as stricter, at least by indigenous organizations, Bangladesh and Sri Lanka were warning the working group's fourth session to ignore those who were trying to "divert it from its basic purpose" of evolving standards by leveling specific allegations. At the same time, Tošević adamantly opposed standard setting, which some diplomats perceived as a sign of the Eastern European group's unhappiness that less time was being spent on problems of specific countries. After all, most indigenous delegations have come from the Americas. As long as the working group devoted itself to facts rather than universal standards, its sessions embarrassed the West without threatening the East. The balance has now shifted.

The Content of Indigenous Rights

Although the working group planned to devote its third session in 1984 to land rights,[43] few governments were prepared to deal with specifics, and only one indigenous organization drew up a concrete proposal.[44] On the governmental level, Australia announced plans to give aboriginal communities "inalienable freehold title" to traditional and sacred lands, with a veto

[42] For this reason, the phraseology "indigenous rights" has been preferred over "human rights of indigenous populations" in most recent resolutions, e.g., Sub-Comm'n Res. 1985/22 (Aug. 29).

[43] At the second session in 1983, the working group adopted a "plan of action" calling for a discussion of land rights and definition in 1984, and listing eight other "preliminary priorities" for subsequent sessions, including "autonomy and self-determination." UN Doc. E/CN.4/Sub.2/1983/22, Ann. I. At the third session, it decided to proceed to culture, language, religion and education. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I. The rights to "autonomy, self-government and self-determination," and problems of health and housing are the topics for 1986. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I.

[44] UN Doc. E/CN.4/Sub.2/AC.4/1984/NGO/1 (Four Directions Council).

over development;[45] and Canada described its ongoing land claims process, emphasizing its view that settlements must be negotiated, "not imposed unilaterally." An NGO, the Inuit Circumpolar Conference, stressed the importance of recognizing indigenous land tenure systems, but there was no response from governments. In the end, indigenous representatives jointly submitted a proposal that

> the Working Group recogniz[e], as did the World Conference to Combat Racism and Racial Discrimination of 1978, "the special relationship of indigenous peoples to their land and . . . that their land, land rights and natural resources should not be taken away from them." Discovery, conquest, and unilateral legislation are not legitimate bases for states to claim or retain the territories or natural resources of indigenous peoples. In no circumstances should indigenous peoples or groups be subjected to adverse discrimination with respect to their rights or claims to land, property, or natural resources.[45a]

The working group simply annexed this text, without comment, to its report.

Considering it necessary to force substantive debate, indigenous organizations placed two complete draft declarations before the fourth session, one prepared by the World Council of Indigenous Peoples, and the other representing a consensus of six other indigenous NGOs as well as 16 additional indigenous organizations in the Americas and Australasia.[46] The most provocative provisions of the latter draft referred to land and self-determination:

> 2. All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. . . .
>
> 3. No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned.
>
> 4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. . . .
>
> 5. Rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.
>
> 6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.
>
> 7. In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title.

In addition, the draft declaration called for the recognition of various cultural rights, including:

> 12. Indigenous nations and peoples have the right to be educated and conduct business with States in their own languages, and to establish their own educational institutions.
>
> 14. The religious practices of indigenous nations and peoples shall be fully respected and protected by the laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.

Cultural rights evoked little controversy. Argentina, for example, accepted that indigenous peoples place importance on the "preservation of their cultural identity through the practice of their traditions, and through the use of, and education in their own languages," and made a commitment to include indigenous content in the education of all Argentinians. New Zealand advocated the "promoti[on of] multiculturalism" through the incorporation of indigenous content in all public education, and it announced plans to make Maori an official language as well as an optional language at all educational levels. Canada asserted that the education of indigenous children should be "locally controlled and linguistically and culturally appropriate," as part of a larger policy of "ensuring that indigenous populations have control, and influence, over their own cultural and educational activities." Endorsing "bilingual-bicultural" education, Mexico called for more than "simply declarations of good intentions but real policies and programmes, with the active participation of the indigenous peoples themselves."

The fourth session also paid considerable attention to land. The Government of Argentina candidly described the loss by the Indians of their land and their lack of legal title to what they still occupied, and committed itself to recognizing and restoring ownership to them "in accordance with their own organization and customs." Land would be restored out of public holdings where possible, and out of private holdings if necessary; and in the future, communities would not be relocated without their consent and compensation. Mexico admitted to the same problems, and while emphasizing the need for land reform, it warned against development programs that "result in policies actually recognizable as ethnocide." This comment seemed to anticipate the subsequent efforts of Indonesia, Bangladesh and Sri Lanka to defend their transmigration programs as beneficial to all segments of society through the redistribution of surplus land and labor.

Governmental observers showed more caution about collective political rights. "A guiding principle," observed Norway, "should be that the indigenous peoples should have influence in the decision making process concerning their own affairs." Australia and New Zealand described their policies

[45] At the working group's fourth session, aboriginal observers accused Australia of reneging on this commitment, on the basis of statements of the Government's responsible minister that questioned the practicability of recognizing an aboriginal veto over mining. Australia assured the working group that the matter was still under review.

[45a] UN Doc. E/CN.4/Sub.2/AC.4/1984/WP.1.

[46] The drafts are reproduced in Annexes III and IV of the report of the fourth session, UN Doc. E/CN.4/Sub.2/1985/22. The second draft grew out of a meeting of indigenous organizations at Geneva in July 1985, convened in part to discuss the first.

of encouraging local and regional consultative meetings. Canada reiterated its previous commitments to "establishing self-government structures at the local level" through negotiations, and its agreement in principle with the proposal for a separate Inuit "public government" in the Arctic. The trend towards more local indigenous control of public funds, "[w]hile falling far short of self-determination," was commended by Canada as a way of giving communities "an ever-increasing control over their own affairs."

Attending a session of the working group for the first time, the Holy See referred to "the right of indigenous peoples to a territorial, cultural, economic as well as political environment in which they can develop their own way of life" as "members of the community of nations." Rome's observer stressed in particular Pope John Paul II's January 1985 statement at Latacunga, where he characterized the right "to be able to determine the form of government of your communities" as a "legitimate aspiration," and his September 1984 speech to Canadian natives at Fort Simpson, in which he emphasized "self-determination in your own lives as native peoples," the right "to develop your lands and economic potential, to educate your children, and to plan your future."

Anticipating Latin American arguments that tribal governments would be backward, the observer for the Holy See added that "to preserve their own identity does not mean wanting to remain rooted passively in the past, or in institutions wholly unsuited for modern times." He was confident that indigenous peoples would be motivated "by the spirit of openmindedness and progress." Mexico continued in this vein by stating that "indigenous cultures are dynamic forces in continuous transformation." "The challenge," Canada concluded, "is to enable indigenous populations to benefit from change but still preserve their essential values." The United States, however, made a point of insisting that a declaration stress the responsibility of indigenous governments to respect the human rights of all persons within their jurisdiction.

As for the members of the working group, Alfonso Martínez and Simpson identified life, land, self-determination and cultural rights as appropriate subjects for a declaration. Gu Yijie conceived of the declaration as three-tiered, beginning with the right to nondiscrimination under existing instruments such as the Convention on the Elimination of All Forms of Racial Discrimination. Next, the "right [of indigenous populations] to the land must be protected" because it "is an imperative for their life." Finally, they must have the right to "appropriate political self-rule," at least to the extent officially recognized for ethnic minorities in China. Significantly, she made a connection between land rights and Article 25 of the Covenant on Economic, Social and Cultural Rights, which refers to "the inherent right of all *peoples* to enjoy and utilize fully and freely their natural wealth and resources" (emphasis added).

After the close of the public session, the working group met privately several times to consider how to proceed. At least one member was prepared to draft a complete declaration to serve as a working document; another remained opposed to drafting anything at all. As a compromise, they considered only a few relatively "non-controversial" principles and drafted them in a deliberately preliminary manner:[47]

> 1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.[48]
>
> 2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.[49]
>
> 3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.
>
> 4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to [sacred] sites for these purposes.[50]
>
> 5. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.
>
> 6. The right to preserve their cultural identity and traditions, and to pursue their own cultural development.
>
> 7. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.[51]

Governmental observers from Australia, New Zealand, Canada, the United States, Norway and Argentina praised this progress privately at the subsequent session of the Sub-Commission.[52]

The Growth of Indigenous Advocacy

Ordinarily, only organizations with consultative status (NGOs) may participate in meetings of the Economic and Social Council and its subsidiary bodies. The Working Group on Indigenous Populations is unique in having opened its doors to indigenous groups regardless of their formal status with ECOSOC. This procedural policy, adopted at the first session of the working group in 1982, has made its annual meeting one of the most popular and

[47] UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The Yugoslav member did not attend the drafting meetings.

[48] Compare the text of the indigenous organizations' proposal: "In addition to these rights, indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Rights and other United Nations instruments. In no case shall they be subjected to adverse discrimination."

[49] The indigenous proposal read: "Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression."

[50] Compare the indigenous text, para. 14 at p. 381 *supra*.

[51] Compare Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966).

[52] Owing to delays in issuing the working group's report and lack of time, there was no public debate, but these Governments' views were discussed with each other and with members of the working group.

well-attended human rights activities at Geneva: in 1985 it attracted more than 150 participants, including indigenous representatives of 40 organizations in 18 states. Although at first some governments were reluctant to accept this arrangement, at the fourth session in 1985 many welcomed the initiative taken by indigenous organizations in proposing draft declarations of principles. "During the past decade we have witnessed an increasing will and ability of indigenous groups to coordinate their views and formulate common policies," the Norwegian observer noted. "My government welcomes this development, and holds the view that [this] should be encouraged." Indigenous groups had "taken a serious and constructive approach and have presented concrete proposals for our consideration," the United States said, adding that the proposals "represent an expression of the aspirations of indigenous peoples and a prioritizing of the rights which they hold most important." "Such expressions are useful not only to the Working Group, but also to concerned governments, since they increase our understanding of the unique perspective of indigenous peoples and the actions which they seek from governments and the international community." Even Bangladesh praised the working group's "flexible methods of work," a code phrase for the admission of indigenous observers regardless of NGO status.

On the other hand, for the first time there were allegations of interference with indigenous representatives traveling to Geneva. Three Sri Lankan Veddahs hoping to attend the fourth session reportedly were denied passports, and indigenous NGOs asked the working group, unsuccessfully, to express concern to the Sri Lankan Government. Sri Lanka nonetheless felt obliged to explain and told the working group that there had simply been insufficient time to complete the necessary formalities. Moreover, bringing the Veddahs to Geneva was part of a "reckless" attack; "these innocent people" were to be "exhibit[ed] in a most disgraceful manner before your Working Group." This incident calls into question the working group's ability to assure a truly representative inquiry and highlights the potential future significance of the Voluntary Fund as a means of providing quasi-diplomatic shielding for indigenous representatives from sensitive regions to whom the fund has given travel assistance.

In the meantime, indigenous advocacy is expanding into related fields of human rights law. Interventions on cultural rights were made at the 1985 session of the Commission's Working Group on the Draft Convention on the Rights of the Child, with a view towards adoption of an additional article,[53] and in support of the Sub-Commission's special rapporteur on religious intolerance, to emphasize the protection of sacred sites.[54] At the 1985 session of the Sub-Commission, indigenous observers took an active part in debates on genocide, the definition of minorities and the rights of disabled persons.[55] This activity amounts to more than indigenism. Indigenous organizations are emerging as a kind of regional group with broad interests, which seems likely to enhance both their credibility and the force of their claims to a degree of political responsibility.

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[53] UN Doc. E/CN.4/1985/WG.1/NGO.1; UN Doc. E/CN.4/1985/WG.1/WP.3.

[54] *See, e.g.*, UN Docs. E/CN.4/1984/SR.56 (Four Directions Council), and E/CN.4/Sub.2/1984/SR.33 (Four Directions Council). Indigenous groups also participated in the Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters relating to Religion or Belief, held at Geneva in 1984, UN Doc. ST/HR/SER.A/16 (1984).

RECOMMENDATION ON MINIMUM INTERNATIONAL LABOR STANDARDS

In 1984, under the chairmanship of Professor Louis J. Emmerij, a working group of the Netherlands National Advisory Council for Development Cooperation drafted a report on minimum international labor standards. The report was approved by the Council late that year and was subsequently presented to the Minister for Development Cooperation.

The report considers the desirability of incorporating certain minimum international labor standards into international agreements on economic cooperation and trade policy that involve developing countries. After reviewing the various arguments for and against such incorporation, the report finds that the debate remains inconclusive. However, supporters and opponents both agree on the need to fight protectionism and promote improved working conditions in developing countries. Therefore, an effort is made to identify a number of labor standards whose violation or nonapplication would strongly imply that the basic need for freely chosen work in humane conditions could not be satisfied; it is those standards that ought to be applied in all countries and all economic sectors.

By applying three different types of criteria (social, legal and economic) to existing ILO Conventions, the so-called minimum package of international labor standards was identified. This package consists of the following standards: freedom of association (No. 87), the right to engage in collective bargaining (No. 98), equal remuneration (No. 100), abolition of forced labor

[55] *See, e.g.*, UN Docs. E/CN.4/Sub.2/1985/SR.11 (Four Directions Council), E/CN.4/Sub.2/1985/SR.15 (World Council of Indigenous Peoples and Four Directions Council), and E/CN.4/Sub.2/1985/SR.23 (Four Directions Council).

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Most of the statements quoted in the text are taken from government observers' speaking notes and audiotape transcripts, copies of which may be obtained from the author.

CHAPTER NINE: INTERNATIONAL ENVIRONMENTAL LAW AND THE RIGHTS OF INDIGENOUS PEOPLES

Part A - Comprehensive Rights and Claims of Indigenous Peoples

1. Shutkin, W A, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia Journal of International Law* 479-511.

2. Craig, D and Ponce-Nava, "Implications of Indigenous Rights and Customary Laws on the Development of Environmental Law for Sustainable Development" in *Environmental Law and Sustainable Development*, Nairobi: UNEP (forthcoming 1995).

3. Ministers of Arctic Nations, *The Arctic Environment: The Nuuk Declaration on Environment and Development in the Arctic*, Second Ministerial Conference, Nuuk, Greenland, 16 September 1993.

4. Egede, I, Universal Ethics and the IUCN, Inuit Circumpolar Conference Statement, Buenos Aires, January 1994.

5. United Nations, *Draft Declaration on the Rights of Indigenous Peoples*, UN Commission on Human Rights, Report of the Working Group on Indigenous Populations, 11th session, August 1983.

Part B - Intellectual and Cultural Property Rights of Indigenous Peoples

6. Craig, D, "Implementing the Convention on Biological Diversity: Indigenous Peoples Issues" in *Biodiversity Conservation in the Asia and Pacific Region*, Manilla: ADB and IUCN, 1995, 146-157.

Part C - Recognising the Rights of Australian Indigenous Peoples: A Case Study

7. Bergin, A, *Aboriginal and Torres Strait Islander interests in the Great Barrier Reef Marine Park*, Great Barrier Reef Marine Park Authority, Research Publication No. 31, November 1993, 4-41.

Shelton, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991)31 *Virginia Journal of International Law*, 479-511.

International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*

INTRODUCTION

The issue of the environment has achieved significant status on both the national and international scene. The term "environment" is itself common parlance from Main Street to the halls of the United Nations. Communities around the world have come to learn that the environment is threatened by forces derived from human activity: the greenhouse effect, acid rain, and desertification, to name a few. But the term "environment" is insidious, for it implies an essential distinction between human animals and the rest of nature.[1] Environmental matters are often approached in a way which either wholly divorces or deliberately abstracts human practices from their manifest and pervasive effects on the whole of the physical world.[2]

Environmental degradation is neither contained nor abstract. It is omnipresent, immediate, and threatens entire communities with cultural, if not virtual, extinction. Presently, indigenous peoples of South America, such as the Huaorani in Ecuador, are gravely imperiled by the hazards of natural resource exploitation.[3] On the low-lying islands of the Caribbean, South Pacific, and Indian Ocean entire cultures are potentially endangered by global climate change.[4] With rich social traditions and vital economic practices integral to the physical area in which they occur, these communities depend upon a healthy environment. To be sure, possessing little or no technological capability, these communities *are* their environment—profoundly integrated and deeply dependent.

The concept of international law, like the environment, is also problematic. Traditionally, international law denotes the laws which govern sovereign states exclusively.[5] Yet, certain activities do not fit well into the narrow framework of state-based international law. These include torture by a state against individual subjects, crimes against humanity, and other so-called human rights violations. Consequently, international human rights law has emerged to vindicate the rights of individuals and groups in the face of state persecution or malfeasance.[6]

Basic human rights norms appear to be at issue in the case of indigenous peoples imperiled by environmental degradation.[7] This Note explores the convergence of environmental and human rights issues as they relate to indigenous peoples,[8] and the capacity of international law, as it is and as it might be, to protect both human and non-human nature within the context of human rights jurisprudence.

Part I of this Note considers the evolving concepts of the environ-

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1. The Oxford English Dictionary, (Oxford, 1933 & Supp. 1972), defines "Environ" as "Surrounding," "Encircle," and "Environment" as "the conditions or influences under which any person or thing lives or is developed." See also Cheney, Postmodern Environmental Ethics: Ethics as Bioregional Narrative, 11 Envtl. Ethics 117 (1989) (discussing the idea of place and "the related notions of myth, narrative, storied residence, and ethical vernacular")

2. In the United States and the United Kingdom, for example, a common method by which individuals and communities deal with environmental problems is by declaring "not in my back yard" (NIMBY), as though these problems were not their own. Thus, responsibility for remedial action is shirked.

Another example is the debate concerning global warming. Because the concept of global climate change embraces issues of tremendous scope and some speculation, it has proved easy for individuals and states simply to disregard the plea for united action by explaining that because the matter is so vast, it necessarily demands protracted review before significant funds or resources will be committed to its resolution. See, e.g., Shabecoff, Bush Asks Cautious Response to Threat of Global Warming, N.Y. Times, Feb. 6, 1990, at A1, col. 5 (President's speech reflected concerns at the White House that "more scientific data about global warming and more study of the potential costs . . . are needed before formal international action is taken.").

3. See infra notes 69-106 and accompanying text.

4. See infra notes 107-117 and accompanying text.

5. I. Brownlie, Principles of Public International Law 287 (3d ed. 1979) ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations . . . .")

6. See International Human Rights: Problems of Law and Policy 1-124 (R. Lillich & F. Newman ed. 1979) [hereinafter International Human Rights]; see generally The Rights of Peoples (J. Crawford ed. 1988).

7. For example, the right to life and security of person found in articles 6 and 9 of the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

8. This Note deals specifically with the Huaorani tribe in Ecuador and more generally with

irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage . . . ."[67] Further, the petitioner may urge the Commission to request a prompt reply from the state in "serious or urgent cases or when it is believed that the life, personal integrity or health of a person is in imminent danger."[68] Though article 37 of the Regulations and, more generally, article 46 of the Convention require exhaustion of municipal remedies, urgent cases governed by article 29 or the failure of domestic legislation to afford due process of law excuse the petitioner from this requirement.[69]

III. Existing Remedies in Human Rights Law for Indigineous Peoples

A. *The Huaorani in Ecuador*

The Huaorani are nomadic hunters and gatherers that have lived from time immemorial in the Ecuadorian Amazonia between the Napo and Curaray Rivers.[70] With population estimates ranging from 525 to 3000[71], the Huaorani are a small tribe and the least assimilated of the six remaining indigenous cultures in the Oriente.[72] Approximately five-sixths of the Huaorani live within a reserve one-tenth the size of their traditional territory near Yasuni National Park.[73] The remaining tribe members, nine small bands, occupy traditional lands outside the reserve within or near Yasuni National Park.[74]

Huaorani families possess lots on which they plant manioc, a common food source, and plantain and migrate between them, hunting, fishing and gathering along the way. Their relationship with the forest is one of grave dependence and respect as each season the nomadic Huaorani subsist on the plantlife and wildlife of the Amazonia. As a result, they have developed sustainable methods of resource use which, though requiring large areas, have preserved the biological richness and natural processes of the area.[75]

Further, indigenous cultures of the Amazonia like the Huaorani vest in the environment profound spritual value that can only be appreciated, if not felt, by non-indigenous people. Elements of the environment such as lakes, trees, and wildlife are animated by religious and cultural forces which protect and mystify indigenous communities.[76]

Conoco Ecuador, Ltd., a subsidiary of the U.S. company Du Pont, plans to build a 175 kilometer road and auxiliary roads through the forest inhabited by the Huaorani in order to construct and maintain a pipeline for oil exploration.[77] Since 1972, the government of Ecuador has provided foreign corporations with concessions, or rights, to exploit large tracts of the Oriente for oil as long as the grantee finds oil in commercial quantities. As of April 1989, approximately 630,000 hectares of the Amazonia were being exploited for oil while

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67. Regulations of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.50 doc.6 (1983), art. 29 [hereinafter Regulations].

68. Id. art. 34.

69. Regulations, art. 29; American Convention, art. 46.

70. The information recounted in this section comes from four sources. As a Research Fellow at the Centre for International Environmental Law in London, the author acquired up-to-date and detailed accounts of the Huaorani from Laura Rival, a doctoral candidate in Anthropology at the London School of Economics who lived among the Huaorani for two years. Also, the author was able to obtain both the report of Judith Kimerling, a scientist with the Natural Resources Defense Council who lived in Ecuador and studied the impacts of oil development on the ecology and culture of the Amazonia, and the Masters Thesis of Gustavo Gonzalez, a student in Environmental Planning at the University of California at Berkeley. As well, with the assistance of Helena Paul, an environmentalist at the Gaia Foundation in London, the author was able to examine the correspondences and reports of Conoco, Inc., as they relate to the Huaorani. See generally Rival, Report on the Huorani, Paper submitted to CIEL 1 (Summer 1990).

71. Gonzalez, Land Use Conflicts in Tropical Rainforests: A Critique of the Management Plan for Yasuni National Park in Ecuador, M.A. Thesis, Department of Landscape Architecture, University of California at Berkeley 37 (May 1990).

72. Rival, supra note 70, at 1; Kimerling, supra note 51, at 5.

73. Many Huaorani were initially enticed into a protectorate in order to be Christianized by fundamentalist Protestant missionaries who were part of the Summer Institute of Linguistics. Between 1960 and 1975, the Institute removed up to eighty percent of the Huaorani from the forest and resettled them in an area less than one-tenth of their original territory. However, by the late 1970's opposition from university students and political groups accused the missionaries of serving as an agent of American imperialism by depopulating the forest in the interest of American oil companies. In 1981 the government expelled the Institute from Ecuador. In 1983 the government granted the reserve to the Huaorani. Rival, supra note 70, at 1; Gonzalez, supra note 71, at 10-11.

74. Yasuni National Park was created in 1979 and is considered by scientists to be one of the worlds most biologically diverse areas. The park itself is protected by both the Ecuadorian constitution which guarantees a clean environment and entrusts the state with preserving natureal areas and the Ley Forestal, a law which expressly protects the park from exploitation. La Corporacion de Defensa de la Vida (CORDAVI), an Ecuadorian environmental group, brought a law suit against the state in the Constitutional Court of Ecuador in August 1988 to enjoin further oil development in Yasuni in hopes of preserving not only the park but the territory and culture of the Huaorani. A judgment in the case is still pending as of the time this Note goes to press. Gonzalez, supra note 71, at 2.

75. Gonzalez, supra note 71, at 2-5.

76. Kimerling, supra note 51, at 27-28.

77. Conoco is part of a consortium including OPIC, Maxus, Nomeco, and Murphy and Canan Offshore Ltd. Oil companies from France, Brazil, the United Kingdom, Argentina, Canada have also exploited Yasuni's oil reserves, thus additionally affecting the Huaorani. Nevertheless, it is Conoco's proposed development within Block 16 of Yasuni National Park that most egregiously threatens indigenous culture and lives. See, e.g., Gonzalez, supra note 71, at 3, 9; Kimerling, supra note 51, at 7.

protection of family, freedom of movement and religion, the inviolability of the home, property and privacy."[49] Thus, while an exercise of the right could not justify disrupting the territorial integrity of a sovereign state, it could prohibit the attempts of a sovereign state to impose complete assimilation on indigenous communities.[50] The right to cultural participation or minimal self-determination, therefore, is practicable and justified in light of both state and foreign incursions upon indigenous cultures and the environment. More fundamentally, claims relating to culture entail the right to exist: cultural survival. The protection of a culture from "ethnocide"[51] is the core of the right to cultural participation.[52]

The right to life and the right to security of person, paramount in all human rights agreements, are also at issue in the matter of indigenous communities and the environment. With threats to the environment which could destroy indigenous territories—namely, the submersion of low-lying islands due to global warming—as well as exploitative actions on indigenous lands which degrade hunting and agricultural areas, these most basic human rights of self-preservation[53] are jeopardized.

The right to life and the right to security of person are non-derogable and universally regarded as *jus cogens*.[54] Moreover, the right to life has application beyond intentional or arbitrary deprivation of life, and requires that governments act affirmatively to protect life by promoting policies to ensure survival of persons within a state's jurisdiction.[55]

Cultural extinction is a genuine possibility for indigenous communities threatened by environmental degradation. Indigenous peoples have emphatically emphasized the intricate spiritual and historical qualities of their relationship with the earth which are essential to their existence.[56] Thus, members of indigenous communities have passionately advocated for protection of their native lands. The Coordinator of the Indian Nations Union explains:

> When the government took our land . . . they wanted to give us another place . . . but the State, the government, will never understand that we do not have another place to go. . . . The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.[57]

Another member of an indigenous community lamented the plight of native peoples, declaring:

> [T]he surest way to kill us is to seperate us from our part of the Earth. Once seperated, we will either perish in body or

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49. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser. L/V/II.62 Doc. 10 Rev. 3 and OEA/Ser. L/V/II.62 doc. 26 (1984), at 81-82 [hereinafter Miskito Report]. Rights related to culture are also articulated in Declaration of the World Conference to Combat Racism and Racial Discrimination, E/CN.4/Sub. 2/476/Add. 4 (1984), at 31-34 (protecting minority rights, particularly those relating to cultural identity and development). See also Universal Declaration of Rights of Peoples, Algiers, 1976; Banjul Charter on Human and Peoples Rights, CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) (member states of Organization of African Unity recognize and protect individual human rights). Professor Brownlie suggests that cultural rights essentially serve to guarantee group identity and equality. Brownlie, in The Rights of Peoples, supra note 6, at 6.

50. Miskito Report, supra note 49, at 80-81. Professor Brownlie says "the claim to self-determination does not necessarily involve a claim to statehood and secession." Brownlie, in The Rights of Peoples, supra note 6, at 6.

51. Ethnocide denotes the death of a culture in all but physical form, i.e., a group stripped of its traditional habitat and ability to participate in customary practices. See, e.g., Kimerling, Petroleum Development in Amazonian Ecuador: Environmental and Socio-Cultural Impacts, A Report of the Natural Resources Defenses Council 27-28 (Oct. 1989).

52. See e.g. Communication 167/1984 (Ominyak v. Canada), U.N. Doc. CCPR/C/38/D/167/1984 (Annex) (Decision of Mar. 26, 1990) [hereinafter Lubicon Lake case].

53. Donnelly, explicating the philosophy of Locke, says that both self-preservation and preservation of the human species constitute our most fundamental human rights. J. Donnelly, The Concept of Human Rights 70 (1985).

54. See Case 9647, Inter-Am. C.H.R. 147, 166, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (1987); Gormley, The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens, in The Right to Life in International Law (Ramcharan ed. 1985) (right to life viewed as unconditional norm binding on global community, even in periods of emergency).

55. See Case 7615 Inter-Am. C.H.R. 24, OEA/Ser. L/V/II.66, doc. 10 rev. 1 (1985) [hereinafter Yanomami case].

56. See, e.g., Declaration of Principles adopted at the Fourth General Assembly of the World Council of Indigenous People in Panama, Sept. 1984, reprinted in Report of the Working Group on Indigenous Populations on its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985) Annex III; Declaration of Principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Invit Circumpolar Conference, and the International Indian Treaty Council, reprinted in Report of the Working Group, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985) Annex IV. These documents provide for exclusive land rights, both surface and subsoil, and prohibit obstruction of any part of indigenous territory which may despoil land, air, water or wildlife without the consent of the community. Such structures came about because of the widespread recognition among indigenous tribes of the supreme value of the environment to their cultural lives.

57. A. Krenak, WCED Public Hearing, Sao Paulo, Oct. 28-29, 1985, quoted in Our Common Future, supra note 19, at 115.

in addition to Recommendations for Action. Moreover, the United Nations Environment Program was established as a special agency within the United Nations Secretariat.[16] The Conference ultimately served to legitimize the global environment as an object of both national and international law and policy and to exemplify the process by which international environmental law would develop.[17]

Thus, since 1972 the issue of the environment, and particularly concern about natural resource exploitation by developed nations, has become well entrenched in international discourse. And none too soon: presently, the state of the environment is at best gravely uncertain and at worst desperate.[18] Consequently, an efflorescence of literature has developed explicating the crisis and appealing for concerted, international action.[19] Foreshadowed by the Stockholm Declaration, the international community now accepts that "[t]he environment does not exist as a sphere separate from human actions, ambitions, and needs [but] is where we all live."[20]

Furthermore, with the growing sense that the global environment is imperiled by human practices such as deforestation and combustion of fossil fuels, international society has come to understand that human communities themselves are threatened, especially indigenous peoples.[21] Problems still conceived as "environmental" are in reality profoundly anthropocentric: the preservation of human life and culture.[22] The World Commission on Environment and Development has noted that on account of environmental exploitation, "[t]ribal and indigenous peoples will need special attention . . . [s]ome are threatened with virtual extinction."[23] "Their traditional rights should be recognized," according to the Commission, and "they should be given a decisive voice in formulating policies about resource development in their areas."[24]

It is well known that indigenous communities maintain an intricate and salutary relationship with the earth which is basic to their existence and their culture. As the Subcommittee on the Prevention of Discrimination and Protection of Minorities explains:

> [A]ll indigenous communities have, and uphold, a complete code of rules of various kinds which are applicable to the tenure and conservation of lands as an important factor in the production process, the foundation of family life and the territorial basis for the existence of their people as such. The whole range of emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned . . . . The land forms part of their existence . . . .[25]

The relationship between indigenous people and the environment, joined with a history of continuing assaults upon their land[26] and the

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16. Non-governmental organizations in a separate Environment Forum called for the institutionalization of international loyalties to earth and humanity which would operate as positive international law enforceable against individuals, businesses, and states. The Forum, simultaneous with the Stockholm Conference, helped to affirm the supranational quality of environmental issues. Caldwell, supra note 9, at 62.

17. See U.N., Report of the Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev. 1 (New York, 1973). While the Declaration on the Human Environment itself is not binding as international law, it does forcefully present a new paradigm of international order. The preamble to the Declaration emphasizes the "need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment." Further, paragraph 7 of the Declaration identifies the locus of responsibility for such action as:

> citizens and communities and . . . enterprises and institutions at every level . . . . Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities . . . . The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their prosperity.

Id. See generally Ruster, supra note 13 (chronological catalogue of all international environmental agreements before and after Stockholm).

18. See supra notes 3-4 and accompanying text.

19. See, e.g., W. McKibben, The End of Nature (1989); S. Roan, The Ozone Crisis: The Fifteen-Year Emergence of a Sudden Global Emergency (1989); S. Schneider, Global Warming: Are We Entering the Greenhouse Century (1989); Wirth, Climate Chaos, 74 Foreign Pol'y 3 (1989); World Commission on Environment and Development, Our Common Future (1987) [hereinafter Our Common Future].

20. Our Common Future, supra note 19, at 21.

21. Certainly environmental degradation poses risks to all human populations. However, concerning the immediate impacts of environmental abuse, it is obvious that indigenous groups in less developed nations are most vulnerable. This is due to their daily dependence on the environment for shelter and sustenance as well as culture and ritual, and the accessibility of their territories to exploitation or, conceivably, the deleterious effects of global climate change. See Our Common Future, supra note 19, at 114-116. For a survey of the fragile status of indigenous peoples, see U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc. E/CN.4/Sub. 2/1986/7 & Adds. 1-4 (1986). See also Roy and Alfredsson, Indigenous Rights: The Literature Explosion, 13 Transnational Perspectives 19 (1987); A. Shoumatoff, The World Is Burning: A Murder in the Rainforest (1990).

22. See W. Gormley, Human Rights and the Environment: The Need for International Cooperation (1976). Gormley writes: "When evaluating the destruction of peoples, i.e. minority groups, because of the destruction of their natural ecology, a new lesson is to be learned: [humans have] become the endangered species." Id. at 19.

23. Our Common Future, supra note 19, at 12.

24. Id.

25. U.N. Subcomm'n on Prevention of Discrimination, supra note 21, at 28.

26. "[T]he history of indigenous people is . . . the chronicle of their unsuccessful attempts to

another 3,000,000 hectares were in the exploratory phase of development. In addition, some 2,500,000 hectares were granted to oil interests by the end of 1989, including land in both Huaorani territory and Yasuni.[78]

As of 1988 Ecuador received 44.5 percent of its export revenues from oil and oil derivative products.[79] At the current rate of exploitation, however, the oil reserves are expected to last only ten to twenty years.[80] In 1984 an environmental bureau was created within the Ecuadoran Ministry of Energy and Mines, Direcion General de Medion Ambiente (DIGEMA).[81] But without authority to act under the existing oil laws, DIGEMA has been able to do little more than basic monitoring of the environmental effects of oil development.[82] Its requests for environmental impact assessments have gone unheeded by the oil companies.[83] For its part, Conoco has pledged support for "environmentally responsible development" that will neither harm the forest nor allow colonists and oil workers to threaten indigenous communities by competing for their resources.[84]

Despite the reassurances of the oil industry, however, oil exploration, exploitation and transportation entail severe risks and hazards for both the environment and the Huaorani. In the exploration phase of oil development, thousands of kilometers of trails and hundreds of heliports and detonation holes for seismic investigations will scar and disrupt the fragile systems of the forest leading to erosion, pollution and wildlife dispersion.[85] The Quichua tribe have reported that the ancient spirits they believe inhabit the Amazonia have abandoned their chain of sacred lakes since the exploitation of oil in Yasuni.[86]

Exploratory drilling, subsequent to seismic investigations, requires massive clearing of forest—two to five hectares for each well and ten to fifteen hectares for boards used for drilling platforms.[87] More heliports, too, will be needed thus requiring the destruction of more wooded area.[88] Drilling itself produces toxic, acidic, and alkaline wastes like petroleum, natural gas, drilling muds, and formation water which are discharged into surrounding soils or streams or burned within the forests.[89] DIGEMA has reported widespread destruction of flora and fauna due to the drilling.[90] Landfilling of waste, as proposed by British Petroleum and Conoco, would involve no pretreatment, lining, or leachate collection system.[91]

In the exploitation phase, more land will be cleared and more wells are drilled.[92] DIGEMA reports that oil spills from production station flowlines averaging 17,000 to 21,000 gallons are a bi-weekly occurence.[93] The Shusufindi and Aquaric Rivers, traditional fishing grounds of indigenous communities in the Amazonia, are now contaminated and have been abandoned by the local tribes.[94]

Additionally, transportation of oil is hazardous to the Amazonian environment and indigenous people.[95] Roads built for oil transportation facilitate soil erosion and sedimentation of rivers and streams.[96] They also serve as barriers to animal migration.[97] Even more invidious, they allow thousands of colonists to enter indigenous areas.[98] In the Cuyabeno Wildlife Reserve, for example, 1200 non-indigenous families followed a pipeline road to settle in the forest.[99] Colonists are notorious for degrading the rainforest and depriving indigenous communities access to traditional hunting and farming lands.[100] Meanwhile, both colonists and oil workers spread deadly disease among indigenous communities.[101] In Brazil between 1974 and 1976,

78. Kimerling, supra note 51, at 6.
79. Id. at 7.
80. Id. at 8.
81. Id. at 9.
82. Id.
83. Id.
84. Letters from Alex B. Chapman, Manager, Conoco Ecuador, to Helena Paul, May 8, 1990 and June 8, 1990.
85. Kimerling, supra note 51, at 11-14.
86. Id. at 13.
87. Id. at 14.
88. Id.
89. Id. Each well produces 42,000 gallons of petroleum waste. When burned this waste produces air-born pollutants such as SO_x, NO_x, CO_x, and heavy metals. Heavy hydrocarbons are either burned or left in waste pits. Also, unsealed oil wells allow migration of contaminants into drinking water wells. Id. at 16.
90. Id. at 15.
91. Id.
92. Id. at 17.
93. Id. at 21.
94. Id. at 19-21.
95. Id. at 23-27.
96. Id. at 24.
97. Id.
98. Id. at 23.
99. Id.
100. As Laura Rival explains, oil workers and colonists are one and the same to the Huaorani—invaders. She remarks:

> [T]he track record of the oil companies . . . is not good. Uncontrolled colonization along the oil roads has destroyed most of the rainforest, leaving little land and no hunting for the Indians. . . . The Cofon, Siona, and Secoya . . . have been reduced to only a few hundred individuals . . . and face cultural extinction. The Tetete have disappeared entirely, leaving just an oil field named after them.

Rival, supra note 70, at 7.
101. Gonzalez, supra note 71, at 43.

most, the right to life and security of person are violated by the actual and potential activities of oil companies authorized by the government of Ecuador. Exploitative practices and colonist encroachment implicate these basic rights which are protected by article 27 of the Convention and universally recognized as *jus cogens*.[120] Moreover, unable to live and evolve in their unique way, the Huaorani are susceptible to ethnocide.[121] Recent human rights reports have urged that immediate attention be given to cases involving the destruction of indigenous cultures and that ethnocide is a grave violation of international human rights law.[122] Hence, as government plans to alleviate pressures on Huaorani culture are inadequate to maintain Huaorani traditions and practices in light of the sanctioning of rapacious exploitation and colonization, the right to life of the Huaorani, individually and collectively, is compromised.[123]

Further, in a similar case the Commission adjudged that gross encroachments by oil workers and colonists onto traditional indigenous lands lead to declines in life-expectancy and health among indigenous people.[124] Governments are obliged to take timely measures to prevent activities which negatively affect the welfare of indigenous communities.[125] Deforestation and pollution jeopardize Huaorani culture by severing the vital nexus between them and the environment.[126]

120. See Case 9647, Inter-Am. C.H.R. 147, 166, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (1987) (applying concept of *jus cogens* to United States system of capital punishment).

121. See, e.g., UNESCO, Declaration on Ethnocide and Ethnodevelopment, San Jose (1981).

122. See, e.g., Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub. 2/1983/21/Add. 3; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub. 2/1985/6.

123. See Annual Report, Inter-Am. C.H.R. (1973), at 27 OEA/Ser.P,AO/doc.409/174, Mar. 5, 1974.

124. See Yanomami case, supra note 55. In 1985 the Inter-American Commission found widespread human rights abuses in Brazil on account of road construction, destruction of Amazonian land, government-authorized exploitation of resources, failure to stem massive colonization and contagion, and the displacement of indians from traditional land. Id. In the Peruvian Amazonia, oil exploitation by Royal Dutch Shell in collaboration with the government of Peru over a period of three years resulted in disease that killed almost half the Nahua population and initiated a wage labor economy that disrupted Indian traditions with alchoholism and prostitution.

125. Yanomami case, supra note 55, at 33. See also Velasquez Rodriguez Case, Inter-Am. C.H.R., Judgment of July 29, 1988, Inter-Am. Ct. H.R. Annual Report 35, OEA/Ser. L/V/III.19 (1988) (governments have an affirmative duty regarding the promotion and protection of basic human rights).

126. See Muntarbhorn, Background Paper, Report on the U.N. Seminar on Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22 (1989).

concerning rights to minimal self-determination such as the right to family, home, privacy, and property incorporated in the Declaration and Convention, the Huaorani have a right to exist as a distinct culture.[127] Article 27 of the International Covenant of Civil and Political Rights, to which Ecuador is a signatory, mandates that the cultural identity of a community be protected.[128] The Huaorani may assert these rights to preserve their identity and prohibit harmful intrusion upon or degradation of traditional lands and destruction of traditional livelihoods and practices, without seeking independent sovereignty.

Thus, under regional regimes such as the American Convention on Human Rights, claims can be brought before an international tribunal to simultaneously protect indigenous peoples and, indirectly, the environment. The situation changes, however, when harm to indigenous societies and the environment is not actual but potential.

B. *Cultures of Low-lying Islands in the Caribbean, South Pacific, and Indian Oceans*

The international legal process is clearly stretched to accomodate alleged human rights violations brought on behalf of isolated communities possibly threatened by the potential consequences of a disputed environmental condition, namely global warming. Given this problem, this section of this Note discusses the possible application of existing human rights law in the context of low-lying island cultures potentially threatened by global climate change.

There is little doubt among the scientific community that global climate change brought about by increased emissions of fossil fuels poses at least some threat to the health of the earth's ecosystems, including humankind.[129] As Barber Conable, President of the World Bank, has remarked, "[t]he possible risks [of global warming] are too high to justify complacency or evasion. The international community cannot sit back hoping that these problems will somehow pass us

127. See Miskito Report supra note 49, Lubicon Lake case, supra note 52.

128. See International Covenant on Civil and Political Rights, supra note 7, art. 27.

129. See Council on Environmental Quality, Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act, 6 (Feb. 24, 1989); Mintzer, Living in a Warmer World: Challenges for Policy Analysis and Management, 7 J. Pol'y Analysis & Mgmt. 445 (1988); The Changing Atmosphere: Implications for Global Security (July 3, 1988), held in Toronto, Canada on June 27-30 (1988). Stevens, New Report Intensifies the Warning on Global Warming, The New York Times, Oct. 17, 1990, at 9, col. 1.

by."[130] Though the industrialized nations have contributed most significantly to what many believe to be a global crisis,[131] lesser developed nations are likely to suffer the consequences of global warming equally, if not more, than their industrialized counterparts.[132] This is particularly so in the case of low-lying coastal and island states which potentially will lose substantial territory or, worse, disappear under rising seas.[133]

Island states in the Caribbean, South Pacific and Indian Oceans such as Trinidad and Tobago, Kiribati, the Republic of Maldives, and Tuvalu are rarely more that three meters above sea-level.[134] A two meter rise in sea-level, for instance, could decimate Kiribati and its 60,000 inhabitants, or the capital of the Maldives, or many of the populated atolls of the Indian Ocean.[135]

As island cultures, these societies have maintained for centuries a vital relationship with the marine environment. It is a source of sustenance and economic opportunity, allowing a rich food source and profitable tourist and commercial trade. These cultures have shaped their traditions around the sea and islands; indeed they are defined by their insular, marine existence. Thus, even a moderate rise in sea-level could decimate islands and the cultures which inhabit them. Floods and storms would become more frequent and severe. Diminished drinking water supply and a dearth of tourists due to eroded beaches and damaged coral reefs would also likely result.[136]

Threatened with territorial and cultural devastation, low-lying states essentially must have recourse to the protections afforded by human rights law. Without an applicable regional regime, Carribean, South Pacific and Indian Ocean states can attempt to seek remedies under customary international law.[137] These states could, conceivably, sue offending states for violating basic human rights—such as the right to life and security of person and the right to peaceful enjoyment of property—on account of massive emissions of gases which could alter the environment and thus destroy their habitats and cultures.

However, the difficulties in assessing each state's contribution to the harm expected and in fashioning relief which will not inequitably effect an offending party are surely prohibitive of such claims.[138] Moreover, the magnitude and complexity of proof, liability, and responsibility, coupled with the bulwark of state sovereignty, essentially debilitate existing human rights law in this situation. Claims based on existing human rights standards thus appear impracticable for the protection of low-lying islands and the cultures which subsist on them.

IV. Recent Developments in Human Rights Jurisprudence

Notwithstanding the relative inadequacy of existing international law, recent developments in the jurisprudence of human rights portend a more significant role for human rights law in preventing both global warming and the destruction of human cultures that would accompany it.

As a successor to the first and second generations of human

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130. Conable, Development and the Environment: A Global Balance, 5 Am. U.J. Int'l L. & Pol'y 235, 239 (1990).

131. North America and Europe, representing eight percent of the world's population, nonetheless emit three-quarters of the world's CO_2. Developing countries, however, represent eighty percent of the world's population but contribute only seven percent of CO_2 emissions. Id. at 244.

132. See infra notes 135-136 and accompanying text.

133. See Male Declaration on Global Warming and Sea Level Rise, Small States Conference on Sea Level Rise, held in Male, Republic of Maldives on Nov. 14-18, 1989, reprinted in Selected International Legal Materials for Global Warming, 5 Am. U.J. Int'l L. & Pol'y 513, 602 (1990) (describing potential for global warming and sea level rise and their impact on small coastal and island states); Zaelke and Cameron, Global Warming and Climate Change—An Overview of the International Legal Process, 5 Am. U.J. Int'l L. & Pol'y 249 (1990).

134. Zaelke and Cameron, supra note 133, at 259.

135. Id.

136. Id. at 260.

137. Of the states mentioned, none is a signatory to either of the U.N. covenants. Nevertheless, the human rights involved, e.g., the right to life, are norms of customary international law or even *jus cogens* and thus can be invoked by any state party. Lillich, Civil Rights, in Human Rights in International Law, supra note 64, 117-118.

138. Customary international law, apart from human rights norms, has proved largely inadequate when applied to environmental damage. While the International Court of Justice has held that every state has the obligation not to use its own territory in a way which contravenes the rights of other states, see Corfu Channel Case (U.K. v. Albania), 1949, I.C.J. 4, 22; Lake Lanoux Case (Fr. v. Spain), 53 Am. J. Int'l L. 156 (1959), substantial proof of injury must be proferred before a court will act to enjoin a state. See Trail Smelter Case (U.S. v. Canada), 3 R. Int'l Arb. Award 1907 (1941).

Moreover, there are no definitive precepts in international law which address state liability for environmental damage caused by private activities within a state's territory, or the consequences of transboundary pollution. This is largely due to the reigning assumption in international law that states have the sovereign right to develop their economies and to determine the rules which govern activities on their territories. See Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), at 50, U.N. Doc. A/9631 (1974). But see article 194(2) of the U.N. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261, 1308 (1982) ("States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.")

rights,[139] a so-called third generation of rights is emerging, adumbrating the rights to environment and development, among others.[140] These rights purport to signify an evolving conciousness of the world as interdependent. Akin to economic, social, and cultural rights, this latest category of rights can also be described as containing solidarity, or group, rights. Rights to environment and development, though not yet regarded as legitimate rights,[141] may serve in the future to protect human communities and the environment. Moreover, these rights are not contravening, as their respective titles would indicate, but actually mutually reinforcing.

The idea of a right-to environment has been discussed for some years.[142] The concept holds that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being and the responsibility to protect the environment for the benefit of present and future generations."[143] Moreover, a right to environment implies an international obligation on the part of states vis-a-vis other states and even individuals irrespective of their nationality.[144]

The World Commission on Environment and Development (WCED) has encouraged the "full recognition and legal protection of the environmental rights of individuals, groups and organizations."[145] Implicit in the idea of environment, the WCED adds, is "[c]ulture and cultural heritage of all sorts" which would also be protected by a right to environment.[146] Further, an environmental right entails the substantial participation of NGOs to ensure that states protect both environment and individuals or groups whose enviroment is imperiled.[147] The WCED states that "[g]overnments should recognize the special expertise and experience of NGOs, and their direct partnership and contact with local communities [so that] . . . traditional activities of indigenous peoples [will] be allowed to continue."[148] NGOs thus would be empowered to act on behalf of individuals or groups in the interest of the environment, notwithstanding jurisdictional constraints.

Another aspect of the right to environment is the notion spelled out in article I of the Charter on Environmental Rights that "[e]very generation receives a natural and cultural legacy in trust from its ancestors and holds it in trust for its descendants."[149] This trust "imposes upon each generation the obligation to conserve the environment and natural and cultural resources for future generations."[150] By depleting resources and degrading the environment, the present generation interferes with "the rights of future generations to share in the benefits of the planet."[151]

This concept of "intergenerational equity" thus demands equality among generations and between members of a particular generation to access and enjoyment of a healthy environment, and postulates that all states have an obligation to future generations regardless of nationality.[152]

As a component of an environmental right, then, rights of future generations are not individual rights but group rights which, conceivably, could be guarded by NGOs or state-appointed representatives acting in the capacity of a human rights commission.[153] Trust funds could be established as well to compensate future generations for depletion of resources and to meet future costs of present

139. See supra notes 39-43 and accompanying text.

140. See Rich, The Right to Development: A Right of Peoples?, in The Rights of Peoples, supra note 6, at 41.

141. See, e.g., Experts Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development Legal Principles 40 (1986) [hereinafter Final Report]; Brownlie, The Human Right to Development, 14-16 (1989).

142. See, e.g., Gormley, supra note 22. A separate discourse concerning rights in the environment itself began as early as 1964 when a law professor at the University of Pennsylvania wrote a piece on the rights and duties of animals and trees in the Journal of Legal Education. Morris, The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects, 17 J. Legal Educ. 185 (1964).

143. Charter on Environmental Rights and Obligations of Individuals, Groups and Organizations, art. 1 reprinted in Report on the Regional Conference at Ministerial Level on the Follow-Up to the Report of the World Commission on Environment and Development in the Economic Commission for Europe Region, Action for a Common Future, held at Bergen, Norway, May 8-16, 1990 [hereinafter Action for a Common Future]. See also The Hague Declaration, The Hague, Netherlands, March 11, 1989, reprinted in Selected International Legal Materials for Global Warming, supra note 133, at 567.

144. See Final Report, supra note 141, at 39-41.

145. Action for a Common Future, supra note 143, at 44.

146. Id.

147. See Charter on Environmental Rights, art. 6-8, in id.

148. Id. at 48-49.

149. Id.

150. Weiss, In Fairness to Future Generations, Environment, Apr. 1990, at 7.

151. Id. at 8.

152. Id. at 9. Principles of intergenerational equity include:

1. Conservation of options—diversity of the natural and cultural resource base available to future generations must be conserved.
2. Conservation of equality—environmental quality must be preserved which is comparable among generations.
3. Conservation of access—each generation must provide its members with rights of access to the planetary legacy of past generations and conserve that access.

Id. at 9-10.

153. See Sands, The Environment, Community and International Law, 30 Harv. Int'l L.J. 393, 416 (1989).

at the expense not only of the environment but indigenous societies which depend on it. While ideally in the interest of the whole of a society, development may often result in the destruction of those cultures within the society which do not want to partake in economic development but wish to remain as they are—traditional, pre-industrial.

There is a less ominous face, however, to the right to development. As the International Commission of Jurists has urged, development is not a purely economic matter. Rather, development should be seen as:

> a global concept, including, with equal emphasis, civil and political rights and economic, social, and cultural rights .... True development requires a recognition that the different human rights are inseperable from each other .... Development should be understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilize under the Rule of Law all his [or her] human rights, whether economic, social, cultural, civil or political.[163]

Development thus aims at the improvement of the welfare of the entire population of a state.[164] Concerning indigenous cultures, Professor Brownlie explains that:

> [t]hey are to share in the process of development of the national community as a whole, without discrimination. This is the outcome of the prominent reference to the usual standards of human rights in the Declaration [on the Right to Development] and the interdependence of economic and other categories of rights. At the same time, there can be no doubt that indigenous peoples are among the beneficiaries and claimants of the right to development.[165]

The right to development, then, entails an abiding interest in social justice and could thus enhance the status of indigenous peoples by protecting their right to develop their unique cultures. The problematic of development remains, however, because states will be hard-pressed to maintain an equitable balance between cultural autonomy

163. Sieghart, An Introduction to the International Covenants on Human Rights, Paper Prepared for the Commonwealth Secretariat 13 (London, 1988)

164. See Sieghart, supra note 40, at 95.

165. Brownlie, supra note 141, at 19.

and the introduction of economic changes intended to improve living standards throughout the state.

In order to resolve this problematic, the notion of "sustainable development" and the precautionary principle have emerged as components of international environmental discourse. Sustainable development implies that states, regardless of their stage of development, must treat the conservation of natural resources and the environment as an integral part of the planning and implementation of development activities.[166] Particular attention is to be paid to environmental problems arising in developing countries. Underdevelopment often involves a risk of improper management of natural resources due to a lack of capital for financing institutions required to conserve natural resources and a dearth of relevant scientific and technological expertise. Thus, sustainable development involves the establishment of programs designed to provide developing countries with financial support and scientific and technical information and equipment, garnered in part from developed states, to promote rational use of natural resources and to prevent or abate degradation of the environment.[167]

Concomitant with the notion of sustainable development is the precautionary principle. This principle holds that in order to achieve sustainable development environmental measures "must anticipate, prevent and attack the causes of environmental degradation."[168] As the WCED emphasizes, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[169]

Clearly these principles embody a prudential, progressive attitude towards the global environment and the human societies that constitute a part of it. Also, they appear to resolve the problematic of environmental and cultural preservation and economic development. Yet, as mere principles and theories, sustainable development and the precautionary principle remain essentially effete, lacking even the semblance of law. Unlike the idea of a right to environment, however, these principles do not seem to require a substantial leap in sensibility or consciousness. They are thus likely to be more quickly realized in the form of positive international law than the right to

166. See Final Report, supra note 141, at 65-69; World Charter for Nature, G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51), U.N. Doc. A/37/51 (1982)

167. Final Report, supra note 141, at 67-68.

168. Action for a Common Future, supra note 143, at 15.

169. Id.

The "commodities" of international exchange—resources, goods, ideas—have become a vital part of each nation's daily functioning. Thus global interdependence means that the actions of any state and its population may adversely affect another state and its population inadvertently. Certainly, this is true both in the case of the Huaorani threatened by the energy "needs" of foreign states, and the situation of low-lying islands imperiled by global climate change resulting, in large part, from the energy use of industrialized states.

International law, then, should come to reflect *these* contingencies of history. It should incorporate as subjects the individuals and groups that constitute states and, *a fortiori*, the international community. Only then will the critical problems of environmental degradation and cultural extinction—issues which, after all, affect those selfsame individuals and groups and not the abstract agents called states—be effectively resolved.

William Andrew Shutkin

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radioactive debris, the flow of money, the power of religious or secular ideas, [and] AIDS . . are only a few of the phenomena that pay scant attention to national borders or to sovereignty." Urquhart, Sovereignty vs. Suffering, N.Y. Times, April 17, 1991, at A23, col. 1 (late ed.)

2. UNEP PUBLICATION ON

ENVIRONMENTAL LAW AND

SUSTAINABLE DEVELOPMENT

9.17

Implications of Indigenous Rights and

Customary Laws on the Development of

Environmental Law for Sustainable Development

87

by Donna Craig and Diana Ponce Nava

Draft July, 1995

1. INTRODUCTION

During the last 20 years, international law and policy has gradually given recognition to the rights of indigenous peoples culminating in the United Nations Draft Declaration on the Rights of Indigenous Peoples, the International Labour Organisation Convention No 169 on Indigenous and Tribal Peoples and Chapter 26 of Agenda 21 recognising the role of indigenous peoples in sustainable development.

The announcement of the United Nations Decade for the World's Indigenous Peoples is indicative that the recognition of the fundamental rights of indigenous peoples will continue to evolve internationally and nationally. It has become clear that the human rights of indigenous peoples cannot be protected without recognising the integral relationship between their rights to land, sea, natural resources, wildlife and their right to continue to sustainably develop and manage these territories and resources. The legal recognition and protection of indigenous knowledge and practices relating to conservation, natural resources and management through intellectual and cultural property rights is also an important issue

UNCED represented a global attempt to link the economic, social, cultural and physical environment dimensions of sustainable development and to propose detailed implementation strategies through Agenda 21. Indigenous people provide unique examples of sustainable development which is embedded in their cultures and evolved and transmitted through many generations. There are also instances where this process has been halted by genocide, dispossession and the devaluation of indigenous use, knowledge and practices

Emerging indigenous rights standards seek to prevent these breaches of indigenous human rights within a wider assertion of indigenous self-determination. International environmental law and policy needs to look at indigenous sustainable development for positive examples and guidance but it also needs to observe international indigenous rights standards. The recognition of a limited indigenous right to intellectual and cultural property in the Biodiversity Convention was a significant step in this direction.

At the national level, there has been some limited constitutional, legislative and cujstomary law provisions for indigenous rights to sustainable development. This Chapter provides an overview and discussion of the international legal and policy framework for recognising indigenous peoples' sustainable development and examples of national implementation through common law and legislation. It involves increasingly overlapping areas of indigenous rights which are now articulated through the concept of sustainable development

Concept of Sustainable Development

The Report of the World Commission on Environment and Development (WCED, 1987) has popularised the concept of sustainable development. Taken out of the context of the Report, such popularity is understandable. It seems to imply that we can continue to have economic growth, so long as we develop "better" ways of managing the environment. The

indigenous peoples (for example, human rights, land and resource rights, intellectual and cultural property, rights to manage the environment and natural resources) as illustrated by the United Nations Draft Declaration on The Rights of Indigenous Peoples. This recognition of indigenous rights and customary law will have considerable influence on the direction of sustainable development at the international, national and local level.

Some tribal societies have been able to maintain a long-term sustainable relationship with their environment (Goodland, 1982). Clearly, much can be learnt about sustainable development from the historical, anthropological and scientific study of traditional societies which functioned in the past as well as those which have survived relatively intact into the 20th century. However, indigenous peoples often assert that they have a contemporary indigenous culture which should be valued in the same way as earlier forms of indigenous culture. An understanding of contemporary indigenous social relationships must come to grips with the use of land for social, economic, political and spiritual purposes. In some ways this demonstrates an integrative approach advocated in the Brundtland WCED Report (1987). Contemporary indigenous peoples are seeking ways of developing economic and political self-determination that is essential for their cultural and physical survival in the modern world. Locking them into the past is to reduce their options (especially when their environment and societies may have been irrevocably altered).

2. RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL LAW AND POLICY

The concept of ethno-development primarily focuses on local issues within territory occupied by indigenous people. However, they are inevitably impacted by decisions and plans which go beyond their land and involve peoples from the dominant culture. Sustainable development requires action at the national and international level. The United Nations Human Rights Commission has argued that we should "reconcile the needs of indigenous peoples with the requirements of national economic development" (United Nations Human Rights Commission's Subcommission on Prevention of Discrimination and Protection of Minorities, 1983). A key issue which must be addressed is how we recognise the requirements of sustainable development and the needs of indigenous people for self-determination.

We start from the premise that Aboriginal peoples must have legally recognised title to their land, seas and natural resources and the power to control their use and management in a way that they consider appropriate.

Following the United Nations Conference on the Human Environment (Stockholm, 1972), several declarations have stated the basic right of indigenous peoples to exercise self-determination to achieve sustainable development:

> "Development should respect, maintain and enhance the diversity of natural life and human culture to maintain and expand the availability of options for this and future generations .... This requires that homogenization of land use and human lifestyles be avoided." (Cocoyoc Declaration, 1974)

The Declaration of San Jose (UNESCO, 1981) defines the right to ethno-development as:

> "the amplification and consolidation of ... a culturally distinct society's own culture, through the strengthening of its capacity to guide its own development and exercise self-determination ... and implying an equitable and proper organisation of power."

This declaration went on to emphasise the fundamental importance of recognising indigenous peoples' rights to their territories:

> "For the Indian peoples, land is not only an object of possession and production. It constitutes the basis of their physical and spiritual existence, as well as their existence as autonomous entities. Territorial space is fundamental to their relationship with the universe and the maintenance of their cosmo-vision.
>
> These Indian peoples have a natural and inalienable right to the territories they possess and to reclaim those lands of which they have been dispossessed. They are entitled to the natural and cultural patrimony contained in their territories, as well as the right to determine freely their use and benefits.
>
> The cultural patrimony of these peoples includes their philosophy of life and experiences, knowledge and accumulated historical achievements in the cultural, social, political, juridical, scientific, and technological fields, for this reason, they have a right to the access, utilisation, diffusion and transmission of this entire patrimony.
>
> Respect for the forms of autonomy required by these peoples is the essential condition for guaranteeing and realising these rights (UNESCO, 1981)."

UNCED - Rio Declaration and Agenda 21

This consistent approach was again reflected in the Karioca Declaration by indigenous peoples at the "Earth Summit" (UNCED, 1992). The Rio Declaration, at UNCED, attempted to recognise indigenous sustainable development in Principle 22:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The implementation of the Rio Declaration is elaborated in Agenda 21 which provides for a programme of national and international action for sustainable development. It is not a

Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". This Convention will be discussed in more detail later in this chapter.

The trend of recognition of the right to self-determination has continued through new international legal instruments. For example, in July, 1992 in the context of the Second IberoAmerican Summit, governments created the Fund for the Development of the Indigenous Peoples of Latin America and the Caribe. Article 1.1 of the Convention, that created this fund, also recognised in a limited manner the right to self-determination of the indigenous peoples. It stated that the use of the term "peoples" shall not be construed in a way that may have any implication regarding the rights that may be attached to that term in international law. However, it also provided that "indigenous peoples" exist as "peoples within national States" and as such they are entitled to the rights of the original inhabitants, including the preservation and defence of their lands as the basis of their physical and cultural existence. During the XIX sessions period of the Organisations of American States General Assembly (November, 1989) it was resolved to request that the InterAmerican Commissions of Human Rights and the InterAmerican Indianist Institute prepare a legal instrument regarding the rights of indigenous populations.

On December 10, 1992, Human Rights International Day, the UN General Assembly declared 1993 as "International Year of the World Indigenous Populations". The UN Working Group on Indigenous Populations has prepared a Draft Universal Declaration of the Rights of Indigenous Peoples. This Declaration focused on the following concepts:

- The right of indigenous populations to life, physical integrity and security;
- The right to self-determination and the right to develop their own culture, traditions, language and way of life;
- The right to freedom of religion and traditional religious practices;
- The right to land and natural resources;
- Civil and political rights;
- The right to education; and
- Other rights.

The third chapter of the Declaration provides for particular protection of the rights of indigenous peoples to their lands, territories and natural resources. Strengthening ideas already included in Convention 169, it establishes the following:

- Affirms that governments shall respect the special cultural and spiritual values which land represents for indigenous peoples, as well as its collective aspect;
- Provides for the recognition of the rights of ownership and possession by these peoples of the lands they have traditionally occupied;
- Their rights to the natural resources pertaining to their lands is guaranteed, as well as their participation in the use, management and conservation of these resources;
- States that indigenous peoples shall not be removed from their lands, but if such removal is necessary as an exceptional measure, it shall take place only with their free and informed consent, after appropriate procedures. It also guarantees their right to return once the emergency is past.
- Deals with the procedure of transmission of land rights, respecting indigenous customs;
- Requires the establishment of penalties for unauthorised intrusion upon or use of the lands; and
- Requires equal treatment for indigenous and tribal peoples under national agrarian programmes.

It should be said that the activities of the non-governmental organisations interested in the issues of indigenous rights, played a major role in the advancement of the recognition of these rights at international levels by States and other members of the international community. For instances, on September 1977 the UN hosted the International Conference of Non-Governmental Organisations on Discrimination of Indigenous Peoples in the Americas. It was in this forum that the international community witnessed, for the first time, the claim for a right to self-determination. This Conference was the first of a series of meetings where intense diplomatic activities were undertaken by indigenous peoples and organisations in order to achieve the recognition of their rights.

Two of the most important fora were the IV Russell Tribunal on Rights of Indigenous Peoples of the Americas, held on November 1980 and the United Nations' Conference of International Non-Governmental Organisations on Indigenous Peoples and the Earth, held on September 1981. Both meetings ended by adopting documents which submitted Native States and their legislation to a public judgement, evidencing the non-compliance of those States to both their own laws and international law and the deep discrimination embodied in their social structure as well as the genocide and ethnocide committed against millions of indigenous persons in the world.

Recognition of Indigenous Rights in the International Law of Natural Resources and Environment:

In the field of natural resources and environment, international legal instruments adopted in general during this century, make only isolated mention of the rights of indigenous communities. As we will see, of the more than one hundred instruments on protection and use of natural resources, only a few provide for exceptions to be applied to the uses made by indigenous people.

As it may also be seen, important progress was made in the last part of the decade of the eighties, and more particularly at UNCED.

The Convention relative to the Preservation of Fauna and Flora in their Natural State (London, November 1993), applicable within the territory of Africa, in article 8, provides for the protection of species mentioned in the annex to that Convention. This protection has

The vital roles of indigenous peoples, local communities and women are recognised in the Preamble to the Convention. Most attention has been focused on Article 8 (j) which provides that each contracting party shall, as far as possible and as appropriate:

> 8(l) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

The Explanatory Guide to the Convention on Biological Diversity (IUCN Environmental Law Centre, 1994) notes that the proviso of subjecting these obligations to national legislation is unusual. The objectives of the article could be defeated since the wording implies that existing national legislation will take precedence. It also could be taken to imply that these concerns of indigenous peoples can be respected and preserved without addressing outstanding issues of indigenous peoples' rights to land and biological resources. It is obvious that such communities cannot continue these traditional practices in isolation from the land and biological resources that they need (IUCN, 1994 at p 93), and this is consistent with the growing body of international obligations such as ILO 169 and the Draft Universal Declaration on the Rights of Indigenous Peoples.

Article 10 (c) of the Convention on Biodiversity requires contracting parties to "Protect and encourage customary use of biological resources in accordance with traditional cultural practices". Most of the Articles in the Convention recognise that non-indigenous laws, policies and practices will change as we learn more about biodiversity and strategies to protect it. Indigenous culture has always been subject to some change. Indeed, this is why some of their biodiversity strategies and protective systems have been so effective. If expressions such as "customary use" and "traditional cultural practices" are interpreted as protecting only past, or existing, uses and practices this would deny contemporary indigenous self determination and undermine many of the purposes of the Convention. The relevant focus is indigenous sustainable use and judgements about "traditionality" may impede indigenous co-operation on these issues.

A close analysis of the Convention reveals a concern for indigenous rights, but it also presents a serious risk that indigenous peoples will be seen as a "resource" for biological diversity rather than as peoples who hold legal and cultural rights in relation to it. Posey has argued that indigenous knowledge has been a considerable source of wealth (1992 pp 62, 63). For example, the annual world market value for medicines derived from medicinal plants discovered by indigenous peoples is US$43 billion. At the present time, virtually none of the profits are returned to indigenous peoples. Several Articles in the Convention are primarily concerned with promoting commercial access to genetic resources and

16) make no specific provisions for indigenous peoples and they have to be read in the context of the earlier articles which recognise indigenous rights and interests.

3. EXAMPLES OF LEGAL RECOGNITION AND IMPLEMENTATION OF INDIGENOUS SUSTAINABLE DEVELOPMENT

A key issue for indigenous peoples is land rights. Because indigenous societies are largely agriculturally based, they view access to and control over significant land areas as vital to their economic welfare and social cohesion. Recently, indigenous groups have linked land rights issues to the international debate on environmental protection. They argue that economic expansion onto indigenous lands has degraded the environment and the natural resource base. This poses a threat, many warn, not only to indigenous lifestyles which depend on the land, but also to the regional and global ecological balance. The remedy, indigenous groups argue, is for the international community to support indigenous peoples' demands for secure titles to and control over their lands on the grounds that their use of the land will protect the environment better than other uses.

In the following paragraphs we present some of the notable legal provisions that are in force in various countries which show the degree of recognition and protection provided for indigenous sustainable development rights. The emphasis is on South America, Mexico, United States, Canada and New Zealand. Further studies will need to include Africa, Asia and the Pacific regions. Indigenous sustainable development and legal mechanisms for supporting it is such a diverse area that this section is illustrative rather than comprehensive. However, we draw on examples from developing and developed nations.

Many nations have recognised the customary laws of indigenous peoples to use and manage their resources through the common law or through statute. In the Canadian, New Zealand and Australian experience the recognition of native title (Calder v Attorney General for British Columbia (1973 34 DLR (3rd) 145), Mabo v Queensland ((1992) 175 CLR1) and Te Weehi v Regional Fisheries Officer (1986) 1 NZLR 680)) has encompassed related customary laws for the use of land and natural resources. In Mabo, the Australian High Court recognised the existence of Native Title which entitles indigenous peoples in Australia to the use and enjoyment of ancestral lands in accordance with their unique laws and customs. Four judges explicitly rejected a narrow view of "traditional law or custom" (Brennan, J, Dean J, Gaudron, J and Toohey, J). Justice Brennan stated

> "Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according

Mexico

On January, 1992 the Political Constitution of the Mexican United States was amended (articles 4 and 27) to support indigenous peoples' initiatives and strengthen and protect their use of the land. Article 4 established that "the Mexican Nation has a pluricultural composition, sustained originally in its indigenous peoples. The law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organisation and shall guarantee to their members, effective judicial access. On agrarian legal procedures their legal practices and customs shall be taken into account as provided by the law".

The third paragraph of Article 27 states that the nation has the right to deal with private property according to the public interest, to regulate the social benefit, the use of the natural resources which may be appropriated, to promote an equitable distribution of public wealth, take care of its conservation, achieve a balanced development of the country and the improvement of the standards of life of rural and urban population, as well as to ensure preservation of the ecological balance, to collectively manage and use the communal property, the development of small rural property; to promote agriculture, cattle ranching, forestry and other economic activities in rural areas and to avoid destruction of natural elements, including possible harm that may affect society.

Common property and groups are recognised by law and their property over land is protected, both for human settlements and for productive activities. In accordance with the law, indigenous land shall be protected. The same article recognises legal personality to communal groups and the so-called "ejidos" entitling them to own land both for human settlements and productive activities. Furthermore, provisions establishing preferential rights to obtain licenses and permits are included in sectoral laws, such as the Fisheries Law, Forestry Law, national Waters Law, Mining Law and Agrarian Law.

A special Commission was created on January 1994, whose objective is to co-ordinate the actions and to define policies of the government, in order to promote, protect and support the integral development of indigenous peoples and the betterment of their life conditions.

United States of America

Federally recognised Indian tribes are considered to be in a trust relationship with the U.S. government. Under this trust relationship the Federal Government is responsible for protecting tribes' self-governing status, property rights and well-being. The trust responsibilities are, however, subject to redefinition by Congress and the Federal courts.

Indian tribes are considered to be "sovereign" - that is, to have inherent though limited, powers of self government, subject to modification, regulation and even abrogation by Congress. Self government is restricted to the reservation. All recognised tribes have some form of tribal government and most have a tribal court system. Tribal governments are

limited in their power, however, and tribal courts are limited in their jurisdiction to certain areas, persons and crimes or causes of action. All tribes retain the right to define their own membership. In recent years, the U.S. Government has followed a policy of strengthening tribal government powers. For instance, tribal environmental regulation powers have been expanded. In the last few years, however, Supreme Court decisions have cut into tribal government powers in certain areas of zoning law and court jurisdiction.

Indians are full citizens of the United States, with all the rights of the citizens, under the Citizenship Act of 1924. These citizenship rights are in no way compromised or contradicted by tribal membership or the Federal trust relationship.

Venezuela

Venezuela has protected indigenous property and promoted sustainable development by indigenous communities through biosphere reserves. The legal basis for this has been ILO Convention 107 and various decrees establishing these sort of reserves. Through these decrees it is recognised that the territory that serves as the seat for these natural reserves is also the traditional seat of indigenous communities that have lived in harmony, possessing environmental and culture values that should be preserved and disseminated among present and future generations of Venezuelans, and it is a duty of the State to protect the rights of those populations to enjoy the natural resources of the sites inhabited by them.

There is a Permanent Commission for biosphere reserves whose main obligation is to undertake consultations with indigenous peoples about the necessary measures to prevent harm to the environment arising from the change in settlement patterns or new economic activities.

Also, participation of indigenous communities has been promoted in the establishment of new national parks such as Parima-Tapirapeco in the High Orinico. The main instrument used in these cases is ecological land use plans and zoning.

AUSTRALIA

Recognition of Native Title and Land Rights

It is only in the last 25 years that Australian Aboriginal and Torres Strait Islander peoples have had any tangible input into policy development. Earlier policies were based on assimilation which centred around the integration of indigenous peoples into Australian society, partly through the removal of Aboriginal communities from their traditional lands. The constitutional recognition of Aboriginal peoples and the empowerment of the federal government to legislate on Aboriginal affairs led to new administrative structures to better target services to indigenous communities. In the 1970s the Woodward inquiry into Aboriginal land rights led to the first land rights legislation with the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Limited versions of this Act were created in New South

Wales and South Australia. A long standing proposal of the federal government to extend statutory land rights to all indigenous communities in Australia, that continued to have a traditional relationship with their land, did not eventuate. Instead, the emphasis shifted to the protection of their heritage through the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and improving the administration and delivery of social and economic services to indigenous peoples through the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth). Community debate about a national treaty of reconciliation led to the establishment of a council to advise the government, under the *Council for Aboriginal Reconciliation Act* 1991 (Cth). With the recognition of native title through the *Mabo* decision of the High Court and the *Native Title Act* 1993 (Cth), indigenous communities in Australia are now in a somewhat better position to consider new policies, such as negotiated regional agreements, for the settlement of their outstanding claims.

In *Mabo* the High Court found that pre-existing native rights may continue without any act of recognition by the Crown as if the territory was acquired by cession. The case involved the Meriam people who claimed that they had occupied certain islands in the Torres Strait since time immemorial. Although the islands came under British sovereignty, it was argued that this circumstance did not disturb the rights of the plaintiffs to the continued enjoyment of their rights. In a six-to-one majority judgement, the court rejected the doctrine that Australia was terra nullius and held that common law recognises a form of native title which the Meriam people enjoyed.

The Australian Government has established a legislative framework to recognise native title, register interests, grant compensation and to regulate future dealings affecting native title (Native Title Act, 1993). The interests of all Aboriginal and Torres Strait Islander Peoples (whether they can own or claim land at the present time) is intended to be promoted through this legislation and two related measures:

(a) the land fund to acquire land for indigenous peoples; and

(b) the Social Justice Package.

The Land Fund has been established by the Australian Government. The Social Justice Package is meant to change government institutions and policies to promote the citizenship rights and indigenous rights of Aboriginal and Torres Strait Islander peoples. Negotiated Regional Agreements are being considered as part of this package.

Joint Management In Australian National Parks

The concept of joint management of national parks in Australia arose from the Ranger Uranium Environmental Inquiry (Fox et a 1977). The Commission of Inquiry was established to evaluate a uranium mining proposal and its wider policy implications for Australia. It was also required to adjudicate several Aboriginal land claims. Formal legal title to Kakadu National Park was granted to the Aboriginal owners. The Ranger Inquiry

recommended that the mining proposal go ahead. The mine was to be excluded from the area to be established as a national park. A large part of the Alligator River region in the Northern Territory, has been dedicated as Kakadu national park and is jointly managed by the Aboriginal owners and the Australian Native Conservation Agency (ANCA)

Another land claim, by the Aboriginal owners of Uluru national park, was eventually recognised by the Commonwealth government. The land was granted to the Uluru-Kata Tjuta Land Trust in 1985 and it is jointly managed by its Aboriginal owners and ANCA

The mechanism employed to establish joint management is a compelled lease-back from Aboriginal owners to ANCA and a planning process and lease agreement requiring the recognition of specific Aboriginal interests. A Plan of Management must be prepared for the area by a Board of Management. The legislation provides that the majority of Board members shall be nominated by the traditional owners of Aboriginal land (which becomes a National Park).

Joint managed national parks are now well established in the Northern Territory of Australia. Gurig and Nitmiluk involve the Northern Territory Conservation Commission and the Aboriginal owners. It is administered under Northern Territory laws. Joint management processes are currently being proposed in Western Australia, South Australia, Queensland and New South Wales. These proposed parks are likely to be established and managed under State government laws and agreements. Many national parks have enormous natural and cultural value to Aborigines and non-Aborigines in Australia. Both Uluru and Kakadu national park are located in the Northern Territory and are on the World Heritage List under the World Heritage Convention for their natural and cultural value.

CANADA

Native Title and Treaty Rights

As in many other countries, land is central to the needs and aspirations of indigenous peoples in Canada. They have sought not only title to land and resources that they have traditionally used and occupied, but also a key role in determining the way in which land and resources are used and managed, as well as benefits derived from any exploitation.

There is a well developed doctrine of native rights in the common law jurisprudence which the Canadian courts have drawn on in defining contested indigenous rights. In the United States, beginning with the case of *Johnson v McIntosh*, the Supreme Court identified an Aboriginal right of occupancy or usufruct that existed independent of treaty, statute or other formal government action and which was inalienable except by surrender to the Crown and extinguishable by the Crown only. The Supreme Court also determined in *Worcester v State of Georgia* that the rights of indigenous peoples already in possession must be recognised by any sovereign body claiming title on the basis of mere "discovery" of territory

some of, their native title to the relevant territory and in exchange receive:

- fee simple title to portions of land traditionally used and occupied (some areas are granted with fee simple title to mines and minerals and the right to work the same).
- provisions for resource royalty and royalty sharing;
- rights to hunt, fish and trap wildlife over land that they own and a larger area of surrounding land and sea;
- rights to advise government authorities, or share in the making of decisions, regarding the use and management of marine resources, land, water and wildlife and the regulation of non-renewable resource development; and
- financial compensation for past, unauthorised use of this land and in consideration for land given up which may have been subject to native title.

The latest policy of the Canadian Government does not make relinquishment of native title an essential requirement for a regional agreement.

NEW ZEALAND

Treaty of Waitangi

The formal legal recognition of the Treaty of Waitangi has been in dispute, but Maori people see it as part of the fundamental law of New Zealand. Their protests culminated in the passing of the Treaty of Waitangi Act, 1975. This Act established the Waitangi Tribunal to hear petitions from Maori people "prejudicially affected" by any proposed Government policies, legislation or practices which were inconsistent with the Treaty of Waitangi occurring after 1975. A subsequent amendment (1985) allowed Maori petitions to extend to grievances since 1840. The Tribunal was given the exclusive right to determine the meaning of the Maori and English versions of the Treaty of Waitangi and to reconcile any differences between them when deciding claims. The Waitangi Tribunal makes recommendations which do not bind the Government. However, they have developed considerable political force.

Maori people constitute approximately half the Tribunal. The hearings are conducted on the Marae (traditional meeting place) and according to Maori custom, wherever possible. This has been a powerful process which has contributed to Maori political development and mutual knowledge of law and policy. The tribunal pays very close attention to history, particularly Maori versions of it. An examination of the Tribunal reports show a strong environmental concern in many Maori claims. For example, they have fought to prevent the pollution of rivers and fishing grounds. Maori people insist that their claim to land and resources (protected by the Treaty of Waitangi) is linked to their tribal sovereignty (see

McHugh in Kawharu, 1989:25-64). The Maori version of the Treaty of Waitangi (signed by 500 Maori chiefs) never ceded sovereignty. McHugh argues that British constitutional principles can be adapted to recognise Maori sovereignty under the Treaty (in Kawharu, 1989:37-47).

This involves a lot more than abstract legal issues. Maori people are asserting that developing greater tribal autonomy is a vital part of their claim to land and resources. Maori culture has traditionally respected the need for unpolluted rivers and seas and promoted sustainable practices when fisheries have been utilised (see Muriphertua Fishing Report, Waitangi Tribunal, 1988). This can be contrasted with devastating depletion of fisheries since they have been exploited by Europeans. Maori claims before the Waitangi Tribunal (and a land mark court case - The New Zealand Maori Council v Attorney General (1987) 7 NZAR 353) have forced the New Zealand Government to negotiate with Maori representatives over claims to fisheries (culminating in the Treaty of Waitangi Fisheries Claims) Settlement Act, 1992).

New Zealand Resource Management Act, 1991

Cabinet policies are now reviewed for compliance with the Treaty of Waitangi and the responsibilities of the Department of Maori Affairs are being devolved to tribal (iwi) governments. All laws relating to land, air, water, noise and coast issues have been reviewed and consolidated by the New Zealand Government (the Resource Management Law Reform - RMLR). It is becoming clear that the cultural and environmental concerns of Maori people must be recognised and protected in all of these contexts. The Resource Management Act, 1991 recognises the obligations to Maori people under the Treaty of Waitangi in s 6:

> In achieving the purpose of this Act, all persons who exercise functions and powers under this Act have a duty to take into account the special relationship between the Crown and te iwi Maori as embodied in the Treaty of Waitangi

The purpose of the Act is to promote the sustainable management of nature and physical resources in New Zealand. This included consideration of the "relationship of Maori and their culture and traditions with their ancestral lands, waters, sites and other taonga" (s 4(g)). These principles, related to the plan making, environmental assessment and consent procedure under the Act, necessitate a greater attention to Maori values and participation in all aspects of planning, conservation and resource management in New Zealand.

The developments relating to the RMA and the Treaty of Waitangi Tribunal show the close relationship between the cultural aspirations of Maori people and the ownership and control of land and natural resources. The Waitangi Tribunal process demonstrates this relationship in the way hearings are conducted. The Tribunal provides a means of institutional development, cross-cultural education and bicultural law reform.

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CE1081

3. Ministers of Arctic Nations, *The Arctic Environment: The Nuuk Declaration on Environment and Development in the Arctic*, Second Ministerial Conference , Nuuk, Greenland, 16 September 1993.

We, the Ministers of the Arctic Countries,

Recognizing the special role and responsibilities of the Arctic Countries with respect to the protection of the Arctic environment,

Acknowledging that the Arctic environment consists of ecosystems with unique features and resources which are especially slow to recover from the impact of human activities, and as such, require special protective measures,

Further acknowledging that the indigenous peoples who have been permanent residents of the Arctic for millenia, are at risk from environmental degradation,

Determined, individually and jointly, to conserve and protect the Arctic environment for the benefit of present and future generations, as well as for the global environment,

Noting that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it,

Recognizing the importance of applying the results of the United Nations Conference on Environment and Development to the Arctic region,

Welcoming the efforts of the eight Arctic Countries to implement, through the Arctic Environmental Protection Strategy, relevant provisions of the Rio Declaration, Agenda 21 and the Forest Principles, efforts which include the Arctic Monitoring and Assessment Program (AMAP), and the Working Groups on the Conservation of Arctic Flora and Fauna (CAFF), Emergency Prevention, Preparedness and Response, and the Protection of the Arctic Marine Environment,

Affirming Principle 2 of the Rio Declaration on Environment and Development which affirms that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

Further affirming Principle 22 of the Rio Declaration, which states that: "indigenous peoples and their communities .... have a vital role in environmental management and development because of their knowledge and

traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

hereby make the following Declaration:

1. We reaffirm our commitment to the protection of the Arctic Environment as a priority and to the implementation of the Arctic Environmental Protection Strategy.

2. We adopt the report of the Second Ministerial Conference of the Arctic Environmental Protection Strategy, and endorse its provisions to implement the Strategy, in particular:

-seeking resources to enable each country to fully participate in the program activities under the Arctic Environmental Protection Strategy;

-endeavouring to support, through these resources, joint projects in order to ensure that each country is able to participate in the activities of the Arctic Monitoring and Assessment Programme (AMAP), including the completion of national implementation plans and the comprehensive assessment of results;

-establishing a working group to assess the need for further action or instruments to prevent pollution of the Arctic marine environment and to evaluate the need for action in appropriate international fora to obtain international recognition of the particularly sensitive character of the ice-covered sea areas of the Arctic;

-reaffirming the commitment to sustainable development, including the sustainable use of renewable resources by indigenous peoples, and to that end agreeing to establish a Task Force for this purpose.

-underlining the necessity of a notification system and improved cooperation for mutual aid in case of accidents in the Arctic area;

-reaffirming that management, planning and development activities shall provide for the conservation, sustainable use and protection of Arctic flora and fauna for the benefit and enjoyment of present and future generations, including local populations and indigenous peoples.

3. We will cooperate to conserve, protect and, as appropriate, restore the ecosystems of the Arctic. We will in particular cooperate to strengthen the knowledge base and to develop information and monitoring systems for the Arctic region.

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legislation is a prerequisite to the protection of the environment. As Ministers we shall promote legislation required for the protection of the Arctic environment.

5. We support the achievements of the United Nations Conference on Environment and Development, and state our beliefs that the Principles of the Rio Declaration on Environment and Development have particular relevance with respect to sustainable development in the Arctic.

6. We believe that decisions relating to Arctic activities must be made in a transparent fashion and therefore undertake to facilitate through national rules and legislation appropriate access to information concerning such decisions, to participation in such decisions and to judicial and administrative proceedings.

7. We recognize the special role of the indigenous peoples in environmental management and development in the Arctic, and of the significance of their knowledge and traditional practices, and will promote their effective participation in the achievement of sustainable development in the Arctic.

8. We believe that development in the Arctic must incorporate the application of precautionary approaches to development with environmental implications, including prior assessment and systematic observation of the impacts of such development. Therefore we shall maintain, as appropriate, or put into place as quickly as possible, an internationally transparent domestic process for the environmental impact assessment of proposed activities that are likely to have a significant adverse impact on the Arctic environment and are subject to decisions by competent national authorities. To this end we support the implementation of the provisions of the Convention on Environmental Impact Assessment in a Transboundary Context.

9. We underline the importance of prior and timely notification and consultation regarding activities that may have significant adverse transboundary environmental effects, including preparedness for natural disasters and other emergencies that are likely to produce sudden harmful effects on the Arctic environment or its peoples.

10. We recognize the need for effective application of existing legal instruments relevant to protection of the Arctic environment, and will cooperate in the future development of such instruments, as needed. We support the early ratification of the United Nations Conventions on Biological Diversity and Climate Change.

11. We undertake to consider the development of regional instruments concerned with the protection of the Arctic environment.

In witness whereof we have signed the present Declaration.

4. UNIVERSAL ETHICS AND THE IUCN

by
Ingmar Egede
Inuit Circumpolar Conference
Greenland

To try to develop universal concepts of ethic is like putting predators and grass eaters into the same cage. The outcome will be single sided. Some may disagree being convinced that the predators would let the grass eaters live in peace, if they just got a convincing explanation of why it would be a good idea to change food habits.

It seems like unity only develops if all the partners gain from the unity, if they accept their differences, if they recognise the necessity of understanding each other, and then find ways to refine their means of communication and co-operation.

On this background I would like to write some commends: To develop a World ethic will either result in an ethic dictated by the dominant nations, or most likely the exercise will be doomed to fail.

Ethic builds on culture. People within the same culture are much alike in habits, they know what to expect from each others, and they share the same value systems. But a New York'er in Bagdad will soon learn, that people there react unpredictable to him. A Bedouin's eating habits will be bizarre to a Scotsman.

Thinking differs from culture to culture. Our categorisations of our surroundings depend on where and how we live. Within the IUCN wildlife is a self-evident concept, but we the Inuit, not having an agricultural background, must use an explanatory expression to cover the concept. To us the species just have names. On the other hand, our naming of the species is elaborate, often including age, gender etc.; now and then you can even express how the animal normally appears when seen - all in one name.

As IUCN work primarily in English these cultural differences are mostly hidden and unknown to the negotiating members. Indigenous peoples have a special difficulty in these discussions. We come from different cultures, and must move in partly unknown concept fields, and we must negotiate in one of the three official languages which often will be our second or third language. Interventions by participants from developing countries in Africa and Asia suggest that they may have the same problems.

One must hope that the discussion on a common World ethic will take another direction. From my point of view IUCN should work with operational goals as these are expressed in the concepts of conservation, ecology, sustainability and equity.

These words are new, but cover ancient knowledge still living among indigenous peoples. In the industrialised countries the concepts were put aside when man made himself believe that he could master and change nature, and when man thought that the abundance of natural resources were beyond limits. Some Euro-American debaters seem to have displaced their concerns for their immediate environmental problems to the protection of baby seals, great whales and elephants - all comfortably far away from their own urban daily life.

With concepts like conservation, sustainability and ecology as common goals, with honest co-operation and with a decent system of communication the international organisation of IUCN may benefit from leaving it to its member regions states and cultures to find their own ways to these important goals. In this way we could free our- selves from the potential new ideological colonialism emerging with the want to develop a world concept of ethic.

Buenos Aires
January 1994

DRAFT

5. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Revised working paper submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes, purusant to Sub-Commisison resolution 1992/33 and Commission on Human Rights resolution 1993/31

Introduction

In its resolution 1992/33 of 27 August 1992, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, be entrusted with the task of further elaborating the paragraphs of the draft declaration on the rights of indigenous peoples which were agreed upon at second reading and circulating these paragraphs to the members of the Working Group for thier comments. In the same resolution the Sub-Commission requested the Secretary-General to transmit the revised and re-organised text of the draft declaration, prepared pursuant to paragraph 5 of the resolution, to Governments, indigenous peoples, and intergovernmental and non-governmental organisations. The Commisison on Human Rights, in its resolution 1933/31 of 5 March 1993, welcomed the recommendation of the Sub-Commission that the Chairperson-Rapporteur be entrusted with the task of further elaborating the paragraphs of the draft declaration which were agreed upon at second reading, taking into consideration, *inter alia*, the comments of Governments, indigenous people's organisations and other intersted parties. The text which follows constitutes the revised working paper submitted by the Chairperson-Rapporteur, Ms. Erica-Irene Daes.

APPENDIX 7

PERAMBULAR AND OPERATIVE PARAGRAPHS OF THE DRAFT DECLARATION AS AGREED UPON BY THE MEMBERS OF THE WORKING GROUP AT FIRST READING AND REVISED BY THE CHAIRPERSON-RAPPORTEUR, MS. ERICA-IRENE DAES

First preambular paragraph

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognising the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

Second preambular paragraph

Considering that all peoples contribute to the diversity and richness of civilisations and cultures, which constitute the common heritage of humankind,

9.37

Third preambular paragraph

Reaffirming that all doctrines, policies and practices based on racism and racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

Fourth preambular paragraph

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Fifth preambular paragraph

Concerned that many indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in the dispossession of their lands, territories and resources, as well as in their poverty and misery,

Sixth preambular paragraph

Recognising the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their cultures, spiritual traditions, histories and philosophies, as well as from their political, economic and social structures,

Seventh preambular paragraph

Welcoming the fact that indigenous peoples are organising themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

Eighth preambular paragraph

Convinced that increasing the control of indigenous peoples over development affecting them and their lands, territories and resources will enable them to continue to strengthen their institutions, cultures and traditions, as well as to promote their development in accordance with their aspirations and needs,

Ninth preambular paragraph

Recognising also that respect for indigenous knowledge and practices contributes to sustainable development and management of the environment,

Tenth preambular paragraph

Emphasising the need for demilitarisation of the lands and territories of indigenous peoples, which contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Eleventh preambular paragraph

Reaffirming the importance of giving special attention to the rights and needs of indigenous elders, women, youth, children and disabled,

Twelfth preambular paragraph

Recognising in particular that it is in the best interest of indigenous children for their families and communities to retain shared responsibility for their upbringing, training and education,

Thirteenth preambular paragraph

Believing that indigenous peoples have the right freely to determine their relationships with states in a spirit of co-existence,

Fourteenth preambular paragraph

Considering that treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility,

Fifteenth preambular paragraph

Noting that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Sixteenth preambular paragraph

Bearing in mind that nothing in this Declaration may be used as a pretext to deny any peoples their right of self-determination,

Seventeenth preambular paragraph

Encouraging States to comply with and effectively implement all international instruments as they apply to indigenous peoples, in consultation and co-operation with the peoples concerned,

Eighteenth preambular paragraph

Believing that this Declaration is a first step in the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Nineteenth preambular paragraph

Solemnly proclaims the following Declaration on the Rights of Indigenous Peoples:

Operative paragraph 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations and in international human rights law;

generations their languages, oral traditions, writing systems and literatures, and designate and maintain their own names for communities, places and persons. States shall take effective measures to preserve, respect and protect the sacred place and cemeteries of indigenous peoples;

Operative paragraph 14

Indigenous peoples have the right to all levels and forms of education, including access to education in their own languages, and the right to establish and control their educational systems and institutions;

Operative paragraph 15

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations reflected in all forms of education and public information. States shall take effective measures, in consultation with indigenous peoples, to eliminate prejudice and to promote tolerance, understanding and good relations;

Operative paragraph 16

Indigenous peoples have the right to the use of and access to all forms of media in their own languages;

Operative paragraph 17

Indigenous peoples have the right to participate fully at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures;

Operative paragraph 18

Indigenous peoples have the right to participate fully, through procedures determined in consultation with them, in devising legislative and administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before implementing such measures;

Operative paragraph 19

Indigenous peoples have the right to maintain and develop their economic and social systems, to be secure in the enjoyment of their own means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fishing, herding, gathering, forestry and cultivation. Indigenous peoples who have been deprived of their means of subsistence are entitled to just and fair compensation;

continuing improvement of their economic and social conditions, including the areas of employment, vocational training and re-training, housing, health and social security.

Attention shall be paid to the special needs of indigenous elders, women, youth, children and disabled;

Operative paragraph 21

Indigenous peoples have the right to determine and develop priorities and strategies for their development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions;

Operative paragraph 22

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals, and minerals;

Operative paragraph 23

Indigenous peoples have the right to recognition of their distinctive and profound relationship with their lands and territories. The use of the term "lands and territories" in this Declaration means the total environment of the lands, air, water, sea, sea-ice, flora and fauna and other resources which indigenous peoples have traditionally owned or otherwise occupied or used;

Operative paragraph 24

Indigenous peoples have the collective and individual right to own, control and use their lands and territories. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights;

Operative paragraph 25

Indigenous peoples have the right to the restitution of lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent and, where this is not possible, to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands and territories at least equal in quality, size and legal status;

Operative paragraph 26

Indigenous peoples have the right to the recreation and protection of the total environment and the productive capacity of their lands and territories, as well as to assistance for this purpose from States and through international co-operation. Military activities and the storage and disposal of hazardous materials shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

6.

IMPLEMENTING THE CONVENTION ON BIOLOGICAL DIVERSITY: ISSUES OF LAW AND INDIGENOUS PEOPLES

By Donna Craig

ABSTRACT

The Convention on Biological Diversity recognizes the close and traditional dependence of indigenous and local communities on biological resources and encourages the application of traditional knowledge and equitably sharing of benefits from this knowledge. Agenda 21, International Labour Organization Convention 169, the UN Draft Declaration on the Rights of Indigenous Peoples, and Intellectual Property Law all provide support for the rights of indigenous peoples to participate actively in decisions affecting biodiversity on their own territory. However, indigenous concepts of conservation and sustainable use still need to be much better understood by the wider national and international community, especially by enabling indigenous peoples to express their views directly in their own words. It is clear that the issue of intellectual property rights of indigenous peoples still requires further consideration and development under the specific provisions of the Convention. In the meantime, codes of conduct for governments, researchers, and corporations relating to access to indigenous knowledge should be developed to form the basis of contracts governing access to genetic resources developed by the indigenous peoples. Such private law developments are low cost, legally enforceable, and could be readily available to indigenous peoples in the Asia-Pacific region.

1. INTRODUCTION

The crucial role of indigenous communities in the socio-economic aspects of conserving biodiversity is now well recognized, but the distinction between cultural concerns and "ecological" biodiversity, adopted by many researchers and policymakers, provides a serious barrier to understanding the role of

indigenous peoples in biodiversity conservation. In the indigenous world, the distinction makes no sense in the context of their belief systems and practices. It is also important to recognise that indigenous peoples have consistently made comprehensive claims to secure land title, management of their lands and resources and related political and economic rights. ADB, IUCN, multilateral agencies and conservation agencies have a central role in this wider agenda. Biodiversity conservation by indigenous peoples will be seriously threatened unless conservation measures are integrated into related programmes to recognise their land title and political and economic rights. This indigenous version of the integrated and cross-sectoral approach is fundamental to achieving sustainable development (see WCED, 1987).

2. RELEVANT BIOLOGICAL DIVERSITY ISSUES

The Convention on Biodiversity refers to indigenous and local communities in the following contexts:

- recognising their close and traditional dependence on biological resources (Preamble, Article 8(j) and Article 10(c));
- promoting the wider application of indigenous knowledge, innovations and practices with the approval and involvement of the indigenous holders of such knowledge, innovations and practices (Article 8(j));
- encouraging the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices (Article 8(j));
- protecting and encouraging customary use of sustainable resources in accordance with traditional customary practices that are compatible with conservation or sustainable use requirements (Article 10(c));
- supporting for local community actions to develop, protect and remediate biological diversity (Article 10(d));
- facilitating the access to genetic resources for environmentally sound uses by the contracting parties (Article 15);
- facilitating the access to and transfer of technology relevant to the conservation and sustainable use of resources, on terms consistent with

26.8 Governments should incorporate, in collaboration with the indigenous people affected, the rights and responsibilities of indigenous people and their communities in the legislation of each country, suitable to the country's specific situation. Developing countries may require technical assistance to implement these activities.

A valuable discussion of what international action should be taken by governments under existing international conventions and policies was provided to UNCED by Tauli-Corpuz (1992). The Report was prepared from an Asian indigenous peoples perspective. Recent conventions reflect the ongoing concerns of developing nations (with provisions differentiating them from developed nations) as well as the concerns of indigenous peoples. Both of these aspects will need to be considered by indigenous peoples in Asia.

3.2 ILO Convention 169

In 1989 the International Labour Organisation adopted a new Convention, ILO 169, concerning indigenous and tribal peoples in independent countries. Some indigenous peoples, and other commentators, consider that ILO 169 undermines indigenous aspirations by emphasising "participation" or "consultation" rather than self-determination. However, Article 7 is more specific and states:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and cooperation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories that they inhabit."

3.3 Draft Declaration on the Rights of Indigenous Peoples

A Draft Universal Declaration on the Rights of Indigenous Peoples has been prepared by the United Nations Commission on Human Rights Working Group on Indigenous Populations. The Draft will be considered by the UN General Assembly for adoption as a Universal Declaration. The 1993 Draft adopts the comprehensive approach to indigenous peoples rights, as discussed in the introduction to this paper. Numerous provisions are relevant to the role of indigenous peoples in the protection of biodiversity and indigenous cultural and intellectual property, including Articles 12, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30 and 31. Article 29 is particularly significant when considering the Biodiversity Convention, providing that indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

3.4 Intellectual Property Law

Intellectual property law provides the primary mechanism for non-indigenous governments and corporations to appropriate indigenous knowledge. The main international conventions are as follows:

- The Paris Convention for the Protection of Industrial Property 1883 (amended 1967);

- Contracting parties are meant to promote wider application of indigenous knowledge with the approval and involvement of relevant indigenous people. The holders of the knowledge or technology may be an individual, group or community. This will make the participatory provisions difficult to implement without sound applied anthropological studies and cooperation from individuals and communities. It is unclear who can, or should, determine the issue of who are the "holders" of knowledge and technology.

- The provision for the "equitable sharing" of benefits, from the wider applications, raises the same issues discussed above. Will "equity" be determined from an indigenous perspective and does it imply the recognition of cultural and intellectual property rights held by indigenous peoples? At the very least indigenous peoples will expect that the wider application of their knowledge, practices and technology would be preceded by the recognition of indigenous concerns in the first part of Article 8(j). The analogy is with the idea of a "trust". If national governments are to use indigenous knowledge, innovations and practices for the wider public "good", then there should be a clear obligation towards the indigenous peoples who have developed them. It would be against the intent (see Preamble) of the Convention to construe Article 8(j) purely as a means of appropriating indigenous knowledge without reciprocity. The legal and practical forms of this reciprocity remain to be worked out under the Convention.

Article 10(c) requires contracting parties to "protect and encourage customary use of biological resources in accordance with traditional cultural practices". Most of the Articles in the Convention recognise that non-indigenous laws, policies and practices will change as we learn more about biodiversity and strategies to protect it. Indigenous culture has always been subject to some change. Indeed, this is why some of their biodiversity strategies and protective systems have been so effective. If expressions such as "customary use" and "traditional cultural practices" are interpreted as protecting only past, or existing, uses and practices, this would deny contemporary indigenous self-determination and undermine many of the purposes of the Convention. The relevant focus is indigenous sustainable use. Judgments about "traditionality" may impede indigenous cooperation on these issues.

4.2 Intellectual Property Issues

A close analysis of the Convention reveals a serious risk that indigenous peoples will be seen as a "resource" for biological diversity rather than as peoples who hold legal and cultural rights in relation to it. Posey (1992) has argued that indigenous knowledge has been a considerable source of wealth. For example, the annual world market value for medicines derived from medicinal plants discovered by indigenous peoples is US$43 billion. At the present time, virtually none of the profits are returned to indigenous peoples. Several Articles in the Convention are primarily concerned with promoting commercial access to genetic resources and promoting the commercial access and transfer of technology. The relevant articles (15 and 16) make no specific provisions for indigenous peoples and they have to be read in the context of the earlier articles (such as 8(j)).

The promotion of access to genetic resources, and recent proposals to patent genes, could eventually deny indigenous people the biological resources which they have managed for thousands of years (Shiva, 1993). The United States has allowed patents on mammals and is now in the process of collecting genetic material from diverse indigenous communities with the intention of patenting human lines (Shiva, 1993). These issues are of concern to indigenous and non-indigenous peoples. The provisions for increased access to genetic resources needs to be considered in the context of proposals to patent animal and other life forms with the possible reduction in biodiversity because of monopolies in ownership and control.

The provisions for the access and transfer of knowledge and technology (Articles 16, 17 and 18) include indigenous and traditional knowledge and technology. The term "technology" can encompass such knowledge and technology (in Article 16) and it is explicitly referred to in Articles 17 and 18. The only basis for indigenous "control", "participation" and "benefit" is contained in Article 8(j). The scene is set for wide use of indigenous knowledge and practices relating to biodiversity. However, few jurisdictions have developed legislation and codes of conduct which will ensure that some of the benefits are returned to indigenous communities.

One strategy for indigenous peoples is to use existing intellectual property laws for their own benefit where possible. At the same time, they are pushing for

A Personal Vision of
VANISHING WILDLIFE

One of the cherished illusions of our culture is that animals will always live contentedly in idyllic wilderness. Through television, magazines, books, and calendars we continually feed ourselves scenes of wildlife surrounded by glorious vistas, exquisite plant life, and Technicolor sunsets. Such romantic imagery creates a sense that all is right with the world, that Eden is still out there, that the idyll will exist forever.

As a photographer I am no stranger to that illusion. The reality, in fact, is far different. The shapes and colors of animals' surroundings distract our attention from the beauty of the creatures themselves. I decided to strip away the visual encumbrances that keep us from seeing the full beauty of the animals' form, line, color, and texture. This kind of rendering forces us to confront the animals directly, to see their extraordinary aesthetic properties, and to answer a key question: Are these "objects" of exquisite formal beauty, such as the zoo chimpanzee at right caught in a striking but natural pose, worth saving?

In many cases it is already too late. Humans have actually destroyed much of the world's natural landscape in our relentless search for farmland, living space, wood, and minerals. As a result the age of truly wild animals is nearly over. Unprecedented numbers of mammals, birds, reptiles, and amphibians are facing extinction; more than a thousand species and subspecies are presently considered threatened, and hundreds more are under enough pressure that they need considerable protection. Such animals are the subject of the photographs that follow.

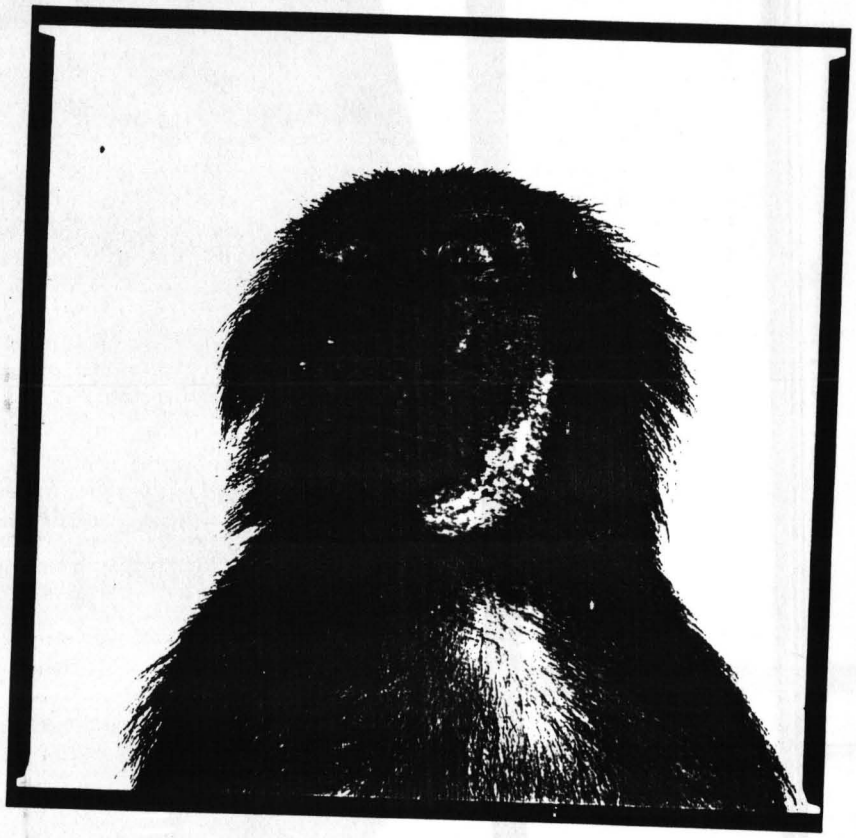
Many of the species that survive this wave of extinction will be quasi-domesticated residents of wildlife preserves, where the

National Geographic, Vol 177, No. 4, April 1990

WEST INDIAN MANATEE

TRICHECHUS MANATUS

A native of the Caribbean and the Atlantic from Florida to Brazil, the West Indian manatee has long been slaughtered for its meat and hide. In Florida motorboats now take an increasing toll. I photographed this seven-year-old female at Sea World in Orlando. She was placid and gentle, lolling poolside and allowing me to scratch her skin, talk to her, and shake her blubber. Her snout was soft as deerskin, but the rest of her hide had the rough tautness of a football made of sandpaper.



HAMADRYAS BABOON

PAPIO HAMADRYAS

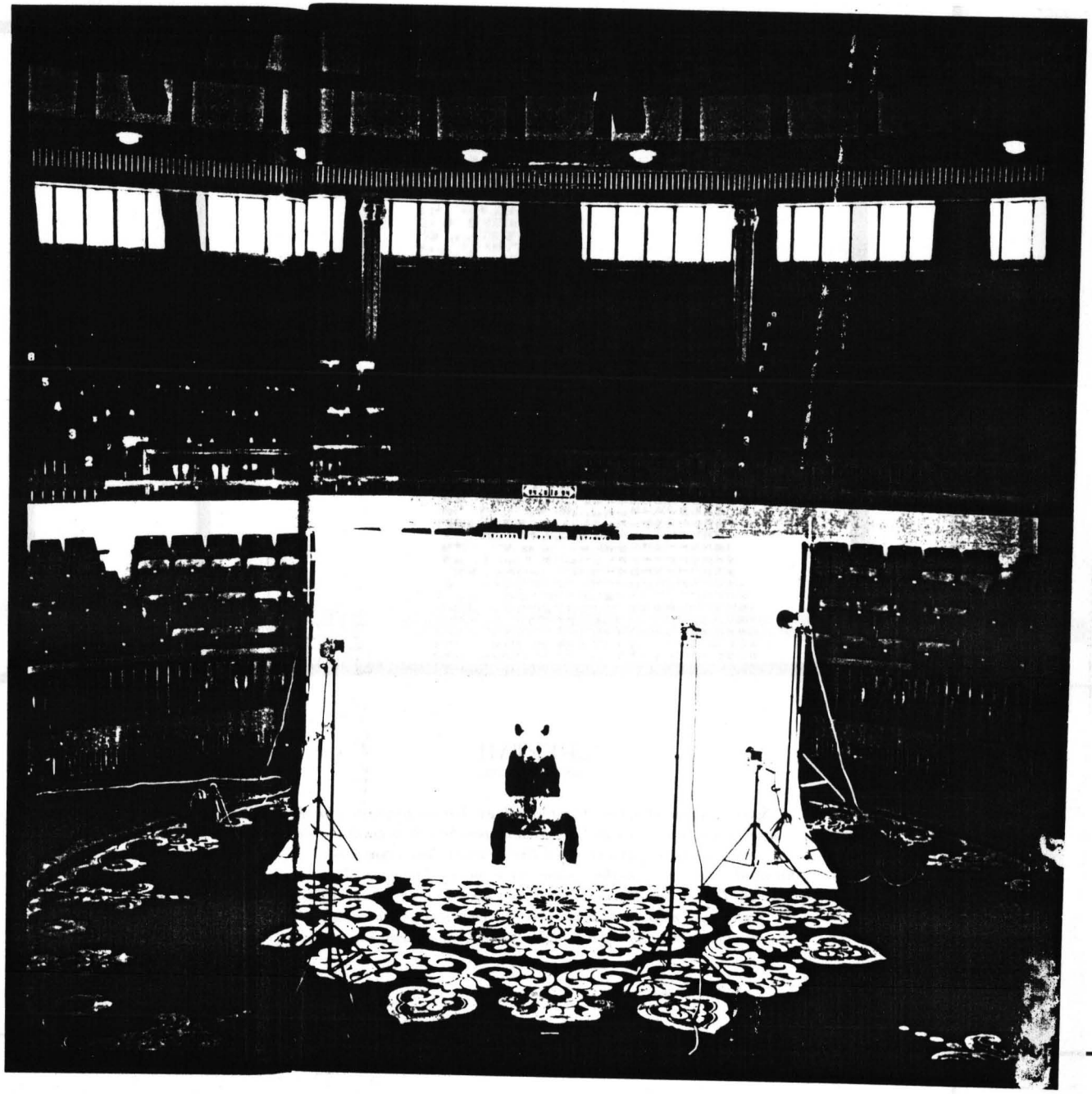
Ancient Egyptians regarded the hamadryas baboon as sacred and associated it with their god of wisdom. Today the species is extinct in Egypt and rare in Ethiopia, where most of the remaining stock lives. I photographed four-year-old Marlena at a Florida circus where she performs. Marlena considers her owner, Lee Stevens, to be her mate, and I had to be careful of any gesture I made toward him to avoid upsetting her.

GIANT PANDA

AILUROPODA MELANOLEUCA

In developed countries, popular interest in conservation is often governed by what some call the "cult of cuteness." Pandas have been primary recipients of this kind of adoration, but their survival is nonetheless in jeopardy: Last estimated at a thousand, the wild population in China has been declining, and reproduction in captivity has been disappointing. Meanwhile panda pelts sell on the black market for as much as $20,000 each, mainly in Japan.

Wei-Wei, a 16-year-old male with the Shanghai Acrobatic Theater, performs a nightly act involving pushing a toy wheelbarrow and having dinner with his trainer—routines that struck me as ineffably cute. I thought it appropriate to photograph Wei-Wei on location. Given that setting, I could not help but make this image: It is a statement about how we project our illusions onto pandas. Though Wei-Wei is a flesh-and-blood animal, he is as visually surreal as any creature on earth.



LEOPARD

PANTHERA PARDUS

The fashion industry—which transforms unusual animal fur into expensive coats—has been the nemesis of many of the world's great cats. Leopards are no exception; they were once slaughtered by the tens of thousands to supply the fashion salons of the world. Moreover, wild leopards living close to human settlements often develop a taste for cattle, sheep, goats, and dogs. As a result, leopards have disappeared from much of their former range in Asia and North Africa, although they remain widespread south of the Sahara.

I photographed this trained six-year-old male black leopard in a mobile studio near Malibu, California. Most of his work consists of acting in feature films or television commercials.

Rarely in the course of photographing this series did I have such a sense of malevolence and danger from an animal; those yellow eyes glaring from that dark feline face seemed to embody hostility. After seeing him jump from one platform to another, I made this picture. Do we actually see a leopard, a shadow, or perhaps a symbol flashing through our minds? I cannot say.

I believe the function of art is to ask questions as much as to provide answers. Perhaps the leopard and other animals in this portfolio will move us to ask the crucial question: How can we help the animals, and ourselves, survive? □

Partial support for James Balog's project was provided by the Professional Photography Division of the Eastman Kodak Company, the Colorado Council for the Arts and Humanities, and ECOM and GMI Photographic of New York.

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Environmentalism means different things to different people.

What Does It Mean to be Green?

by MICHAEL SILVERSTEIN

VISION PRECEDES ACTION. You have to know where you are going before you can get there. You must also know the best road to take, the best vehicle to use, the detours and distractions to avoid along the way.

This truism raises some disturbing questions about the current state of environmental thinking. At a time when virtually everyone on the planet is (or claims to be) environmentally conscious and expresses at least some level of concern about the well-being of nature, there are an extraordinary variety of views about the real meaning, purposes, beliefs, and behavior appropriate to genuine "environmentalism."

It could not, of course, be otherwise. Around the world and throughout history, as soon as people acquired the technical and organizational ability to transcend the limitations of their natural surroundings, they invariably tended to do so. Most modern human institutions have thus evolved in ways that at best are oblivious or neutral toward the natural order, and at worst positively hostile toward it.

This is the basis of our present conundrum vis-a-vis the environment. A fivefold increase in human population during the last century, together with technologies infinitely more chemically complex and hence environmentally destructive that are now employed in lands around the globe, oblige us to behave in more environmentally sound ways. To meet these new imperatives, however, we must largely rely on outdated institutions and ways of thinking.

Michael Silverstein is a Philadelphia-based writer and commentator on environmental economics. His latest book, *The Environmental Economic Revolution* (St. Martin's) was published in August.

The extraordinary reach of global communications has spread knowledge of serious and pervasive ecological damages and generated a universally felt need for environmentalism. But it has not answered the question: What kind of environmentalism?

Addressing this question requires rummaging through historical and cultural legacies for guideposts, retaining still usable institutional bits and pieces, while at the same time dispensing with old views when newer thought better serves newly perceived ends. Such a process, alas, is a prescription for a wrenching, disruptive, and painful transformation of the kind the Chinese refer to as interesting times.

Given the breadth and scope of the problems involved here, the institutional inertia working against their immediate resolution, and the speed at which environment-related issues are taking a prominent role in human affairs, it would be hard to imagine a more interesting period in human history than the one now coming into being because of environment-linked necessities. Perhaps the only way to damp down on some of this unsettling interest is to undertake the painful process of rethinking old assumptions from fresh perspectives.

A MATTER OF DEFINITIONS

Since almost everyone's definition of environmentalism involves protecting nature, the logical place to seek a coherent foundation for a contemporary environmentalism is to ask what, exactly, is the nature of the nature we are seeking to protect. Is it a truly natural world when other species are left largely undisturbed and unaltered by humanity? Or is it a world

three now flow freely over their entire length unharnessed in any way that would serve the interests of the Japanese people.

With the exception of very few places in Japan's northernmost peripheries, there are literally no places that are wild or unshaped by man in this island nation. In a very real sense, Japan is a man-made natural environment.

What then, is the goal of a Japanese environmentalism? Certainly not American deep ecology, or even American preservationism. And because of the intense demands of population and a general paucity of indigenous raw materials, not even an American mix of preservationism and conservation.

"There is 300 times as much insect flesh on this planet as human flesh."

To Americans generally, nature is kind, benevolent, a source of infinite gifts, and therefore something to be cherished and kept intact whenever possible. To Japanese generally, nature is volcanic and stormy, exacting and difficult, something that is only kind when tamed, and only truly beautiful when sculptured or adorned by the hand of man.

Moving from a densely populated Asian land to an African nation like Zaire, which is sparsely populated by humanity but whose human occupants are far, far less materially rich than the Japanese, yet another profoundly different view of the nature of nature prevails. Here, in a part of the world with some of the most copious biodiversity, and many ecosystems less altered by humanity than almost anywhere else on the planet, the love-of-the-wilds attitude of many American environmentalists is viewed by local people as eccentricity at best and ecocolonialism at worst.

Is the true doctrine of environmentalism then, as it regards the nature of nature, a matter of local and regional preference? Is it one of those things where East never meets West, where the world's poor and the rich can never see eye to eye, something put into cold storage as an act of courtesy, or changed altogether when visiting or immigrating abroad?

And if this is, indeed, the case, how can it be thus? How could environmentalism have a different face in different countries, or be blatantly culture-specific in defining the nature it seeks to protect when there is little or no correlation between most national and cultural boundaries and most natural ecosystems?

There is certainly more than intellectural hair splitting involved in these ever more frequently recurring questions. After all the easy accommodations are made, after all the logical compromises balanced, countless policies must ultimately be pursued around the world about whether or not to cut down old-growth forests, whether or not to kill whales, whether to save some wetlands or build more shopping centers.

FIERCE DISAGREEMENT

All such decisions for proponents of environmentalism depend in the end on a particular view of nature. The goals of all future international environmental treatises also ultimately come down to a particular view of what nature is, whether most people, in fact, actually like nature, and the extent to which this entity can and should be transformed by the hand of man.

The whole nature of nature question for environmentalism must also meet a growing challenge of defining what is covered under the natural banner. Beyond a universally agreed-upon wish not to befoul our air, water, and land with materials that cause cancer and other human maladies, there is fierce disagreement about which species or categories of species are "natural" from the point of view of meriting human attention and protection.

Substantial human constituencies now work to protect populations of most larger plants and animals. For a growing number of specialists and aficionados, protecting the biodiversity of nature down to the level of insects has gained favor — an attitude given a weighty justification in a recent study which estimated that there is 300 times as much insect flesh on this planet as human flesh. Certain invertebrates like frogs, and critically important bedrock elements of the food chain like plankton, now have their own scientific support constituencies as well.

But how about protection at the bacterial level? While today there is at least lip service being paid to keenly watching over the biological health of whales and shad, pine and poplar, how about the effects of manmade pollution on the paramecium set?

The truth is that we humans live much closer to E. coli bacteria than to penguins or walruses. We cohabit with E. coli, in fact, at the gut level. So, from the point of view of self-interest, should environmentalism not concern itself more with the effects of pollution on certain bacteria than on larger but far less intimate mammalian interests? Even beyond the consequences for humanity, is not pollution-linked alter-

logically inert as a rock. These people are actually proponents of a particular human aesthetic applied to the great outdoors. Is this environmentalism?

Everyone agrees that a material like plutonium, which never existed in nature before humans created it, is a pollutant. But when environmental groups express concern about radon contamination, environmentalism's definition of pollution goes fuzzy. Radon is a naturally occurring mineral. If it pollutes simply because it endangers human health, then meat-eating tigers or flooding rivers are pollutants, too.

Can the term pollution be logically applied to indoor substances inimical to human health, such as air duct dust or cigarette smoke, when no nonhuman creatures are equally endangered by this material? How about noise pollution? Applying a pollution label to jackhammers and low-flying airplanes, as many environmentalists are prone to do these days, suggests that environmentalism as envisioned by these people includes any and all social irritants.

The language of environmentalism is thus not just different in different lands. Its usages vary greatly within the same cultures.

It would seem, therefore, that trying to define or even discuss nature in consistent ways so that a vision of environmentalism consistently works to protect the same things and serves the same ends is a very difficult task. In time, in space, in language, the nature of nature is a moving target.

THE SCIENCE FRONT

Equally discomforting, the techniques currently employed to monitor this moving target are shifting and unstable. Our understanding of natural sciences at the end of the twentieth century is roughly comparable to our understanding of medical science 100, or even 200 years ago. That is to say it is deficient, and often, extremely deficient.

Life sciences today are just beginning to systematically explore the chemistry of cells, to unlock the secrets of DNA and RNA. On a larger biological canvas, we are only now starting to comprehend the interdependence of species as revealed by their complex interactions.

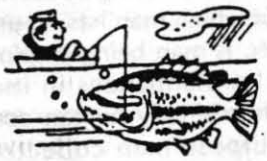
Many physical sciences with environmental import, which until recently were believed to be quite evolved, are currently undergoing explosive revisions. In some cases, these disciplines have quite literally entered an era of chaos.

Modern geology, with even a rudimentary understanding of the way the earth's mantle functions and shifts, really only dates back to the 1950s. Concepts employed in contemporary volcanology are even more recent. Climatology, critical in understanding the milieu in which organic life operates on this planet, was in many ways just guesswork before the launch of earth-monitoring satellites and the modelling revolution made possible by advanced computer technology.

On ecological questions as basic as the rate of extinction of America's own 20,000-plus native plants, there is profound disagreement. Some experts today claim that 20 percent of these species will disappear over the next decade because of human activities. Others claim that our practices with respect to forests have virtually no material effect on extinction rates — or rates at which new species appear, for that matter.

It is, of course, splendid that science in these and related environmental spheres is not hidebound, and constantly alters its views. But how does one construct a philosophy, much less make coherent policies, with such fundamental schisms and uncertainties pervading the ranks of those whose knowledge we depend on to shape our own notions about environmentalism?

And how does one make long-term commitments and projections concerning the natural environment based on this kind of fast-changing science? To carry through on the analogy noted above, if the definition of nature that a true environmentalism seeks to protect is a moving target, our tools to hit this target are unrifled muskets with floppy gun sights.



The core problems inherent in defining nature so that environmentalism can properly protect such an entity and employing scientific and other measuring mechanisms in ways that ensure proper policies work to bring about these ends are woven into all sorts of contemporary human cultures in different parts of the world. These disagreements themselves are then bent, folded, and not infrequently mutilated, to accommodate national and cultural environmental biases.

Clear and Present Danger

In an essay in a recent issue of *Harper's*, author Jonathan Raban quotes a seventy-something man who had lived all his life along a bay in Washington state:

"People now, they talk about how clear the water is — how you can see right to the bottom. Used to be it was all milky here. You couldn't see more than a few inches down. Then you'd look a little closer, and you'd see that milkiness was life. It was things swimming. It was all kinds of small sea life. Now all that life's gone. It's getting clearer all the time. Used to be, you'd look out there on a day like this and all you'd see would be salmon jumping. Any one moment, there'd be a thousand splashes out there — many, many more than you could take in with your eye. That whole sea was alive with salmon. Now . . ." He laughed — a sour, small, knowledgeable laugh, an audible shrug, with no amusement in it at all.

theology, things are easier when the focus is put on mysticism and spirituality. Here again, though, what the true environmentalist spirit is and is not can be subject to enormous discrepancies of interpretation.

Is a true environmental mystic approach better exemplified by the American transcendentalism of Emerson, or the Slavic spiritualism of Tolstoy? Emerson was a dry, meticulous New England Yankee with a strong belief in progress and individualism who often shared a lecture stage with people we would label today "popular apostles of self-improvement." Tolstoy's nature mysticism was ferociously antimaterialistic and bound up with a collectivized rural Russion ethos. The man himself was disordered and prone to enormous excess.

What do these very different personal and intellectual paradigms say about the potential for a universal environmental mysticism, one grounded in something other than local culture, taste, and prejudice?

And what does secular humanism have to offer when it comes to insights about environmentalism? Humankind given dominion over nature strikes many secular environmentalists as absurd, because it sets us apart and above the natural order. But is this notion any more intrinsically absurd (or indeed all that different) than the Hellenic-by-way-of-the-Renaissance humanist notion that "man is the measure of all things"? If we are the measure of all things, how can anything we have done or will do to our natural surroundings be deemed inappropriate?

The time spectrum humanity uses to make vitally important ecological decisions is also hopelessly unattuned to natural time cycles. Most business decisions aim for results within a single quarter, or a year at most. Most political decisions focus on results to be achieved within a congressional session, the duration of an administration, or occasjonally, the life span of a political regime.

Yet the total history of most of the world's present nations, and even the histories of entire civilizations of which these nations are part, have almost no "synchronisity" with natural life cycles. Such discrepancies suggest that trying to encompass environmental planning within human institutions is akin to life-cycle plans for elephants devised by fruitflies.

What is environmentalism's answer to this quandary?

If religious and nonreligious meaning-of-life thinking seems to be environmentalist grab bags, social institutions and their underlying philosophical rationales can be just as confusing and contradictory when approaching the question: What in Sam Hill does it mean to be green?

One can construct a social environmentalism based on cooperative values and social justice, and argue that by giving all groups within a society, and on a larger stage, all peoples of the world, vested interests in preserving the natural environment, this natural environment can best be protected in meaningful ways over a sustained length of time. Such, indeed, has been the argument of so-called socially responsible American environmentalists for decades, and is the thrust of the philosophy espoused by Europe's Green parties.

"When it comes to environmentalism, the thinking world is split down the middle."

But there is an equally compelling (if, in many ways, repellent model) for social environmentalism — social Darwinism. If an elite practicing social injustice, but also is dedicated to serving environmental ends, enforces its preferences on environmentally predatory masses, that, too, could bring about a functioning social environmentalism.

To carry these contrasting social environmental models and their concomitant value systems into the political sphere: Is an authoritarian (or even a fascist) government that is genuinely dedicated to environmental protection acceptable to environmentalists, if

SANDRA POSTEL

Carrying Capacity: Earth's Bottom Line

As a society, we have failed to discriminate between technologies that meet our needs in a sustainable way and those that harm the earth.

It takes no stretch of the imagination to see that the human species is now an agent of change of geologic proportions. We literally move mountains to mine the earth's minerals, redirect rivers to build cities in the desert, torch forests to make way for crops and cattle, and alter the chemistry of the atmosphere in disposing of our wastes. At humanity's hand, the earth is undergoing a profound transformation—one with consequences we cannot fully grasp.

It may be the ultimate irony that, in our efforts to make the earth yield more for ourselves, we are diminishing its ability to sustain life of all kinds—humans included. Signs of environmental constraints are now pervasive. Cropland is scarcely expanding any more, and a good portion of existing agricultural land is losing fertility. Grasslands have been overgrazed and fisheries overharvested, limiting the amount of additional food from these sources. Water bodies have suffered extensive depletion and pollution, severely restricting future food production and urban expansion. And natural forests—which help stabilize the climate, moderate water supplies, and harbor a majority of the planet's terrestrial biodiversity—continue to recede.

These trends are not new. Human societies have been altering the earth since they began. But the pace and scale of degradation that started about mid-century—and continues today—is historically new. The central conundrum of sustainable development is now all too apparent: Population and economies grow exponentially, but the natural resources that support them do not.

Biologists often apply the concept of "carrying capacity" to questions of population pressures on an environment. Carrying capacity is the largest number of any given species that a habitat can support indefinitely. When that maximum sustainable population level is surpassed, the resource base begins to decline; sometime thereafter, so does the population.

The earth's capacity to support humans is determined not just by our most basic food requirements but also by our levels of consumption of a whole range of resources, by the amount of waste we generate, by the technologies we choose for our varied activities, and by our success at mobilizing to deal with major threats. In recent years, the global problems of ozone depletion and greenhouse warming have underscored the danger of overstepping the earth's ability to absorb our waste products. Less well recognized, however, are the consequences of exceeding the sustainable supply of essential resources, and how far along that course we may already be.

As a result of our population size, consumption patterns, and technology choices, we have surpassed

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Table 2 **Grain Consumption Per Person In Selected Countries, 1990**

Country	Grain Consumption Per Person (kilograms)
Canada	974
United States	860
Soviet Union	843
Australia	503
France	465
Turkey	419
Mexico	309
Japan	297
China	292
Brazil	277
India	186
Bangladesh	176
Kenya	145
Tanzania	145
Haiti	100
World Average	323

Sources: Worldwatch Institute estimate, based on U.S. Department of Agriculture, *World Grain Database* (unpublished printout), 1992; Population Reference Bureau, *1990 World Population Data Sheet*, 1990.

Disparities in food consumption are revealing as well (see *Table 2*). As many as 700 million people do not eat enough to live and work at their full potential. The average African, for instance, consumes only 87 percent of the calories needed for a healthy and productive life. Meanwhile, diets in many rich countries are so laden with animal fat as to cause increased rates of heart disease and cancer. Moreover, the meat-intensive diets of the wealthy usurp a disproportionately large share of the earth's agricultural carrying capacity, since producing one kilogram of meat takes several kilograms of grain. If all people in the world required as much grain for their diet as the average American does, the global harvest would need to be 2.6 times greater than it is today—a highly improbable scenario.

• *Economic Growth*: The second driving force economic growth—has been fueled in part by the introduction of oil onto the energy scene. Since mid-century, the global economy has expanded fivefold. As much was produced in two-and-a-half months of 1990 as in the entire year of 1950. World trade, moreover, grew even faster. Exports of primary commodities and manufactured products rose elevenfold.

Unfortunately, economic growth has most often been of the damaging variety—powered by the extraction and consumption of fossil fuels, water, timber, minerals, and other resources. Between 1950 and 1990, the industrial roundwood harvest doubled, water use tripled, and oil production rose nearly sixfold. Environmental damage increased proportionately.

• *Population Growth*: Compounding the rises in both poverty and resource consumption in relation to the worsening of inequality and rapid economic expansion, population growth has added greatly to pressures on the earth's carrying capacity. The doubling of world population since 1950 has meant more or less steady increases in the number of people added to the planet each year. Whereas births exceeded deaths by 37 million in 1950, the net population gain in 1993 was 87 million—roughly equal to the population of Mexico.

The U.N. median population projection now shows world population reaching 8.9 billion by 2030, and leveling off at 11.5 billion around 2150.

The resource base

The outer limit of the planet's carrying capacity is determined by the total amount of solar energy converted into biochemical energy through plant photosynthesis minus the energy those plants use for their own life processes. This is called the earth's net primary productivity (NPP), and it is the basic food source for all life.

Prior to human impacts, the earth's forests, grasslands, and other terrestrial ecosystems had the potential to produce a net total of some 150 billion tons of organic matter per year. Stanford University biologist Peter Vitousek and his colleagues estimate, however, that humans have destroyed outright about 12 percent of the terrestrial NPP and now directly use or co-opt an additional 27 percent. Thus, one species—*Homo sapiens*—has appropriated nearly 40 percent of the terrestrial food supply, leaving only 60 percent for the millions of other land-based plants and animals.

It may be tempting to infer that, at 40 percent of NPP, we are still comfortably below the ultimate limit. But this is not the case. We have appropriated the 40 percent that was easiest to acquire. It may be impossible to double our share, yet theoretically that would happen in just 60 years if our share rose in tandem with population growth. And if average resource consumption per person continues to increase, that doubling would occur much sooner.

In addition, much of the land we continue to farm is losing its inherent productivity because of unsound agricultural practices and overuse. The "Global Assessment of Soil Degradation," a three-year study involving some 250 scientists, found that more than 550 million hectares are losing topsoil or undergoing other forms of degradation as a direct result of poor agricultural methods (see *Table 3*).

On balance, unless crop prices rise, it appears unlikely that the net cropland area will expand much more quickly over the next two decades than it did between 1980 and 1990. Assuming a net expansion of 5 percent (which may be optimistic), total cropland area would climb to just over 1.5 billion hectares. Given the projected 33-percent increase in world population by 2010, the amount of cropland per person would decline by 21 percent (see *Table 4*).

• *Pasture and Rangeland*: They cover some 3.4 billion hectares of land, more than twice the area in crops. The cattle, sheep, goats, buffalo, and camels that graze them convert grass (which humans cannot digest) into meat and milk (which they can). The global ruminant livestock herd, which numbers about 3.3 billion, thus adds a source of food for people that does not subtract from the grain supply, in contrast to the production of pigs, chickens, and cattle raised in feedlots.

Much of the world's rangeland is already heavily overgrazed and cannot continue to support the livestock herds and management practices that exist today. According to the "Global Assessment of Soil Degradation," overgrazing has degraded some 680 million hectares since mid-century. This suggests that 20 percent of the world's pasture and range is losing productivity and will continue to do so unless herd sizes are reduced or more sustainable livestock practices are put in place.

During the 1980s, the total range area increased slightly, in part because land deforested or taken out of crops often reverted to some form of grass. If similar trends persist over the next two decades, by 2010 the total area of rangeland and pasture will have increased 4 percent, but it will have dropped 22 percent in per capita terms. In Africa and Asia, which together contain nearly half the world's rangelands and where many traditional cultures depend heavily on livestock, even larger per capita declines could significantly weaken food economies.

Table 4 **Population Size and Availability of Renewable Resources, Circa 1990, With Projections for 2010**

	Circa 1990 (million)	2010	Total Change (percent)	Per Capita Change
Population	5,290	7,030	+33	
Fish Catch (tons)[1]	85	102	+20	-10
Irrigated Land (hectares)	237	277	+17	-12
Cropland (hectares)	1,444	1,516	+5	-21
Rangeland and Pasture (hectares)	3,402	3,540	+4	-22
Forests (hectares)[2]	3,413	3,165	-7	-30

1 Wild catch from fresh and marine waters, excludes aquaculture.

2 Includes plantations; excludes woodlands and shrublands.

Sources: Population figures from U.S. Bureau of the Census, Department of Commerce, *International Data Base*, unpublished printout, November 2, 1993; 1990 irrigated land, cropland, and rangeland from U.N. Food and Agriculture Organization (FAO), *Production Yearbook 1991*; fish catch from M. Perotti, chief, Statistics Branch, Fisheries Department, FAO, private communication, November 3, 1993; forests from FAO, *Forest Resources Assessment 1990*, 1992 and 1993. For detailed methodology, see *State of the World* 1994, among other sources.

• *Fisheries*: Another natural biological system that humans depend on to add calories, protein, and diversity to human diets is our fisheries. The annual catch from all sources (including aquaculture) totaled 97 million tons in 1990—about 5 percent of the protein humans consume. Fish account for a good portion of the calories consumed overall in many coastal regions and island nations.

The world fish catch has climbed rapidly in recent decades, expanding nearly fivefold since 1950. But it peaked at just above 100 million tons in 1989. Although catches from both inland fisheries and aquaculture (fish farming) have been rising steadily, they have not offset the decline in the much larger wild marine catch, which fell from a historic peak of 82 million tons in 1989 to 77 million in 1991, a drop of 6 percent.

With the advent of mechanized hauling gear, bigger nets, electronic fish detection aids, and other technologies, almost all marine fisheries have suffered from extensive overexploitation. Under current practices, considerable additional growth in the global fish catch overall looks highly unlikely. Indeed, the U.N. Food and Agriculture Organization (FAO) now estimates that all seventeen of the world's major fishing areas have either reached or exceeded their natural limits, and that nine are in serious decline.

Given the extent of cropland and rangeland degradation and the slowdown in irrigation expansion, it may be difficult to sustain the past pace of yield increases. Indeed, per capita grain production in 1992 was 7 percent lower than the historic peak in 1984. Whether this is a short-term phenomenon or the onset of a longer-term trend will depend on what new crop varieties and technologies reach farmers' fields and whether they can overcome the yield-suppressing effects of environmental degradation. Another factor is whether agricultural policies and prices will encourage farmers to invest in raising land productivity further.

In many agricultural regions—including northern China, parts of India, Mexico, the western United States, and much of the Middle East—water may be more of a constraint to future food production than land, crop yield potential, or most other factors. Developing and distributing technologies and practices that improve water management is critical to sustaining the food production capability we now have, much less to increasing it for the future.

Water-short Israel is a front-runner in making its agricultural economy more water-efficient. Its current agricultural output could probably not have been achieved without steady advances in water management—including highly efficient drip irrigation, automated systems that apply water only when crops need it, and the setting of water allocations based on predetermined optimal water applications for each crop. The nation's success is notable: Between 1951 and 1990, Israeli farmers reduced the amount of water applied to each hectare of cropland by 36 percent. This allowed the irrigated area to more than triple with only a doubling of irrigation-water use.

Matching the need for sustainable gains in land and water productivity is the need for improvements in the efficiency of wood use and reductions in wood and paper waste, in order to reduce pressures on forests and woodlands. A beneficial timber technology is no longer one that improves logging efficiency—the number of trees cut per hour—but rather one that makes each log harvested go further. Raising the efficiency of forest product manufacturing in the United States, the world's largest wood consumer, roughly to Japanese levels would reduce timber needs by about one-fourth, for instance. Together, available methods of reducing waste, increasing manufacturing efficiency, and recycling more paper could cut U.S. wood consumption in half; a serious effort to produce new wood-saving techniques would reduce it even more.

With the world's paper demand projected to double by the year 2010, there may be good reason to shift production toward "treeless paper"—that made from nonwood pulp. Hemp, bamboo, jute, and kenaf are among the alternative sources of pulp. The fast-growing kenaf plant, for example, produces two to four times more pulp per hectare than southern pine, and the pulp has all of the main qualities needed for making most grades of paper. In China, more than 80 percent of all paper pulp is made from nonwood sources. Treeless paper was manufactured in forty-five countries in 1992, and accounted for 9 percent of the world's paper supply. With proper economic incentives and support for technology and market development, the use of treeless paper could expand greatly.

The role of trade

Consider two countries, each with a population of about 125 million. Country A has a population density of 331 people per square kilometer, has just 372 square meters of cropland per inhabitant (one-seventh the world average), and imports almost three-fourths of its grain and nearly two-thirds of its wood. Country B, on the other hand, has a population density less than half that of Country A and nearly five times as much cropland per person. It imports only one-tenth of its grain and no wood. Which country has most exceeded its carrying capacity?

Certainly it would be Country A—which, as it turns out, is Japan—a nation boasting a real gross domestic product (GDP) of some $18,000 per capita. Country B, which from these few indicators seems closer to living within its means, is Pakistan—with a real GDP per capita of only $1,900. By any economic measure, Japan is far and away the more successful of the two. So how can questions of carrying capacity be all that relevant?

The answer, of course, lies in large part with trade. Japan sells cars and computers, and uses some of the earnings to buy food, timber, oil, and other raw materials. And that is what trade is supposed to be about—selling what one can make better or more efficiently, and buying what others have a comparative advantage in producing. Through trade, coun-

much. The problem is the total weight, which has surpassed the carrying capacity of the ship.

Economist Herman Daly sometimes uses this analogy to underscore that the scale of human activity can reach a level that the earth's natural systems can no longer support. The ecological equivalent of the Plimsoll line may be the maximum share of the earth's biological resource base that humans can appropriate before a rapid and cascading deterioration in the planet's life-support systems is set in motion. Given the degree of resource destruction already evident, we may be close to this critical mark. The challenge, then, is to lighten our burden on the planet before "the ship" sinks.

More than 1,600 scientists, including 102 Nobel Laureates, underscored this point by collectively signing a "Warning to Humanity" in late 1992. It states: "No more than one or a few decades remain before the chance to avert the threats we now confront will be lost and the prospects for humanity immeasurably diminished.... A new ethic is required—a new attitude towards discharging our responsibility for caring for ourselves and for the earth.... This ethic must motivate a great movement, convincing reluctant leaders and reluctant governments and reluctant peoples themselves to effect the needed changes."

A successful global effort to lighten humanity's load on the earth would directly address the three major driving forces of environmental decline—the grossly inequitable distribution of income, resource-consumptive economic growth, and rapid population growth—and would redirect technology and trade to buy time for this great movement. Although there is far too much to say about each of these challenges to be comprehensive here, some key points bear noting.

Wealth inequality may be the most intractable problem, since it has existed for millennia. The difference today, however, is that the future of rich and poor alike hinges on reducing poverty and thereby eliminating this driving force of global environmental decline. In this way, self-interest joins ethics as a motive for redistributing wealth, and raises the chances that it might be done.

Important actions to narrow the income gap include greatly reducing Third World debt, much talked about in the 1980s but still not accomplished, and focusing foreign aid, trade, and international lending policies more directly on improving the living standards of the poor. If decisionmakers consistently asked themselves whether a choice they were about to make would help the poorest of the poor—that 20 percent of the world's people who share only 1.4 percent of the world's income—and acted only if the answer were yes, more people might break out of the poverty trap and have the opportunity to live sustainably.

A key prescription for reducing the kinds of economic growth that harm the environment is the same as that for making technology and trade more sustainable—internalizing environmental costs. If this is done through the adoption of environmental taxes, governments can avoid imposing heavier taxes overall by lowering income taxes accordingly. In addition, establishing better measures of economic accounting is critical. Since the calculations used to produce the gross national product do not account for the destruction or depletion of natural resources, this popular economic measure is extremely misleading. It tells us we are making progress even as our ecological foundations are crumbling. A better beacon to guide us toward a sustainable path is essential. The United Nations and several individual governments have been working to develop better accounting methods, but progress with implementation has been slow.

In September 1994, government officials will gather in Cairo for the "International Conference on Population and Development," the third such gathering on population. This is a timely opportunity to draw attention to the connections between poverty, population growth, and environmental decline; and to devise strategies that simultaneously address the root causes. Much greater efforts are needed, for instance, to raise women's social and economic status and to give women equal rights and access to resources. Only if gender biases are rooted out will women be able to escape the poverty trap and choose to have fewer children.

The challenge of living sustainably on the earth will never be met, however, if population and environment conferences are the only forums in which it is addressed. Success hinges on the creativity and energy of a wide range of people in many walks of life. The scientists' "Warning to Humanity" ends with a call to the world's scientists, business and industry leaders, the religious community, and people everywhere to join in the urgent mission of halting the earth's environmental decline.

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Human Rights Approaches to Environmental Protection: An Overview

MICHAEL R. ANDERSON*

The late twentieth century has witnessed an unprecedented increase in legal claims for both human rights and environmental goods. Never before have so many people raised so many demands relating to such a wide range of environmental and human matters. And never before have legal remedies stood so squarely in the centre of wider social movements for human and environmental protection. It is likely that legal historians writing in the twenty-first century will look back on the last quarter of this century as the period in which both environmental law and human rights reached a kind of maturity and omnipresence. In recent years law-making activities in these areas, at both the international and domestic level, have been marked not only by speed and proliferation, but also by remarkable innovation. Like human rights, environmental law houses a hidden imperial ambition; both potentially touch upon all spheres of human activity, and claim to override or trump other considerations.

In addressing the link between human rights and the environment, this volume aims to evaluate the role of environmental rights in the overall landscape of environmental protection and human rights. In particular, it seeks to survey the current state of affairs, analyse emerging trends and problems, and gesture toward future developments. It was motivated by a concern to investigate a cluster of closely related questions: how are human rights and the environment related; to what extent are environmental rights recognized in existing legal arrangements; how are environmental rights defined, justified, and applied; and what are the advantages and disadvantages of approaching environmental issues through a rights framework? It is fortuitous that this volume appears after the important Final Report of the UN Sub-Commission on Human Rights and the Environment, prepared by Mrs Ksentini, the Special Rapporteur.[1] This Report not only explores the relationship between human rights and the environment, but also proposes the adoption of Principles on Human Rights and the Environment. These are set out in the Appendix to Chapter 3.

The chapters in the present collection draw in part upon a conference on

* I am grateful to Alan Boyle for important substantive contributions and to an anonymous reviewer for helpful comments on an earlier draft of this chapter.

[1] UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).

jurisprudence is the most ambitious in this regard, similar developments are apparent in international law. As Boyle explains, the Ksentini Report is mainly concerned with 'greening' existing human rights law so that environmental protection arises as a logical corollary of human rights protection. Many of the Report's draft Principles on Human Rights and the Environment reformulate existing rights such as life and health so as to develop their environmental dimensions.

If the Indian jurisprudence and the Ksentini Report represent the high water marks of reformulated rights, it is clear from a number of chapters in this volume that further scope for development exists elsewhere. Apart from the rights to life and health, which other settled rights might lead to direct environmental protection? Several candidates emerge. First, the right to equality may be read widely to include the right to equal access to, and protection of, environmental resources. As the chapters by Glazewski and Fernandes suggest, a profound inequality of exposure to environmental degradation is a consequence of economic and political inequalities. Affluence and poverty create different environmental problems, and it is sometimes the case that only the problems of affluence are addressed in state policy. An effective right to procedural equality would help in such circumstances, but some judicial enforcement of a right to substantive equality, as has occurred in India, holds far greater potential. Secondly, the right to freedom of speech may easily be extended to encompass the right to voice objections to environmental damage, as Harding's discussion of the Penang Hill affair in Malaysia shows. Thirdly, although the right to property has conventionally been conceived mainly in terms of political and economic protection, it is amenable to a thoroughgoing environmental reinterpretation. Douglas-Scott notes developments on this front, but Harding warns that the right to property may be a two-edged sword since, although it may be used to protect customary land rights and the environmental quality of land in general, it may also be used by private developers to inhibit the creation of national parks and conservation areas. It is precisely for this reason that a full reinterpretation of the right, rather than a mere mobilization of it, is necessary for environmental protection. Fourthly, religious rights may have an environmental dimension. Harding points to the right to religious practice and profession as a possible vehicle for the expression of environmental concerns in Malaysia, while Lau underscores the role of Islam in expanding the right to environmental justice in Pakistan.

(c) New Human Rights to Environmental Protection

Although existing human rights, if fully mobilized, may offer a great deal to global and local environmental protection, there are good reasons to suspect that they will fall short of meeting desired ends. Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required. Although the matter is discussed at a theoretical level by Merrills, several approaches to the actual content of new environmental rights may be seen in the various chapters. Some contributions, including those by du Bois, Glazewski, Anderson, Fabra, and Lau, are more optimistic about the role of special rights in environmental protection, while those by Harding, Boyle and Redgwell are more cautious. Most notably, the authors are divided on whether new environmental rights, if desirable, should be mainly procedural or substantive in character.

(i) *Procedural rights*

One view, espoused by Boyle, Douglas-Scott, and Cameron and Mackenzie, advocates that effective environmental rights should be principally procedural in character. Likewise, Harding, who does not advocate new rights but rather the effective use of existing arrangements, looks mainly to procedural remedies, recalling Dicey's dictum that a practical procedure is worth a thousand pious pronouncements of principle.

Several chapters, including particularly those by Douglas-Scott and Cameron and Mackenzie, identify a range of procedural rights at both the international and domestic levels which are relevant to environmental protection. These include: the right to information, including the right to be informed in advance of environmental risks; the right to participate in decision-making on environmental issues at both the domestic and international level; the right to environmental impact assessment; the right to legal redress, including expanded *locus standi* to facilitate public interest litigation; and the right to effective remedies in case of environmental damage.

A procedural or participatory approach promises environmental protection essentially by way of democracy and informed debate. The enthymeme in this argument is that democratic decision-making will lead to environmentally friendly policies. The point remains to be demonstrated, but one argument in its favour is that in creating legal gateways for participation, it is possible to redress the unequal distribution of environmental costs and benefits. Thus marginalized groups who currently suffer the most deleterious effects of environmental degradation—including women, the dispossessed, and communities closely dependent upon natural resources for their livelihood—can be included in the social determination of environmental change. If the people who make the decisions are the same as those who pay for and live by the consequences of the decisions, then we go a long way toward protecting the environment.

There is another argument in favour of a procedural right, rather than a substantive right, which is this: because the desired quality of the environment is a value judgement which is difficult to codify in legal language, and which will vary across cultures and communities, it is very difficult to arrive at a single precise formulation of a substantive right to a decent environment. Therefore, the more flexible, honest, and context-sensitive approach is to endow people with

robust procedural rights which will foster open and thoroughgoing debate on the matter. Much the same argument applies to the pursuit of sustainable development.

(ii) Substantive rights

Yet even if the virtues of procedural rights are acknowledged, they may not provide adequate protection of environmental goods. If we take this view, then an argument for a substantive right to a satisfactory environment may emerge. As Anderson's discussion of India suggests, a substantive right can provide more effective protection, and may play a role in defining and mobilizing support for environmental issues. Advocates of substantive environmental rights may not trust procedural rights alone for the simple reason that even if procedural or participatory rights are fully realized, and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection. Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption. Indeed, the industrial democracies of the North, with their liberal rights-based legal systems, are disproportionately responsible for much environmental damage, including the consumption of finite resources and the emission of greenhouse gases. The point is that procedures alone cannot guarantee environmental protection. But if substantive rights are contemplated, then urgent questions of definition and application arise. These are considered in the next section.

3. ENVIRONMENTAL RIGHTS IN THEORY AND PRACTICE

(a) Definition and scope

Many of the chapters consider the issues associated with defining new environmental rights. The problem of defining such rights so as to satisfy diverse ethical criteria is complicated by the need to make them operate in a legal context. To secure effective implementation, Merrills notes, rights must be determinate in scope and consistent in formulation. But how should a substantive environmental right be defined? Which dimensions of the environment are to be protected and what degree of environmental change is permissible? In a survey of existing constitutional and statutory provisions relating to environmental quality, one finds a series of adjectives attached to the word 'environment' to describe what is actually being protected. References are made to a 'clean', 'healthy', 'decent', 'viable', 'satisfactory', 'ecologically balanced', or 'sustainable' environment. Environments 'free from contamination' (Constitution of Ecuador), or 'suitable for the development of the person' (Constitution of Portugal) are also envisaged. The African Charter of Human and Peoples' Rights delineates the right to: 'a general satisfactory environment favourable to their [the peoples'] development' (Article 24). Does this require that environmental protection and economic development should be balanced off against each other, or rather that the right to a satisfactory environment may only be claimed where it will not infringe the requirements of social and economic development? As Churchill notes, the African Commission has interpreted the provision narrowly to refer mainly to pollution abatement, but a range of interpretations could easily be offered. Similarly, the Indian case law reveals a wide range of inconsistent and overlapping judicial interpretations of an environmental right. As Anderson notes, these include the right to a healthy environment, a pollution-free environment, and an environment in ecological balance. But such definitions often do little definitional work, and end up begging the question.

Why is the exercise of defining so difficult? One reason is that precise qualitative and quantitative dimensions of environmental protection are not readily translated into legal terms. Moreover, technical measures of environmental quality are more easily incorporated within regulatory instruments than in a human rights provision of general application. Boyle notes that a substantive right may even be incapable of definition. But the problem is not merely one of conveying environmental standards, it is also one of agreeing to them. As du Bois points out, difficult ethical decisions are at stake: are we to protect human health and livelihood, or ecological sustainability, or the aesthetic value of existing natural endowments? Underlying such questions, du Bois suggests, are different conceptions of the good life, involving moral choices of the most profound nature. Even where a precise and comprehensive textual definition of a right may be agreed upon, moral choices will still lie in its interpretation. The enforcing body, whether a judge at the domestic level or a supervisory committee at the international level, will necessarily be involved in evaluating competing moral claims.

Even with such definitional questions set aside for the moment, other issues will arise. For example, do environmental rights entail a right to the prevention of environmental harm or rather the right to remedy where such harm has already occurred? The Indian and Pakistani case law would suggest that both aspects are recognized, but most of the relevant constitutions and international instruments are silent on the matter. If the right does extend to prevention of environmental damage, which standards should apply in the context of imperfect knowledge and scientific uncertainty? The Supreme Court of Pakistan and the European Union have both adopted the precautionary principle, but a similar stance is absent in most formulations of environmental rights.

One way out of the definitional muddle is to ask what, exactly, constitutes a violation of the right in a particular context. The question is of jurisprudential interest, but it is also a matter of urgent concern among individuals and businesses who may be subject to litigation in jurisdictions such as India. One of the problems with legal developments in India is that the precise scope of environmental rights is vague, thus leaving both businesses and environmentalists uncertain how far their rights and duties extend. Vague and poorly-defined

usually be easier, and perhaps more legitimate, to make such judgements at the national or local level rather than in international fora.

(c) Problems of Anthropocentrism

Whatever jurisprudential arguments may be marshalled in favour of a human right to a protected environment, there remains the common objection among environmentalists that such a right, indeed any human right, is inherently focused upon the human being to the exclusion of other living species. A human right to environmental protection, no matter how ambitious in its protective objectives, is still at base a *human* right, and is very different indeed from a right bestowed upon non-human species or upon natural resources. When the right to life is expanded to include those aspects of environmental protection which are necessary to preserve and foster human well-being, components of the natural environment are clearly being treated as instrumental means to a distinctly human end.

Redgwell's chapter considers these arguments, and asks whether human rights to environmental protection must always be instrumental in character. She notes that enhanced environmental awareness may focus upon human well-being alone, but may also extend to concern for non-human species and larger ecosystems for their own sake. Accordingly, it is entirely possible to exercise human rights with a view to protecting the intrinsic, rather than instrumental, value of other species. It should be equally possible to enforce environmental rights in a non-instrumentalist way, and thereby diminish although not eliminate the human-centred quality of the rights. The crucial point is that the anthropocentric nature of human rights may be a matter of degree rather than a simple binary question. This is a view endorsed by Glazewski, who notes that the African National Congress proposal for a right to 'ecological balance' was less human-centred than the South African Law Commission's proposal for a right based upon human well-being, and by Boyle who points to the very broad and ecocentric foundation of environmental rights adopted in the Ksentini Report draft Principles on Human Rights and the Environment.

Although rights may be more or less anthropocentric, depending upon their formulation, to what extent is some degree of anthropocentrism an inescapable feature of human rights systems? Considering this question, Redgwell's chapter examines cogent arguments in favour of animal rights, noting that even proposed animal rights would be limited in application to sentient beings, and that the circle could be widened even further to include plants and even ecological processes. However, endowing animals, plants, or wider ecological processes with legal rights is a decidedly difficult matter for a variety of theoretical and practical reasons. Even if humans agreed to confer rights upon animals or mountains, the act of conferring would still be conceived and executed by humans, and the rights could only be enforced by humans against other humans. There

is, it would seem, a deep structural anthropocentrism which inevitably accompanies a human-made legal system.

This is a point also raised by Lau in a rather different context. Some Islamic legal scholars in Pakistan argue that in focusing on the relationship between the individual and government, the language of rights necessarily excludes the important relationship between the individual and the divine. Here the humanist focus of rights is anthropocentric not with respect to biota and ecosystems, but rather with respect to God. Where environmental stewardship is articulated and regulated through a complex of duties to Allah, rather than rights and duties in respect of other human beings, a human rights approach to environmental protection misses the point entirely. Although many Islamic jurists endorse human rights, others adopt this line of reasoning in rejecting human rights approaches entirely, preferring to focus upon human duties and close adherence to the path of Islam.

These objections, while important, operate mainly in the realm of theory. If we turn to policy considerations, how does the critique of anthropocentrism bear upon the practical matter of enhancing global environmental protection for all species? If we concede that a degree of anthropocentrism exists, how might a rights regime be modified to alleviate its human-centred effects? Redgwell argues that the common proposal to extend rights to the natural world will not solve the problem. It is not clear, she suggests, that a rights-based approach is appropriate, much less ideal, for actually protecting the intrinsic value of sentient and non-sentient entities. We might do better, she suggests, by taking non-human values into account in the interpretation and exercise of human rights. A human rights approach which recognizes the intrinsic value of the natural world, rather than merely its instrumental value, goes a long way toward minimizing anthropocentric consequences. Although Lau does not discuss the point, a similar argument might be advanced in respect of some Islamic objections to human rights, so it might be possible to exercise a right to environmental protection with a view to fulfilling the duty of stewardship over the natural environment in accordance with Islamic precepts. Since environmental rights can be drafted so as to acknowledge and respect non-human entities, objections to the most extreme forms of anthropocentrism may be overcome.

(d) Relation to other rights

Where does an environmental right fit into a hierarchy of human rights, and how should conflicts with other human rights, such as the right to property or livelihood, be resolved? Conflicts between environmental concerns and the rights of individual property owners are hardly new. A straightforward limitation upon property rights to preserve environmental goods, such as that revealed in Douglas-Scott's discussion of the *Fredin* case, is not only possible, but a settled feature of many legal systems. Similarly, the Indian case law shows a

of the jurisprudence of both the European Court of Justice following the *Francovich* decision and the European Court of Human Rights with the *Lopez Ostra* case. As Anderson notes, a tendency to make monetary awards for the violation of environmental rights takes human rights implementation into the area traditionally reserved for tort law, and may ultimately require legal technologies for assessing causation and quantum of damages similar to those which occur in tort or delict.

(f) National or International Law?

The final question concerning legal application of environmental rights relates to the appropriate jurisdiction, since an argument can be made for the recognition of environmental rights in both domestic and international law. In some ways, a national and an international right are very different entities since national rights are often capable of immediate enforcement in court, and are much more likely to be caught up in the everyday business of environmental management, while international rights exist mainly as aspirations, instruments of general supervision, and ultimate safety nets. National constitutions are often highly detailed and can express local particularities, while international instruments must be drafted at levels of generality and abstraction required to secure multilateral agreement. Yet these differences create complementary rather than competing legal regimes, and the dialogue between the two is beneficial. Recent years have brought such an explosive growth in the volume of international regulation that national legal systems are increasingly interpellated within a network of global standards, including those relating to trade, finance, labour, and environmental protection. In these circumstances, the interdependence of national and international rights is perhaps unavoidable.

The coexistence of national and international norms may be an important advantage for activists. As Fabra shows, the mere existence of an environmental right in the Ecuador Constitution did not provide the Hourani people with an effective remedy against economic and environmental depredation. The procedural right to take their case to the Inter-American Commission on Human Rights provided an important back-up mechanism when domestic law failed. More generally, she argues, closer co-operation between international and domestic law will maximize the effectiveness of both legal systems. Similarly, Cameron and Mackenzie show that the growing role for environmental NGOs stems in part from their role in bringing local concerns to international fora while communicating international standards and remedies back to the local level. The experience of groups such as Amnesty International or Anti-Slavery International is that the most effective implementation results when distinct but complementary campaigns are mounted at the local, national, and international levels simultaneously. Both agenda setting and the development of suitable standards occur within a comparative and international context. This is apparent in

Lau's discussion of the Pakistani decision in which the Precautionary Principle embodied in the Rio Declaration was incorporated into Pakistan's constitutional jurisprudence. Remembering that the Precautionary Principle originated in the domestic law of the Federal Republic of Germany, the growing cross-fertilization of domestic and international environmental law is obvious.

However, problems of variable standards suggest that overly zealous standard-setting at the international level may not only be inappropriate, but might actually impede the freedom of states to produce detailed, culturally sensitive and ecologically appropriate standards at the national level. The European Union principle of subsidiarity—whereby standard-setting and decision-making are devolved to the lowest practicable level—may offer instruction in this regard. Where local groups object to the formulation or indeed the very idea of environmental rights, as the chapters on Malaysia, Ecuador, and Pakistan suggest, there may be an argument for advancing environmental protection through other legal idioms.

4. EFFECTIVE ENFORCEMENT

The greatest challenge for both human rights standards and environmental regulation is surely the problem of effective enforcement. And to compound the problem, in these days of fiscal stringency, enforcement must be available at a viable cost. In part, these questions are matters of administrative organization and political culture, but they also bear directly upon the varieties of procedures and remedies which are available to concerned parties.

There is no reason why environmental rights cannot be enforced at the international level in the same way as other human rights. The right to environmental impact assessment could be implemented in a manner similar to other political rights while a right to a healthy environment could easily be implemented as an extension of the right to health. For international human rights, there is a well-established set of procedural mechanisms available for implementation. These include: reporting procedures, arrangements for fact-finding bodies, political supervision, complaints procedures, judicial supervision, and non-judicial dispute resolution. The established supervisory procedures are suited to implementing a broad range of rights, although not always with equal efficacy. It is entirely possible to conceive of an environmental right linked, for example, with a reporting procedure requiring states to submit reports on environmental conditions and policies. Yet as both Boyle and Redgwell suggest, international supervision may be clumsy with respect to environmental rights, particularly if cast in substantive rather than procedural language. The commissions, committees, and courts charged with supervising international human rights are frequently overworked with more conventional human rights issues, and it is not clear that they possess either the technical competence or the institutional structures

public and private law. Thirdly, a human rights approach may stimulate concomitant political activism on environmental issues. Concerned citizens and NGOs are more likely to rally around a general statement of right than a highly technical, bureaucratic regulation expressed in legalese. Fourthly, a human rights approach can provide the conceptual link to bring local, national, and international issues within the same frame of legal judgment. At present, environmental damage is unequally distributed at both the national and international level; a non-discriminatory human rights standard could facilitate comparison, and foster political mobilization linking local concerns with more global issues. For example, with the emerging procedural rights described by Cameron and Mackenzie, the operations of the World Bank could be made subject to a human rights standard which would apply equally to its international transactions, its national programmes, and its local projects. Fifthly, a general expression of right can be interpreted creatively as issues and contexts change. This is evident in the Indian jurisprudence, where the right to a healthy environment held to be implicit in the right to life has been given more precise definition on a case-by-case basis as specific disputes have come before the courts. Thus, definitions and trade-offs evolve gradually in the light of experience rather than needing to be defined comprehensively and rigidly in a single piece of regulatory legislation.

A number of disadvantages are also apparent. Indeed, some contributors argue that proposals for environmental rights are at best ill-conceived, and at worst a damaging distraction from more fruitful legal avenues. What are their arguments? First of all, it is not clear to what extent a simple right may address the complex and often technical issues of environmental management. Environmental protection, in both decision-making and implementation, requires a legal language capable of incorporating highly technical specifications, distinguishing among industrial processes, evaluating elusive causal relationships, and protecting complicated biological and ecological systems. Not all issues can be resolved in the simple language of rights (although environmental rights may be supplemented with technical expertise and specific standards). As Merrills and Boyle note, disputes which essentially require the balancing of interests may be more difficult to resolve where two rights-holders are involved (although du Bois argues that courts routinely balance competing interests when applying rights). Secondly, a rights approach may not address the relationships of political economy which underlie much environmental damage. The causes of environmental damage—including technology choice, forms of production, and distribution of the social product—will not be addressed by a right directed merely to their symptoms. If environmental rights serve as nothing more than symbolic gestures, as in Hungary, or as mere palliatives which inculcate a sense of environmental responsibility while denigration of the environment continues largely unabated, then those rights may be positively counter-productive, drawing attention away from the structural causes of environmental change. Just as the prescription of anti-diarrhoea drugs in the poorer villages of Bangladesh can only be an expensive and ineffective short-term remedy for people without access to clean drinking water, likewise, the right to object to environmental damage will have little effect unless the social and economic forces causing the damage are confronted directly.

Thirdly, rights, especially procedural rights, may be used by affluent groups or 'cosmetic environmentalists' to protect a privileged quality of life, which may impose further environmental costs upon the dispossessed or environmentally vulnerable communities, who are in turn denied access to justice by poverty or lack of institutional skills. Legal recognition of environmental rights will not necessarily change anything unless disadvantaged groups possess economic and political power to mobilize legal institutions.

Fourthly, the expansion of rights-based litigation may well displace other forms of legal remedy, such as tort law or negotiated settlements, which are better suited to environmental issues. This danger is identified in the Indian context by Anderson, who notes that writ petitions under the Constitution are now displacing statutory regulation and civil suits as the main means of distributing environmental benefits and burdens. This raises the twin dangers of inconsistent standards and the transfer of essentially bureaucratic functions to the courts. Fifthly, as Harding notes, the language of human rights may politicize and draw attention to environmental claims in a way that may attract more overt opposition from polluters, or even exacerbate government repression. Sometimes what may be easily achieved by quiet lobbying and technical regulation may not be possible through public campaigns and prominent litigation. And the explicit incorporation of environmental rights into the Malaysian legal system may invite a series of statutory restrictions and limitations which may leave environmentalists with fewer rights than they held at the outset.

On balance, our deliberations show that human rights approaches to environmental protection offer many attractions, and could play a key role in fostering equitable and sustainable human communities. If very real problems of theory and practice remain, they should stimulate careful analysis and jurisprudential innovation rather than intellectual surrender.

A.A. CANÇADO TRINDADE*

Environmental Protection and the Absence of Restrictions on Human Rights

1. Introduction

The general theme chosen for the 1990 Banff Conference is a particularly suitable and most timely one: "Human Rights in the XXI Century: A Global Challenge". Not only does it allow the examination of a wide variety of aspects and concerns pertaining to the present state of the international protection of human rights, but it also facilitates the projection into the future of insights and ideas which may lead to the enhancement of the international protection of human rights in the next century. Within this general outlook, the topic which has been entrusted to use for presentation is a specific and so far virtually unexplored one: the parallelisms in the evolution of two domains of protection – human rights protection and environmental protection – and the impact of their expansion upon the exercise of previously recognized human rights.

For the purpose of examining this novel topic, we shall explore four lines of thought: first, the identification of affinities in the parallel evolution of human rights protection and of environmental protection; second, the identification of the wide dimension of the fundamental right to life, taken together with the right to health, at the basis of the *ratio legis* of international human rights law and of environmental law; third, the implementation (*mise en oeuvre*) of the right to a healthy environment; and fourth, the related effects witnessed in relation to the expansion of human rights and environmental protection and a critique of the so-called "restrictions" upon the exercise of previously recognized human rights.

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2. The Growth of Human Rights Protection and of Environmental Protection: From Internationalization to Globalization

(1) The Internationalization of Human Rights Protection and of Environmental Protection

The parallel evolutions of human rights protection and environmental protection disclose evident affinities. They both witness, and precipitate, the gradual erosion of so-called domestic jurisdiction. The treatment by the State of its own nationals becomes a matter of international concern. Conservation of the environment and control of pollution likewise become a matter of international concern. There has occurred a process of *internationalization* of both human rights protection and environmental protection. The former as from the 1948 Universal Declaration on Human Rights, the latter, years later, as from the 1972 Stockholm Declaration on the Human Environment.

With regard to human rights protection, eighteen years after the adoption of the 1948 Universal Declaration the International Bill of Human Rights was completed with the adoption of the two U.N. Covenants on Civil and Political (and Optional Protocol), and on Economic, Social and Cultural Rights (1966). Today, the normative corpus of international human rights law is a vast one. It comprises a multiplicity of treaties and instruments, at both global and regional levels, with varying ambits of application and covers the protection of human rights of various kinds and in distinct domains of human activity.

Similarly, the years following the internationalization of environmental protection (through the Stockholm Declaration) produced an increased range of relevant international instruments. These emerged equally at both the global and regional levels. It is estimated that there are presently more than 300 multilateral treaties and approximately 900 bilateral treaties providing for the protection and conservation of the biosphere. To which, over 200 texts from international organizations may be added.[1] This considerable growth of international regulation has, by and large, followed a "sectorial" approach, involving the adoption of conventions devoted to specific sectors or areas, or concrete situations (such as oceans, continental waters, atmosphere, wild life). In sum, international regulation in the domain of environmental protection has taken place in the form of *responses* to specific challenges.

The field of human rights protection has witnessed a similar process: parallel to general human rights treaties (such as the two U.N. Covenants on Human Rights and the three regional – European, American and African – Conventions), there are conventions aimed at concrete situations (e.g., prevention of discrimination, prevention and punishment of torture and ill-treatment), those which apply to specific human conditions (e.g., refugee status, national-

[1] Reference could also be made to the existence of domestic legislation on the matter in virtually all States: it is estimated that domestic legislative instruments currently total some 30,000. A.C. Kiss, *Droit international de l'environnement*, Paris, Pédone, 1989, p.46.

ity and statelessness) and at certain groups in special need of protection (e.g., workers, women, children, the elderly, the disadvantaged). Overall, human rights instruments have likewise developed, at normative and procedural levels, as *responses* to violations of human rights of various kinds.

This being so, it is not surprising that gaps become apparent, as awareness grows of the increasing need of protection. With regard to human rights, the lack of protection extended to certain vulnerable groups, in particular indigenous populations, represents such a gap. A corresponding example in relation to the environment may be seen in the need to enhance international regulation on climate change and protection of the atmosphere.

A significant task for the near future (if not for the present) will be ensuring the proper *co-ordination* of multiple instruments which have emerged during the past decades, pursuant to the "sectorial" approach (*supra*), in the domains of human rights protection[2] and environmental protection. During the course of the internationalization process pattern referred to above, it was soon realized that, in each domain there exists an inter-relatedness among the distinct sectors which have been the object of regulation.

(2) The Globalization of Human Rights Protection and of Environmental Protection

The awareness of this inter-relatedness has, in recent years, contributed in a decisive fashion to the evolution of both human rights protection and environmental protection from a state of internationalization to a state of globalization. As far as human rights are concerned, two decades after the adoption of the 1948 Universal Declaration of Human Rights, the 1968 Teheran Conference on Human Rights, in a global reassessment of the matter, proclaimed the *indivisibility* of all human rights (civil and political as well as economic, social and cultural rights). This was followed by the landmark Resolution 32/130, adopted by the U.N. General Assembly in 1977, where it was stated that human rights issues are to be examined globally.

That Resolution endorsed, from a globalist perspective the assertion of the 1968 Teheran Proclamation of the indivisibility and interdependence of all human rights. It also drew attention to the priority to be given to the search for solutions to massive and flagrant violations of human rights.[3] Thirty years after the adoption of the 1948 Universal Declaration, the U.N. General Assembly endeavoured, through Resolution 32/130, to overcome the old categorizations of rights and to proceed to a needed global analysis of existing problems in the field of human rights. This change of approach was doubtless conditioned by

[2] Cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 21–435.

[3] Th. C. Van Boven, "United Nations Policies and Strategies: Global Perspectives?", in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration*, The Hague, Martinus Nijhoff, 1979, pp. 88–89, and cf. pp. 89–91.

the fundamental changes undergone by so-called international society – including decolonization, capacity of massive destruction, population growth, environmental conditions and energy consumption.

The matter was taken up again by G.A. Resolutions 39/145 of 1984 and 41/117 of 1986, which reiterated the inter-relatedness of all human rights, whereby the protection of one category of rights should not exempt States from safeguarding the other rights. Thus, human rights instruments aimed at securing certain categories of rights, or at dealing with given situations, or at certain groups in special need of protection, are to be properly understood as being complementary to general human rights treaties. Multiple human rights instruments reinforce each other, enhance the degree of the protection due, and disclose an overwhelming identity of purpose.

As regards environmental protection, the presence, despite the "sector-by-sector" regulation, of "transversal" issues and rules contributed to the globalist approach. It was concluded that certain activities and products may increasingly cause harmful effects in any environment (e.g., toxic or dangerous substances, toxic or dangerous wastes, ionizing radiations, and radioactive wastes). In fact, the problem of dangerous substances permeates the whole of "sectorial" regulation, thus pointing to globalization and generating a "*réglementation se superposant aux différents secteurs*"[4].

As early as 1974, two years after the adoption of the Stockholm Declaration, the U.N. Charter on Economic Rights and Duties of States warned that the protection and preservation of the environment for present and future generations was the responsibility of *all* States (Article 30). In 1980, the U.N. General Assembly made its historical proclamation of the responsibility of States for the preservation of nature on behalf of present and future generations.[5] While, in the past, States regarded the regulation of pollution by sectors as a national or local issue, more recently they have realized that some environmental problems and concerns are essentially global in scope.[6] In its Resolution 44/228, of 22 December 1989, whereby it decided to convene a U.N. Conference on Environment and Development in 1992, the U.N. General Assembly recognized that the global character of environmental problems required action at all levels (global, regional and national), involving the commitment and participation of all countries. The Resolution further affirmed that the protection and enhancement of the environment are major issues affecting the well-being of peoples, and singled out, as one of the environmental issues of major concern, the "protection of human health conditions and improvement of the quality of life" (§ 12 (i)).

The global character of environmental issues is reflected in the question of

[4] A.C. Kiss, *op. cit. supra* n. (1), pp. 275–276 and 46, and cf. pp. 93, 106 and 204.

[5] Cit. in ibid., pp. 38–39.

[6] "Formal and informal linkages" across nations and States have contributed to this new perception; R.W. Hahn and K.R. Richards, "The Internationalization of Environmental Regulation", 30 *Harvard International Law Journal* (1989) pp. 421, 423 and 444–445.

conservation of biological diversity. It is further illustrated, in particular, by the problems linked to atmospheric pollution (such as depletion of the ozone layer and global climate change). Those problems, initially thought of as being essentially local or even transboundary, were to disclose "*une portée pratiquement illimitée dans l'espace*".[7] For example, while global warming may threaten to damage many nations, it is a problem which cannot be traced to a single state or group of States. Accepting this position stimulated a need for a new approach to strategies of prevention and adoption as well as for considerable international cooperation.[8] Thus, the U.N. General Assembly, by Resolution 43/53, of 6 December 1988, recognized that climate change is a common concern of mankind, and determined that action should be promptly taken to deal with it within a global framework.

Likewise, the Intergovernment Panel on Climate Change (IPCC) has recognized that climate change is a common concern of mankind, affecting humanity as a whole, and should therefore be approached within a global framework.[9] The Panel has pointed to the need for a global approach to climate change as one of the possible elements to be included in a future framework convention on climate change.[10] The 1989 Hague Declaration on the Atmosphere insists on the search for urgent and global solutions to the problems of the warming of the atmosphere and the deterioration of the ozone layer. In the same vein, the 1989 International Meeting of Legal and Policy Experts, held in Ottawa, reported *inter alia* that the atmosphere constitutes a "common resource of vital interest to mankind".[11]

In November 1989, 67 countries participated in a Ministerial Conference on Atmospheric Pollution and Climatic Change held in Noordwijk, The Netherlands, at which components to be included in the future Convention on Climate Change were considered. The principle of shared responsibility by all States was reasserted. The 1989 Noordwijk Declaration on Climate Change pursued a globalist approach and expressly stated that "climate change is a common concern of mankind".[12] In conclusion, recent trends in environmental protection as well as in human rights protection (*supra*) disclose a clear and progressive tendency from internationalization towards globalization.

[7] A.C. Kiss, *op.cit. supra* n. (1), p.212.

[8] V.P. Nanda, "Global Warming and International Environmental Law – A Preliminary Inquiry", 30 *Harvard International Law Journal* (1989) pp. 380–385.

[9] WMO/UNEP, *IPCC Working Group III (Response Strategies) – Legal Measures: Report of Topic Co-ordinators*, Geneva/Nairobi, [1989] p.III (mimeographed, internal circulation).

[10] Cf. UNEP Governing Council decision 15/36, of 25 May 1989.

[11] Cf. *Statement of the International Meeting of Legal and Policy Experts*, Ottawa, 1989, p.2.

[12] Cf. Ministerial Conference on Pollution and Climatic Change, *The Noordwijk Declaration on Climate Change*, Noordwijk, Nov. 1989, p.4, and cf. pp. 1–13 (mimeographed, restricted circulation).

The globalization of human rights protection and of environmental protection can also be identified in the emergence of *erga omnes* obligations and the consequent decline and end of reciprocity. As far as human rights are concerned, reciprocity has progressively given way to the notion of collective guarantee and considerations of *ordre public*. This constitutes a revolution in the postulates of traditional international law. Human rights treaties incorporate obligations of an objective character, aimed at the safeguard of the rights of human beings and not the reciprocal rights of States on behalf of their respective citizens, on the basis of a superior general public interest (of *ordre public*). Hence, the specificity of human rights treaties.

Likewise, the evolution of environmental protection bears witness of the emergence of obligations of an objective character without reciprocal advantages for States. The 1972 Stockholm Declaration on the Human Environment refers expressly to the "common good of mankind" (Principle 18). Rules on the protection of the environment are adopted, and obligations to that effect are undertaken, in the common superior interest of mankind. This has been expressly acknowledged in some treaties in the field of the environment.[13] It is further implicit in references to "human health" in some environmental law treaties.[14]

The evolution, from internationalization to globalization, of environmental protection, can also be detected in its spatial dimension. Initially, attention was turned to environmental protection in territorial zones under the competence of States. One thus spoke of control of *transboundary* or *transfrontier* pollution (a terminology reminiscent of that employed in the OECD), with an underlying emphasis on the relations between neighbouring countries or on contacts or conflicts between State sovereignties. It soon became evident that, to deal with wider threats to the environment (e.g., marine pollution and atmospheric pollution such as acid rain, depletion of the ozone layer, and global warming), it was necessary to also consider principles applicable on a global scale. Global in the sense of affecting zones where State interests were immediately affected (transboundary pollution), but also other areas where State interests appeared not so visibly affected (e.g., protection of the atmosphere and of the marine environment). In this common international law of the environment, principles of a global character are to apply on the territory of States irrespective of any transboundary or transfrontier effect, and are to govern zones which are not under any national territorial competence.[15]

In this connection, the Brundtland Commission, reporting to the U.N. General Assembly in 1987, dedicated a whole chapter to the management, in the "common interest" of the so-called "global commons" (e.g., those zones falling outside or beyond national jurisdictions).[16] Similarly, the Centre for Studies and Research in International Law in 1985 singled out the gradual evolution from a transboundary or "transterritorial" perspective to a global perspective of the preservation of the environment (and action in favour of resources of the common heritage of mankind).[17]

That international law is no longer exclusively State-oriented can be seen from repeated references to "mankind" not only in academic writings[18] but significantly, also in various international instruments. This may possibly be pointing towards an international law of mankind which pursues preservation of the environment and sustainable development on behalf of present and future generations. As such, the notion of cultural heritage of mankind may be found.[19] The legal principle of the common heritage of mankind has found expression in the law of the sea and in the law of outer space.[20] The reconsideration of the basic postulates of international law to take account of the superior

[13] For example, preambles of the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources; the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft; the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

[14] E.g., the 1985 Vienna Convention for the Protection of the Ozone Layer, preamble and Article 2; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, preamble; Article 1 of the three marine pollution Conventions above quoted.

[15] A.C. Kiss, *Droit international de l'environnement*, Paris, Pedone, 1989, pp. 33, 67–68, 70–72 and 8; L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law", *International Environmental Law* (ed. L.A. Teclaff and A.E. Utton), N.Y., Praeger, 1974, p.251; and cf. Ian Brownlie, "A Survey of International Customary Rules of Environmental Protection", in ibid., p.5.

[16] World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, chapter 10 ("Managing the Commons"), pp. 264–289.

[17] P.M. Dupuy, "Bilan de recherches de la section de langue française du Centre d'Étude et de Recherche de l'Académie", *La pollution transfrontière et le droit international – 1985*, Dordrecht: Martinus Nijhoff/Académie de Droit International de la Haye, (1986), pp. 68–70, 65–66 and 81.

[18] Cf., e.g., C.W. Jenks, *The Common Law of Mankind*, London, Stevens, 1958, pp. 1–442; R.J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, Paris, Economica/UNESCO, 1986, pp. 11–182; among others.

[19] E.g., in the UNESCO Conventions for the Protection of Cultural Property in the Event of Armed Conflict (1954) and for the Protection of the World Cultural and Natural Heritage (1974)).

[20] E.g., the 1982 U.N. Convention on the Law of the Sea, Part XI, particularly Articles 136–145 and 311(6); the 1970 U.N. Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction and the 1979 Treaty Governing the Activities of States on the Moon and Other Celestial Bodies, Article 11; and cf. the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Article I. Cf. A. Schrijver, "Permanent Sovereignty over Natural Resources versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Economic Law?", *International Law and Development* (ed. P. De Waart, P. Peters and E. Denters), Dordrecht, Nijhoff/Kluwer, 1988, pp. 95–96, 98 and 101.

common interests of mankind has been the subject of general academic works on the subject.[21]

More recently an evolution can be discerned from the notion of common heritage of mankind (as found in the contexts of the law of the sea and space law) to that of common concern of mankind. Thus, U.N. General Assembly Resolution 43/53 of December 1988, recognized that climate change was a "common concern" of mankind, the wording of its first operative paragraph describing climate as "an essential condition which sustains life on earth".[22]

Such an essential or fundamental condition is inextricably linked to the new idea of "commonness". This recently proposed notion is inspired by considerations of international *ordre public*. It appears as a derivate of the earlier "common heritage" approach. Its evident intent is to shift emphasis from the sharing of benefits obtained from exploitation of environmental wealths to fair or equitable sharing of burdens in environmental protection, along with the needed concerted actions towards that goal within social and temporal dimensions.[23] It can hardly be doubted, as UNEP itself has acknowledged, that environmental protection is "decisively linked" to the "human rights issue".[24] That is, to the very fulfilment of the fundamental right to life in its wide dimension (right to life – cf. section 3, *infra*).

Resorting to the very notion of mankind, human kind, immediately places the whole discussion within the human rights framework. And it must be emphasized that this reference should not be left implicit or neglected as allegedly redundant. Just as law, or the rule of law itself, does not operate in a vacuum, mankind, the human kind, is neither a social nor a legal abstraction. It is composed of human collectivities, of all human beings of flesh and bone, living in human societies.

In the case that the concept of common concern for mankind becomes widely and unequivocally accepted, the introduction of certain rights and obligations are bound to follow. From this, one may consider the concept's materialization as the right to a healthy environment. Within the ambit of the ***droit de l'humanité***, the common concern of human kind finds expression in the exercise of the recognized right to a healthy environment, in all its dimensions (individual, group, social or collective, and inter-generational – cf. section 5 – *infra*); precisely because mankind is not a social or legal abstraction and is formed by a multitude of human beings living in societies and extended in time.

[21] E.g., Jenks, Dupuy – references in *supra*, note 18.

[22] Cf. also the Report of the UNEP Group of Legal Experts Meeting convened in Malta in December 1990 in order to examine the implications of the concept of "common concern to mankind" on global environmental issues (co-*rapporteurs*, A.A. Cançado Trindade and D. Attard), published by UNEP.

[23] On this last point, cf. UNEP/Executive Director and Secretariat, *Note to the Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues*, Malta Meeting, 13–15 December 1990, document UNEP/ELIU/WG.1/1/2, pp. 1–2, ? 4, and cf. pp. 4–5, ? 8–9 (mimeographed, internal circulation).

[24] Ibid., p. 14 & 22.

The human rights framework is ineluctably present in the consideration of the regime of protection of the human environment in all its aspects; we are ultimately confronted with the crucial question of *survival* of human kind, with the assertion – in face of the threats to the human environment – of the fundamental human right to live.

Just as a couple of decades ago there were questions which were "withdrawn" from the domestic jurisdiction of States to become matters of ***international*** concern (essentially, in cases pertaining to human rights protection and self-determination of peoples)[25], there are nowadays global issues, such as climate change, which are being erected as the *common* concern of mankind. Here, again, the contribution of human rights protection in piercing the so-called reserved domain of States can be perceived in historical perspective. The globalization of the regimes of human rights protection and environmental protection heralds the end of reciprocity and the emergence of *erga omnes* obligations.

Prohibiting the invocation of reciprocity as an excuse for non-compliance of *erga omnes* obligations is confirmed in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties: in providing for the conditions in which a breach of a treaty may bring about its suspension or termination, the Vienna Convention (Article 60 (5)) expressly excepts "provisions relating to the protection of the human person contained in treaties of a humanitarian character". This provision makes an inroad into a domain of international law – the law of treaties – traditionally marked by the voluntarism of States, and constitutes a clause of safeguard for human beings. Thus, the contemporary law of treaties itself discards the principle of reciprocity in the implementation of treaties of a humanitarian character. The obligations enshrined therein generate effects *erga omnes*. The overcoming of reciprocity in human rights protection and in environmental protection has come about in the context of the constant search for an expansion of the ambit of protection (for the safeguard of an increasingly wider circle of beneficiaries, human beings and ultimately mankind), for a higher degree of the protection afforded and for the gradual strengthening of the mechanisms of supervision, in the defense of common superior interests.

Yet another affinity in the recent developments of human rights protection and environmental protection, which has not been sufficiently examined so far and to which we shall now turn, lies in the incidence of the temporal dimension.

[25] A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations", 25 *International and Comparative Law Quarterly* (1976) pp. 723, 731, 737, 742, 761–762 and 765.

3. Further Affinities in the Evolution of Human Rights Protection and of Environmental Protection

(1) Protection of the Human Person and Environmental Protection: Mutual Concerns

Just as concern for human rights protection can be found in the realm of international environmental law[26], concern for environmental protection can also be found in the express recognition of the right to a healthy environment in two recent human rights instruments, namely, the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Article 11) and the 1981 African Charter on Human and Peoples' Rights (Article 24). In the former, it is recognized as a right of "everyone" (§ 1) to be protected by the States Parties (§ 2), whereas in the latter it is acknowledged as a peoples' right.

Presently, concern for the protection of the environment can also be found in the realm of international humanitarian law.[27] Likewise, recent developments in international refugee law are worthy of attention, such as the possible assimilation of victims of environmental disasters to protected [displaced] persons under refugee law.[28]

Furthermore, the protection of vulnerable groups (e.g., indigenous populations; ethnic, religious and linguistic minorities; mentally and physically handicapped persons) appears today at the confluence of international human rights law and international environmental law. As we have indicated in another study, concern for the protection of vulnerable groups can nowadays be found in international instruments and initiatives pertaining to both human rights protection and environmental protection, where the issue has been approached on the basis of both human and environmental considerations.[29]

[26] Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment; Preamble and Principles 6 and 23 of the 1982 World Charter for Nature; Principles 1 and 20 proposed by the World Commission on the Environment and Development in its 1987 report. Cf. A.A. Cançado Trindade, "The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change", *in International Law and Global Environmental Change: New Dimensions* (ed. E. Brown Weiss), United Nations University (UNU) Project, 1992, 93 pp. (in print).

[27] Cf. Articles 35(3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (prohibition of methods or means of warfare severely damaging the environment); the 1977 U.N. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; and the 1982 World Charter for Nature (paragraphs 5 and 20).

[28] E.g., the 1984 Cartagena Declaration on Refugees, recommending an expanded concept of refugee for use in Central America.

[29] Cf. references and sources in A.A. Cançado Trindade, "The Contribution ...", *supra* note 26.

(2) Incidence of the Temporal Dimension in Environmental Protection and in Human Rights Protection

The notion of time, the element of foreseeability, inhere in legal science as such. The predominantly *preventive* character of the normative *corpus* on environmental protection, stressed time and time again[30] and reiterated in clear and emphatic terms in the reference to the temporal dimension in the 1990 Ministerial Declaration of the II World Climate Conference (paragraph 7), is also present in the field of human rights protection.

Its incidence can be detected at distinct stages or levels, starting with the *travaux préparatoires* (e.g., of the U.N. Covenant on Civil and Political Rights, and Optional Protocol), the underlying conceptions and the adopted texts of human rights instruments.[31] The temporal dimension is further present in international refugee law.[32] Second, the incidence of the temporal dimension can also be found in the "evolutionary" *interpretation* of human rights treaties, which has ensured that they remain living instruments. There has been occurring a dynamic process of evolution of international human rights law through interpretation.[33]

Thirdly, in respect to the *application* of human rights treaties, the practice of international supervisory organs affords illustrations of the temporal dimension in human rights protection. Thus, the *jurisprudence constante* of the European Commission and Court of Human Rights under the European Convention on Human Rights has in recent years upheld, in numerous cases, the notion of *potential* or *prospective* victims (that is, victims claiming a valid potential personal interest under the Convention), thus enhancing the condition of individual applicants.[34] Likewise, in 1988 the Inter-American Court of Human Rights, in the *Velasquez Rodriguez* and *Godinez Cruz* cases against Honduras (1988), stressed the States' duty of due diligence to prevent violations of protected human rights.[35]

In fact, the incidence of the temporal dimension can be detected not only in the interpretation and application of norms pertaining to guaranteed rights but also in the conditions of their exercise, as in public emergencies. It can be further detected in the protection not only of civil and political rights but also – and perhaps even more pronouncedly – of economic, social and cultural

[30] Cf. ibid.

[31] E.g., the three recent Conventions – the Inter-American, the U.N. and the European – against Torture, of an essentially preventive character; the 1948 Convention against Genocide; the 1973 Convention against *Apartheid*, along with other international instruments attuned to the prevention of discrimination of distinct kinds.

[32] E.g., the definition of "refugee" under the 1951 Convention (Article 1(a)(2)) and the 1967 Protocol on the Status of Refugees (Artile 1(2)), with the element of the "well-founded fear" of persecution, the threats or risks of persecutions; reference can also be made to the recent U.N. "early warning" efforts of prevention or forecasting of refugee flows.

[33] A.A. Cançado Trindade, "Co-existence and Co-ordination ...", *supra* note (2), pp. 91-112.

[34] Ibid., pp. 243-299.

[35] Cf. A.A. Cançado Trindade, "The Contribution ...", *supra* note 26.

rights (e.g., right to education, right to cultural integrity). This may be carried through to include the right to development and the right to a healthy environment, – extending into time.[36] Manifestations of the temporal dimension become quite concrete, particularly in the field of human rights protection, where they do not appear as soft law. Here, more clearly than in other areas of international law, the evolving jurisprudence (e.g., on the notion of potential victims, on the duty of prevention of violations of human rights) may also serve as inspiration for environmental protection.

4. The Rights to Life and to Health at the Basis of the *Ratio Legis* of International Human Rights Law and of Environmental Law

(1) The Fundamental Right to Life in Its Wide Dimension

The right to life is basic or fundamental because "the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights".[37] As indicated by the Inter-American Court of Human Rights in its Advisory Opinion on ***Restrictions to the Death Penalty*** (1983), the human right to life encompasses a "substantive principle" whereby every human being has an inalienable right to have his life respected, and a "procedural principle" whereby no human being shall be arbitrarily deprived of his life.[38]

The Human Rights Committee, qualifying the human right to life as the "supreme right of the human being", has declared that this fundamental human rights ***"ne peut pas être entendu de façon restrictive"*** and its protection ***"exige que les Etats adoptent des mesures positives"***.[39] The Inter-American Commission of Human Rights has also drawn attention to the binding character of the right to life.[40] In its recent Resolution No. 3/87; on case No. 9647, concerning the United States, the Inter-American Commission, after identifying a norm of ***jus cogens*** which "prohibits the State execution of children", warned against "the arbitrary deprivation of life" on the basis of a patchwork scheme of legislation which subjects the severity of the punishment to the "fortuitous element of where the crime took place".[41]

Under international human rights instruments, the assertion of the inherent right to life of every human being is accompanied by an assertion of the legal

[36] Ibid.

[37] F. Przetacznik, "The Right to Life as a Basic Human Right", 9 *Revue des droits de l'homme/Human Rights Journal* (1976) pp. 589 and 603.

[38] I.-A. Court H.R., Advisory Opinion OC-3/83, of 08 September 1983, Series A, No. 3, p.59.

[39] Cited in J.G.C. Van Aggelen, ***Le rôle des organisations internationales dans la protection du droit à la vie***, Bruxelles, Story-Scientia, 1986, p.23.

[40] Cited in ibid., p.38.

[41] OAS, *Annual Report of the Inter-American Commission on Human Rights – 1986–1987*, pp. 170 and 172–173.

protection of that basic human right and of the *negative* obligation not to deprive arbitrarily of life.[42] However, this negative obligation is accompanied by the *positive* obligation to take all appropriate measures to protect and preserve human life. This has been acknowledged by the European Commission of Human Rights. The Commission's case-law has evolved to the point of holding (*Association X v. United Kingdom*, 1978) that Article 2 of the European Convention on Human Rights also imposed on States a wider and positive obligation ***"de prendre des mesures adéquates pour protéger la vie"***.[43]

Taken in its wide and proper dimension, the fundamental right to life comprises the right of every human being not to be deprived of his or her life (*right to life*) and the right of every human being to have the appropriate means of subsistence and a decent standard of life (preservation of life, *right of living*). As identified by Przetacznik, "the former belongs to the area of civil and political rights, the latter to that of economic, social and cultural rights".[44] The fundamental right to life, properly understood, affords an eloquent illustration of the indivisibility and inter-relatedness of all human rights.[45]

In fact, some members of the Human Rights Committee have expressed the view that Article 6 of the U.N. Covenant on Civil and Political Rights requires the State

> to take *positive measures* to ensure the right to life, including steps to reduce infant mortality rates, prevent industrial accidents, and protect the environment".[46]

Taking the essential requirements of the right of living (*supra*) as a corollary of the right to life, Desch argued that inequitable distribution of food or medication by public authorities, or even the toleration of malnutrition or failure to reduce infant mortality, would constitute violations of Article 6 of the Covenant if they result in an arbitrary deprivation of life.[47]

During the drafting of the 1948 Universal Declaration of Human Rights, attempts were made to make its Article 3, which proclaims the right to life, more precise.[48] A number of issues were the object of discussion in the drafting

[42] E.g., U.N. Covenant on Civil and Political Rights, Article 6(1); European Convention on Human Rights, Article 2; American Convention on Human Rights, Article 4(1); African Charter on Human and Peoples' Rights, Article 4. Th. Desch, "The Concept and Dimensions of the Right to Life (As Defined in International Standards and in International and Comparative Jurisprudence)", 36 *Osterreichische Zeitschrift fur Offentliches Recht und Volkerrecht* (1985) pp. 86 and 99.

[43] Cited in J.G.C. Van Aggelen, *supra* note (36), p.32.

[44] F. Przetacznik, *supra* note (34), p.603, e cf., p.586.

[45] On the right to life bearing witness of the indivisibility of all human rights, cf. W.P. Gormley, "The Right to a Safe and Decent Environment", 20 *Indian Journal of International Law* (1988) pp. 23–24.

[46] Cited in Desch, *supra* note (42), p.101.

[47] Ibid., p. 101.

[48] Cf. H. Kanger, *Human Rights in the U.N. Declaration*, Uppsala/Stockholm, Almqvist & Wiksell, 1984, pp. 81–82.

healthy environment entails the consequent wider characterization of possible threats against those rights, which in turn calls for a higher degree of protection. An example of such threats is provided by the effects of global warming on human health such as skin cancer, retinal eye damage, cataracts and eventual blindness, neurological damage, lowered resistance to infections, and alteration of the immunological system (through damaged immune cells). As a result, depletion of the ozone layer may result in substantial injury to human health as well as the environment (harm to terrestrial plants, destruction of the zooplankton, a key link in the food chain)[63], thus disclosing the needed convergence of human health protection and environmental protection.

For example, in the realm of international environmental law, the 1989 Hague Declaration on the Atmosphere states that "the right *to live* is the right from which all other rights stem". It adds that "the right *to live* in dignity in a viable global environment" entails the duty of the "community of nations" vis-à-vis "present and future generations" to do "all that can be done to preserve the quality of the atmosphere". The use of the expression "the right *to live*" (rather than right *to life*) seems well in keeping with the understanding that the right to life entails negative as well as positive obligations as to preservation of human life (cf. *supra*). The *Institut de Droit International*, while drafting its Resolution on Transboundary Air Pollution (Session of Cairo, 1987), made sure to include provisions referring to the protection of life and human health.[64]

Together with the right to a healthy environment, the right to peace also appears as a necessary prolongation or corollary of the right to life. In fact, both the Inter-American Commission on Human Rights[65] and the U.N. General Assembly[66] have addressed the requirements of *survival* as a component of the right to life. In its general comment 6(16) of 1982 on Article 6(1) of the Civil and Political Covenant, the Human Rights Committee observed that the right to life is "the supreme right from which no derogation is permitted even in time of public emergency." Recalling the earlier comment, in 1985, in its general comment 14(23) on Article 6, the Human Rights Committee went on to relate the current proliferation of weapons of mass destruction to "the supreme duty of States to prevent wars". The Committee associated itself with the growing concern, expressed during successive sessions of the U.N. General Assembly, by representatives of all geographical regions, at what was considered to be "the greatest threat to the right to live which confronts mankind today". In the words of the Committee, "the very existence and gravity of this threat generates a

[63] J.T.B. Tripp, "The UNEP Montreal Protocol: Industrialized and Developing Countries Sharing the Responsibility for Protecting the Stratospheric Ozone Layer", 20 *New York University Journal of International Law and Politics* (1988) p. 734; Ch. B. Davidson, "The Montreal Protocol: The First Step toward Protecting the Global Ozone Layer", in ibid., pp. 807–809.

[64] Cf. preamble and Article 10(2) and 11; text in : 62 *Annuaire de l'Institut de Droit International* (1987)-II, pp. 204, 207–208 and 211.

[65] Cf. Comisión Interamericana de Derechos Humanos, *Diez Años de Actividades – 1971–1981*, Washington, Secretaria General de la OEA, 1982, pp. 338–339, 321 and 329–330.

[66] B.G. Ramcharan, *supra* note 53, p. 303.

climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for an observance of human rights" in accordance with the U.N. Charter and the U.N. Covenants on Human Rights.[67] The Committee, accordingly, "in the interest of mankind", called upon "all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace".[68]

The maintenance of peace is an imperative for the preservation of human life. The Final Act of the 1968 Teheran Conference on Human Rights contains several references to the relationship between the observance of human rights and maintenance of peace.[69] In this light, further reference may be made to the preambles of the two 1966 U.N. Covenants on Human Rights. More recently the "right to peace" has been the subject of a number of U.N. resolutions, which relate peace to disarmament and détente, thus disclosing the temporal dimension of the underlying duty of *prevention* of conflicts[70] (e.g., *inter alia*, G.A. Resolutions 33/73 of 1978, and 34/88 of 1979). The States' duty to co-exist in peace and to achieve disarmament is acknowledged in the 1974 Charter on Economic Rights and Duties of States (Articles 26 and 15, respectively).

The right to peace includes as a corollary the "right to disarmament".[71] In this regard attention has been drawn to the fact that limitations or violations of human rights are often associated with the outbreak of conflicts, the process of militarization and the expenditure on arms[72] – especially nuclear weapons and other weapons of mass-destruction.[73] These have led, and may unfortunately still lead, to arbitrary deprivation of human life. The conception of "sustainable development", as propounded by the Brundtland Commission, points to the ineluctable relationship between the rights to a healthy environment, to peace and to development.[74]

The relationship between the right to life and the right to development as a human right becomes clearer as one moves from the traditional, narrow approach to the right to life (seen as strictly a civil right) into the wider and

[67] U.N. *Report of the Human Rights Committee, G.A.O.R.* – 40th Session (1985), suppl. n. 40 (A/40/40), p. 162.

[68] Ibid., p. 162.

[69] Cf. U.N., *Final Act of the International Conference on Human Rights* (Teheran, 1968), U.N. doc. A/CONF.32/41, N.Y., U.N., 1968, pp. 4, 6, 9, 14 and 36.

[70] Cf. J.-M. Becet and D. Colard, *Les droits de l'homme*, Paris, Economica, 1982, pp. 128–131.

[71] To this effect, cf. ibid., pp. 129–131; Ph. Alston, *infra* note 72, pp. 324–325 and 329–330.

[72] Ph. Alston, "Peace, Disarmament and Human Rights", *Armement, Développement, Droits de l'homme, Désarmement* (Colloque à l'UNESCO, 1982) (ed. G. Fischer), Paris/Bruxelles, Bruylant, 1985, pp. 325–330.

[73] Cf. discussion in, e.g., A.A. Tikhonov, "The Inter-Relationship between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life", in B.G. Ramcharan (ed.) *The Right to Life in International Law*, Dordrecht, Martinus Nijhoff, (1985), pp.97–113.

[74] Cf. World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, pp. 19 and 290–307, and cf. in particular pp. 294–300 on conflicts as a "cause of unsustainable development".

modern approach, which encompasses the minimum conditions for an adequate and dignified standard of living (cf. *supra*). Then the inter-relatedness of the right to life and the right to development as a human right becomes self-evident, as the latter element purports to demand all possible endeavours to overcome obstacles (of destitution and under-development) preventing the fulfilment of basic human needs.[75] Not surprisingly, the U.N. Working Group of Governmental Experts on the Right to Development recommended in 1984 *inter alia* that particular attention should be paid to the basic needs and aspirations of vulnerable or disadvantaged and discriminated groups.[76]

In sum, the basic right to life, which includes the right of living, entails negative as well as positive obligations in favour of preservation of human life. Its enjoyment is a precondition of the enjoyment of other human rights. It belongs concurrently to the realm of civil and political rights, and to that of economic, social and cultural rights, thus illustrating the indivisibility of all human rights. It establishes a "link" between the domains of international human rights law and environmental law. It inheres in all individuals and all peoples, with special attention to the requirements of survival. It has as extensions or corollaries the right to a healthy environment and the right to peace (and disarmament). It is closely related, in its wide dimension, to the right to development as a human right (right to live with fulfilment of basic human needs). And it lies at the basis of the ultimate *ratio legis* of the domains of international human rights law and environmental law – focusing on the protection and survival of the human person and mankind.

(2) The Right to Health as the Starting-Point towards the Right to a Healthy Environment

Like the right to life (right of living, *supra*), the right to health entails *negative* as well as *positive* obligations. In fact, the right to health is inextricably interwoven with the right to life itself, and is a precondition for the exercise of freedom. The right to health implies the *negative* obligation not to practise any act which can endanger one's health. Thus, this basic right is linked to the right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman or degrading treatment.[77] But this duty of abstention (so crucial, for example, in the treatment of detainees and prisoners) is accompanied by the *positive* obligation to take all appropriate measures to protect and preserve human health (including measures of prevention of diseases).

[75] P.J.I.M. De Waart, "The Inter-Relationship between the Right to Life and the Right to Development", in B.G. Ramcharan (ed.) *The Right to Life in International Law*, Dordrecht, Martinus Nijhoff, (1985), pp. 84–96, at pp. 89 and 91–92.

[76] Cited in ibid., p.91.

[77] As recognized and provided for in the U.N. Covenant on Civil and Political Rights, Article 7; the European Convention on Human Rights, Article 3; the American Convention on Human Rights, Articles 4 and 5.

Such positive obligation,[78] linking the right to life to the right to an adequate standard of life[79], discloses the fact that the right to health, in its proper and wide dimension, concurrently has the character of an individual and a social right. Belonging, like the right to life, to the realm of basic or fundamental rights, the right to health is an individual right in that it requires the protection of the physical and mental integrity of the individual and his dignity. It is also a social right in that it imposes on the State and society collective responsibility for the protection of the health of the citizenry and the prevention and treatment of diseases.[80] Like the right to life, the right to health, properly understood, affords a vivid illustration of the indivisibility and inter-relatedness of all human rights.

(3) The Right to a Healthy Environment as an Extension of the Right to Health

The right to health in its "positive" aspect (*supra*) found expression at a global level, in Article 12 of the U.N. Covenant on Economic, Social and Cultural Rights. That provision, in detailing the guidelines for the implementation of the right to health, singled out, *inter alia*, "the improvement of all aspects of environmental and industrial hygiene". The way appeared paved for the future recognition of the right to a healthy environment (*infra*).

This point was the object of attention at the 1978 Colloquy of the Hague Academy of International Law on "The Right to Health as a Human Right", where the issue of the human right to environmental salubrity was raised. On this occasion, after warning that the degradation of the environment nowadays constituted a *"menace collective à la santé des hommes"*[81], P.M. Dupuy advocated that the human right to environmental salubrity be recognized as the "supreme guarantee of the right to health".[82] In proposing that the environment ought to be protected *"en fonction de l'ensemble des intérêts de la collectivitié"*, he argued:

> "Il nous paraît que la chance fournie par l'affirmation d'un droit à la salubrité du milieu est justement de donner l'occasion à l'environnement de

[78] As recognized and provided for in the U.N. Covenant on Economic, Social and Cultural Rights, Article 12; in the European Social Charter, Article 11; and also in WHO and ILO Resolutions on specific aspects.

[79] As proclaimed by the 1948 Universal Declaration of Human Rights, Article 25(1). – On the "negative" and "positive" aspects of the right to health, cf. M. Bothe, "Les concepts fondamentaux du droit à la santé: le point de vue juridique", *Le droit à la santé en tant que droit de l'homme – Colloque 1978* (Académie de Droit International de la Haye), Netherlands: Sijthoff & Noordhoff, 1979, pp. 14–29; Scalabrino-Spadea, "Le droit à la santé – Inventaire de normes et principes de droit international", *in Le Médecin face aux droits de l'homme*, Padova, Cedam, 1990, pp.97–98.

[80] R. Roemer, "El Derecho a la Atención de la Salud", in OMS, *El Derecho a la Salud en las Americas* (ed. H.L. Fuenzalida-Puelma and S.S. Connor), Washington, OPAS, publ. n.509, p.16.

[81] P.M. Dupuy, *infra* n. 83, p.406, and cf. p.352.

[82] Ibid., p. 412, and cf. p.409.

cesser d'être d'abord perçu en termes économiques, ainsi qu'un bien susceptible d'exploitation, afin d'apparaître au moins autant comme un patrimoine de l'individu, necessaire à l'épanouissement de son droit fondamental à la vie, et donc à la santé.[83]

The protection of the whole of the biosphere as such entails "indirectly but necessarily" the protection of human beings, in so far as the object of environmental law and hence of the right to a healthy environment is *"protéger les humains en leur assurant un milieu de vie adéquate"*.[84] The right to a healthy environment, in the perspicacious observation by Kiss, supplements other recognized human rights from another point of view, namely,

"il contribue à établir une égalité entre citoyens ou, du moins, à attenuer les inégalités dans leurs conditions materielles. On sait que les inégalités entre humains de conditions sociales différentes sont accentuées par la degradation de l'environnement: les moyens materiels dont disposent les mieux nantis leur permettent d'échapper à l'air pollué, aux milieux degradés et de se créer un cadre de vie sain et équilibré, alors que les plus démunis n'ont guère de telles possibilités et doivent accepter de vivre dans des agglomerations devenues inhumaines, voire des bidonvilles, et de supporter les pollutions.

L'exigence d'un environnement sain et équilibré devient ainsi en même temps un moyen de mettre en oeuvre d'autres droits reconnus à la personne humaine.

Mais, par ses objectifs mêmes, le droit à l'environnement apporte aussi une dimension supplémentaire aux droits de l'homme dans leur ensemble".[85]

The interrelatedness between environmental protection and the safeguard of the right to health is clearly evidenced in the implementation of Article 11 (on the right to protection of health) of the 1961 European Social Charter. The Committee of Independent Experts operating under the Charter, has recently been attentive to national reports which outline measures taken at domestic levels to prevent, limit or control pollution.[86] With regard to the removal of causes of ill-health (Article 11(1)), the Committee has concentrated on measures taken to prevent or reduce pollution of the atmosphere.[87] Thus, in the consideration of a French report, the Committee took note of "the intention of the public authorities to achieve a 50% reduction in sulphur dioxide emissions

[83] P.M. Dupuy, "Le droit à la santé et la protection de l'environnement", *Le droit à la santé ...– Colloque ..., supra* note 79, p.410.

[84] A.C. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", in *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montreal (Quebec), ed. Quebec/Amerique, 1988, pp.69–70.

[85] Ibid., p.71.

[86] Cf., e.g., Council of Europe/European Social Charter, *Committee of Independent Experts – Conclusions IX–2*, Strasbourg, C.E., 1986, p.71 (Austrian and Cypriot reports); ibid., *Conclusions XI–1*, Strasbourg, C.E., 1989, p.119 (Swedish and British reports).

[87] E.g., German and Italian reports, in ibid., *Conclusions IX–2*, cited *supra* note 86, pp. 71–72.

into the atmosphere during the period 1980–1990".[88] Reviewing the air pollution measures outlined in the latest Danish report, the Committee noted that "emissions of nitrogen oxide into the atmosphere was to be reduced by 50% before 2005 and of sulphur dioxide by 40% before 1995".[89]

The collection *Case Law on the European Social Charter* refers to other pertinent indications of the connection between environmental protection and the right to health. The Committee of Independent Experts has manifested its wish to find information in forthcoming national reports (under Article 11 of the Charter) on "the measures taken to reduce the release of sulphur dioxide and other acid pollutants in the atmosphere".[90] The Committee has called for amplified measures for control of environmental pollution.[91] The Committee has further expressed the opinion that States bound by Article 11 of the Charter should be considered as fulfilling their obligations if they provide evidence of the existence of a medical and health system comprising *inter alia* "general measures aimed in particular at the prevention of air and water pollution, protection from radio-active substances, noise abatement, the food control environmental hygiene, and the control of alcoholism and drugs".[92]

In fact, an attempt has been made under the European Convention on Human Rights itself to extend the protection of the rights to life and health to include well-being. Prior to the convening of the 1973 European Ministerial Conference on the Environment, a Draft Protocol to the European Convention on Human Rights was prepared by H. Steiger. The Draft Protocol, containing two articles, provides for the protection of life and health as encompassing well-being and admits limitations on the right to a healthy environment. It further provides for the protection of individuals against the acts of other private persons. This point (*Drittwirkung*), though giving rise to much debate and controversy, has been touched upon by the European Commission of Human Rights, which, in its 1979 report in the *Young, James and Webster* cases, admitted that the European Convention contained provisions that "non seulement protégent l'individu contre l'Etat, mais aussi obligent l'Etat à

[88] In ibid., p.71–72.

[89] In ibid., *Conclusions XI–1*, cited *supra* note 86, p.118.

[90] Council of Europe/European Social Charter, *Case Law on the European Social Charter-Supplement*, Strasbourg, C.E., 1986, p.37.

[91] Council of Europe/European Social Charter, *Case Law on the European Social Charter*, Strasbourg, C.E., 1982, p.105.

[92] Ibid., p.104 – On the protection of health vis-à-vis the environment under Article 11 of the European Social Charter, cf. further: Council of Europe doc. 6030, of 22.03.1989, p.9; C.E.; *Comité Gouvernemental de la Charte Sociale Européenne – 10e rapport* (1989), p.28 (control of atmospheric pollution); Conseil de l'Europe/Charte Sociale Européenne, *Comité d'Experts Indépendants-Conclusions X–2*, Strasbourg, C.E., 1988, pp. 111–112 (reduction of atmospheric pollution); Council of Europe/European Social Charter, *Committee of Independent Experts – Conclusions X–1*, Strasbourg, C.E., 1987, 108 (reduction of atmospheric pollution, air and water pollution control).

protéger l'individu contre les agissements d'autrui".[93] Although Steiger's proposed Draft Protocol was not accepted at the time by member States, it remains the sole existing proposal on the matter (in so far as the European Convention system is concerned) and its underlying ideas deserve further and deeper consideration[94] (cf. *infra*). Though the question remains an open one, there has however been express recognition of the right to a healthy environment in more recent human rights instruments, as we have already seen (cf. section 3, *supra*).

5. The Question of the Implementation ('Mise en Oeuvre') of the Right to a Healthy Environment

(1) The Issue of Justiciability

It can hardly be doubted that the appropriate formulation of a right may facilitate its implementation. But given that certain concepts escape any scientific definition, it becomes necessary to relate them to a given context for the sake of normative precision and effective implementation. Thus, the term "environment" may be understood as the immediate physical *milieu* surrounding the individual concerned to the whole of the biosphere. It may therefore be necessary to add qualifications to the term.[95] In the implementation of any right, one can not ignore the context in which it is invoked and applies. That is, relating it to the context becomes necessary for its vindication in the particular circumstances.[96]

This applies not only to the right to a healthy environment, but also to any other "category" of rights. But such "new" rights as the right to a healthy environment and the right to development present a greater challenge when one comes to implementation. Whereas many of the previously crystallized civil and political, and economic, social and cultural rights had found expression in domestic law at a much earlier stage and had been formally recognized in national constitutions and other legislation, the above-mentioned "new" rights, for their part, were still "maturing" in their process of transformation into law. They were "conceived directly in international forums" (such as the United Nations system), and had "not had the benefit of careful prior scrutiny at the national level".[97] Many rights, whether classified as civil and political, or else as economic, social and cultural rights, "can only be defined with specificity when located in a given context".[98]

While the element of *formal justiciability* is taken as an "indispensable attribute" of a right in positivist thinking,[99] international human rights law has distinctly considered that "an international system for the 'supervision' of States' compliance with international human rights obligations is sufficient to satisfy the requirement of 'enforceability'".[100] In short, international human rights law has "clearly adopted the notions of 'implementation' and 'supervision' as its touchstones, rather than those of justiciability or enforceability".[101] International human rights law depends largely on means of implementation other than the purely judicial one.[102] Besides recourse to such judicial organs as the European and the Inter-American Courts of Human Rights, various other (non-judicial) means of implementation are often resorted to ensure guaranteed human rights (e.g., friendly settlement, conciliation, fact-finding).[103]

Formal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law. The fact that many recognized human rights have not yet achieved a level of elaboration so as to render them justiciable does not mean that those rights simply do not exist; enforceability is not to be confounded with the existence itself of a right.[104] Attention is to be focused on the *nature* of obligations. For example, it is certain that obligations under the U.N. Covenant on Economic, Social and Cultural Rights were drafted in such a way (e.g., the basic provisions of Articles 2 and 11) that they "cannot easily be made justiciable (manageable by third-

[93] See J.P. Jacqué, "La protection du droit à l'environnement au niveau européen ou regional", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, pp. 74–75, and cf. pp. 72–73. And, on Steiger's proposed Draft Protocol, cf. W.P. Gormley, *Human Rights and Environment: The Need for International Co-operation*, Leyden, Sijthoff, 1976, pp. 90–95, P.M. Dupuy, *op. cit. supra* note 83, pp. 408–413.

[94] W.P. Gormley, *supra* note 93, pp.112–113; J.P. Jacqué, *supra* note 93, pp.73 and 75–76; P.M. Dupuy *supra* note 83, pp.412–413. For the complete text of Steiger's 1973 proposed Draft Protocol, cf. Working Group for Environmental Law (Bonn – *rapporteur*, H. Steiger), "The Right to a Humane Environment / Das Recht auf eine menschenwürdige Umwelt", in *Beiträge zur Umweltgestaltung* (Heft A13), Berlin, Erich Schmidt Verlag, 1973, pp. 27–54.

[95] A. Ch. Kiss, "La mise-en-oeuvre du droit à l'environnement: problematique et moyens", *II Conférence européenne sur l'environnement et les droits de l'homme*, Salzburg, Institute for European Environmental Policy, 1980, p.4 (mimeographed, restricted circulation).

[96] Ibid., p.5.

[97] Ph. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control", 78 *American Journal of International Law* (1984) p.614.

[98] For example, "it would not seem inherently more difficult for a particular society to define a 'right to primary education' (an economic right) than a 'right to take part in the conduct of public affairs' (a political right)". Ph. Alston, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yearbook* (1988) p.35.

[99] Ibid., p.33.

[100] Ibid., p.38.

[101] Ibid., p.35.

[102] K. Vasak, "Pour les droits de l'homme de la troisième génération: les droits de solidarité", *Résumés des Cours de l'Institut International des Droits de l'Homme* (X Session d'Enseignement, 1979), Strasbourg, IIDH, 1979, p.6 (mimeographed).

[103] For a recent study of the operation of international mechanisms of human rights protection, cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp.21–435.

[104] A. Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach", 10 *Human Rights Law Journal* (1989) pp. 36 and 38.

party judicial settlement). Nevertheless, the obligations exist and can in no way be neglected".[105]

In sum, as far as the issue of justiciability is concerned, one may deduce that there are rights which simply cannot be properly vindicated before a tribunal by their active subjects. However, in the specific case of the right to a healthy environment, if, as pertinently pointed out by Kiss, this is interpreted not as the (virtually impossible) right to an ideal environment but rather as the right to the conservation – that is, protection and improvement – of the environment, it can then be implemented like any other *individual* right. That being so, it is taken as a "procedural" right, the right to a due process before a competent organ, and thus assimilated to any other right guaranteed to individuals and groups of individuals. This right entails, as corollaries, the right of the individual concerned *to be informed* of projects and decisions which could threaten the environment (the protection of which aims at preventive measures), and the right of the individual concerned *to participate* in the taking of decisions which may affect the environment (active sharing of responsibilities in the management of the interests of the whole collectivity).[106] In addition to such rights to information and of participation one can refer to the *right to available and effective domestic remedies*. In this connection, it should not be overlooked that some economic and social rights were made enforceable in domestic law once their component parts were "formulated in a sufficiently precise and detailed manner".[107]

Focusing on the *subjects* of the right to a healthy environment, we see first that it has an individual dimension, as it can be implemented, as just indicated, like other human rights. But the beneficiaries of the right to a healthy environment are not only individuals but also groups, associations, human collectivities and, indeed, the whole of mankind. Hence, it has a collective dimension as well. The right to a healthy environment, like to the right to

[105] Ibid., p.41.

[106] A.C. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montreal/Quebec, ed., Quebec/Amerique, 1988, pp. 69–87. As the environment is a common good ("le bien de tous"), "l'ensemble du corps social aussi bien que les groupes ou que les individus qui le composent sont appelés à participer à sa gestion et à sa protection"; P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, p.15 (mimeographed, restricted circulation). On the remedies (in domestic comparative law) for the exercise of the right to information and the right of participation, cf. L.P. Suetens, "La protection du droit à l'information et du droit de participation: les recours", *II Conférence européenne sur l'environnement et les droits de l'homme*, Salzburg, Institute for European Environmental Policy, 1980, pp.1–13 (mimeographed, restricted circulation); and, on private recourses for environmental harm (in domestic comparative law), cf. S.C. McCaffrey and R.E. Lutz (eds.), *Environmental Pollution and Individual Rights: An International Symposium*, Deventer, Kluwer, 1978, pp. XVII–XXIII and 3–162. On the "procedural" conception of the right to the conservation of the environment, cf. A.C. Kiss, "Peut-on parler d'un droit à l'environnement?", *Le droit et l'environnement – Actes des Journées de l'Environnement du C.N.R.S.* (1988) pp.309–317.

[107] A. Eide, *supra* note 104, p.36.

development, discloses an individual and a collective dimension at the same time. Whether the subject is an individual or a private group, the legal relationship is exhausted in the relation between the individual (or group of individuals) and the State. But if we consider mankind as a whole, the legal relationship is not exhausted in that context. This is probably the reason for making the distinction between individual and collective dimensions.

If we focus on *implementation*, it is conceded that all rights, whether "individual" or "collective", are exercised in a societal context. As such, they all have a "social" dimension in that sense, since their vindication requires the intervention, in varying degrees, of public authority for them to be exercised. There is, however, yet another approach which may shed some light on the problem at issue. This entails focusing on the *object* of protection. If we take a common good such as the human environment as the object of protection, not only are we thereby provided with objective criteria to approach the matter, but also we can better grasp the proper meaning of "collective" rights.

These rights pertain equally to each member, as well as to all members, of a given human collectivity. Since the object of protection is the same (a common good, such as the human environment), the observance of such rights benefits both individual members and all members of the human collectivity. Correspondingly, their violation equally affects or harms each member and all members of the human collectivity at issue. This reflects the essence of "collective" rights, such as the right to a healthy environment, in so far as the *object* of protection is concerned.

The multi-faceted nature of the right to a healthy environment thus becomes clearer. That is, the right to a healthy environment has an individual and a collective dimension – being both an "individual" and a "collective" right – in so far as its *subjects or beneficiaries* are concerned. Its "social" dimension becomes manifest in so far as its *implementation* is concerned (given the complexity of the legal relations involved). And it clearly appears in its "collective" dimension in so far as the *object* of protection is concerned (a common good, the human environment).

This matter has not been sufficiently studied to date, and considerable in-depth reflection and research are required to clarify the issues surrounding the implementation of the right to a healthy environment and the conceptual universe in which it rests. In terms of the subjects of the relationships involved, one has moved from the individuals and groups to the whole of mankind, and in this wide range of right-holders one has also spoken of *generational* rights (rights of future generations – cf. *supra*). In terms of the methods of protection careful exploration is required to determine the extent to which protection mechanisms which have evolved under international human rights law (essentially the petitioning, the reporting, and the fact-finding systems)[108] may

[108] On their functioning and co-ordination, cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp.13–435.

also be utilized in the realm of environmental protection.

It seems that the experience accumulated over the last decades of human rights protection can, if properly assessed, be of assistance to the development of methods of environmental protection. Some inspiration can indeed be derived from the application of mechanisms of international implementation of human rights. In this context, it is reassuring to note that the conclusions of a recent Forum on International Law of the Environment, held in Siena, Italy, in April 1990, recognize *inter alia* that "certain procedures used for the protection of human rights could serve as models in the field of the protection of the environment".[109] Likewise, expert writing on international environmental law has suggested that U.N. international environmental bodies could be given "powers similar to those" of the U.N. Committee on Economic, Social and Cultural Rights. Such a move would vest the appropriate bodies with the authority "to study and comment on reports submitted by States since the right to a good environment is similar to and partakes of all the difficulties and drawbacks of social and economic rights".[110] These types of acknowledgements are quite understanding and beneficial to environmental protection, given the fact that human rights protection antedates it in time. In sum, the experience gained through the implementation of human rights protection can be of significant value to the implementation of environmental protection.

(2) The Issue of Protection Erga Omnes: "Drittwirkung"

In the fields of both human rights protection and environmental protection there occur variations in the obligations, in that some norms are susceptible of direct applicability, while others are rather programmatic in nature. Thus, attention ought to be turned to the *nature* of the obligations. An important point from this perspective is the *erga omnes* protection of certain guaranteed rights, which raises the issue of third-party applicability of conventional provisions. This issue, called *"Drittwirkung"* in German legal literature, can be examined from the standpoint of both human rights protection and environmental protection.

In the former, *Drittwirkung* is still evolving in the case-law under the European Convention on Human Rights[111] (*infra*). Bearing in mind the considerable variety of rights guaranteed under human rights treaties, there are provisions which seem to indicate that at least some of the rights are susceptible to third-party applicability. Thus, Article 2(1)(d) of the U.N. Convention on

[109] *Conclusions of the Siena Forum on International Law of the Environment* (April 1990), p.8, 23 *in fine* (mimeographed, restricted circulation).

[110] L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law", in L.A. Teclaff and A.E. Utton (eds.) *International Environmental Law*, N.Y., Praeger, 1975, p.252.

[111] Cf. A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law – A Comparative Study*, Oxford: Oxford University Press, 1983, ch. 8, pp. 199–228; and cf. J. Rivero, "La protection des droits de l'homme dans les rapports entre personnes privées", *René Cassin Amicorum Discipulorumque Liber*, vol. III, Paris, Pédone, 1971, pp. 311ss.

the Elimination of All Forms of Racial Discrimination prohibits racial discrimination "by any persons, group or organization". Under Article 2(1) of the U.N. Covenant on Civil and Political Rights, States Parties undertake not only "to respect" but also "to ensure" to all individuals subject to their jurisdictions the rights guaranteed under the Covenant – which may be interpreted as at least the States Parties' duty of due diligence to prevent deprivation or violation of the rights of one individual by others. And it has been argued that Article 17 of the Covenant (right to privacy) would cover protection of the individual against interference by private organizations or individuals as well as public authorities.[112] In addition, Article 29 of the Universal Declaration of Human Rights refers to "everyone's duties to the community".

The European Convention on Human Rights states in Article 17 that nothing in the Convention may be interpreted as implying "for any State, group or person" any right to engage in any activity or perform any act aimed at the destruction of the guaranteed rights. Articles 8 to 11 indicate that account is to be taken of the protection of other people's rights. And from Article 2, whereby "everyone's right to life is protected by law", may be inferred the State's duty of due diligence of prevention and of making violation of the right a punishable offence.[113] The supreme values underlying fundamental human rights are such that they deserve and require protection *erga omnes*, against any encroachment, by public or private bodies or by any individual.[114]

Even though the issue of *Drittwirkung* was not considered when the European Convention was drafted, the subject matter of the Convention lends itself to *Drittwirkung*. This is apparent in that some of the recognized rights deserve protection against private individuals as well as public authorities, and States have to safeguard everyone – in relations between individuals – against violations of guaranteed rights by other individuals.[115] For instance, with regard to the right to privacy (Article 8), there is also need to protect this right in the sphere of relations *between* individuals (persons, groups, institutions, besides States). In practice, situations have occurred where the State may be involved in the relations *between* individuals (e.g., custody of a child, clandestine recording of a conversation by a private individual with the help of the police).[116] Certain human rights have validity *erga omnes*, in that they are

[112] *Supra*, note 50 at p.119; Jan De Meyer, *op. cit. infra* n.116, p.263.

[113] E.A. Alkema, "The Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights", in *Protecting Human Rights: The European Dimension – Studies in Honour of G.J. Wiarda* (ed. F. Matscher and H. Petzold), Koln, C. Heymanns, 1988, pp. 35–37.

[114] E.A. Alkema, *supra* note 113, pp. 33–34.

[115] This has led one to speak of a sort of "indirect *Drittwirkung*", since "it is realized *via* an obligation of the State". P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer: Kluwer Law & Taxation Publishers, (1984), pp. 14–18.

[116] Jan De Meyer, "The Right to Respect for Private and Family Life, Home and Communications in Relations between Individuals, and the Resulting Obligations for States Parties to the Convention", in A.H. Robertson (ed.), *Privacy and Human Rights*, Manchester, University Press, 1973, pp. 267–269.

recognized in relation to the State but also and necessarily "in relation to other persons, groups or institutions which might prevent the exercise thereof".[117]

Therefore, a human rights violation by individuals or private groups can be sanctioned indirectly when the State fails, in "its duty to provide due protection", to take the necessary steps to prevent or punish the offence.[118] Article 8 of the European Convention effectively illustrates the "absolute effect" of that right to privacy, as well as the need for its protection *erga omnes* against frequent interferences or violations not only by public authorities but also by private persons or the mass media.[119]

In the same vein, it has been forcefully argued that the right to a healthy environment should be *"opposable aux tiers, avoir un effet direct à leur égard"*, and should also be *"opposable directement aux particuliers de façon à assurer la protection des intérêts des individus et des groupes en matière d'environnement"*.[120] *Drittwirkung* focuses on a situation whereby everyone is a beneficiary of the right and everyone has duties *vis-à-vis* the other citizens and *vis-à-vis* the whole community: *"tout le monde est bénéficiaire de ce droit, mais en même temps tout le monde assume aussi des obligations de son fait: État, collectivitiés, individus"*.[121]

6. The Right to a Healthy Environment and the Absence of Restrictions in the Expansion of Human Rights Protection and of Environmental Protection

(1) No Restrictions Ensuing from the Co-Existence of International Instruments on Human Rights Protection

In the field of the international protection of human rights, restrictions are not to be inferred from the possible effects of multiple co-existing instruments of human rights protection upon each other. On the contrary, in the present context, international law has been made use of in order to improve and

[117] Ibid., p. 271, and cf. p.272.

[118] Ibid., p. 273.

[119] Ibid., pp. 274–275.

[120] P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", in *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, p.38 (mimeographed, restricted circulation).

[121] A.C. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", in *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montreal/Quebec, ed. Quebec/Amerique, 1988, p.80, and cf. p.83. "En ce qui concerne le droit à l'environnement, tout le monde est 'créancier' et 'débiteur' en même temps: État, collectivitiés, individus". A.C. Kiss, "La mise en oeuvre du droit à l'environnement: problematique et moyens", in *II Conférence européenne sur "Environnement et droits de l'homme"*, Salzburg, Institut pour une Politique Européenne de l'Environnement, 1980, p.8, and cf. pp.6–9 (mimeographed, restricted circulation).

strengthen the degree of protection of recognized rights. In fact, the interpretation and application of certain provisions of one human rights instrument have at times been relied on as guidance for the interpretation of corresponding provisions of other – usually newer – human rights instruments.[122]

Normative advances in one human rights treaty may indeed have a direct impact upon the application of other human rights treaties, with the effect of enlarging or strengthening the States Parties' obligations of protection and restricting the possible invocation or application of restrictions to the exercise of recognized rights. Multiple human rights instruments appear complementary to one another; and their complementarity reflects the specificity of the international protection of human rights, a domain of international law characterized as being essentially a *droit de protection*. Where States have pursued obligations under multiple co-existing instruments of human rights protection, it may be taken to have been their intention to accord individuals a more extended and effective protection. In sum, there exists a clear trend towards the expansion and enhancement of the degree and extent of protection of rights recognized under co-existing human rights instruments.[123]

(2) No Restrictions Ensuing from the Co-Existence of International Instruments on Environmental Protection

Likewise, in the field of international environmental law, restrictions are not to be implied from the possible effects upon each other of multiple co-existing instruments on environmental protection. To this effect, in propounding the elaboration of a Universal Declaration and a Convention on Environmental Protection and Sustainable Development in its well-known 1987 report, the World Commission on Environment and Development stressed the need "to consolidate and extend relevant legal principles" on the matter in order "to guide State behaviour in the transition to sustainable development". It also stressed that multiple co-existing as well as new international conventions and agreements in the area were to *strengthen and extend* environmental protection.[124] As in human rights protection (*supra*), there is no room for [implied] restrictions in the domain of environmental protection.

Having thus considered the point from the perspective, on the one hand, of the effects of human rights instruments upon each other and, on the other hand, of the effects of environmental instruments upon each other, we have found no room for the incidence of restrictions. These instruments, in both domains, were meant to reinforce each other and strengthen the degree of

[122] A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 401 and 101, and cf. p.104.

[123] Ibid., pp. 110, 121–122 and 125.

[124] World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, pp. 332–333.

protection afforded. What remains is to examine the effects of norms or instruments of human rights protection and of environmental protection *inter se*, or, more precisely, the effects of the recognition of the right to a healthy environment upon the corpus of human rights already recognized.

(3) No Restrictions Ensuing from the Expansion of Systems of Protection (As Evidenced by the Recognition of the Right to a Healthy Environment) in Their Effects upon Each Other

A fairly recent trend of thought has perceived in the development of environmental policies of States the incidence of *restrictions* upon the exercise of certain recognized human rights. Such restrictions are seen as justified on the ground that they protect the environment. It has been suggested that, while some of the more classic civil and political rights are not apparently affected, certain economic and social rights are susceptible of suffering restrictions. By way of example, reference has been made to the rights of free circulation, of choice of residence, and to property, in face of protected areas or zones; the right to work, in face of anti-pollution measures; the right to equality, in face of disparities in administrative measures as to the environment; the freedom of association, in face of measures against noise pollution; the right to family, in face of birth-control measures; and the rights to development and to leisure, in face of measures for conservation of nature.[125]

This approach, it is submitted, is inadequate and short-sighted, even though it is forced to admit that the right to a healthy environment comes ultimately to guarantee and reinforce such basic rights as the right to life and the right to health.[126] In historical perspective, the emergence of new rights has generated the need for their "adaptation" to the corpus of rights already recognized. Thus, economic, social and cultural rights had an impact on classic civil and political rights, and what appeared to be restrictions on the exercise of these latter amounted rather to conditions for the effective exercise of the former.[127] This helped to enlarge the scope of protection of human rights. In the same way, it became clear that the exercise of recognized rights was to take place having regard to the exigencies of *ordre public* or the general welfare.[128] The apparent restrictions amounted rather to adjustments to render effective new rights[129] and thereby strengthen the degree of the protection due. From this perspective, it becomes clearer that the right to a healthy environment, once asserted as a ***human right***, rather than entailing restrictions to the exercise of other rights, comes to enrich the corpus of recognized human rights.[130]

Hence, the appropriateness of the anthropocentric outlook and the need to place the theme of the environment within a human rights framework. There is no antagonism between international human rights law and environmental law, and the latter helps to clarify the social framework within which all human rights are inserted.[131] The recognition of the right to a healthy environment enriches and reinforces existing human rights and discloses other rights in new dimensions (for instance, the much-needed right of citizen participation, which, in turn, requires the effectiveness of the rights to information and to education in environmental matters).[132]

(4) The Recognition of the Right to a Healthy Environment and the Consequent Enhancement, rather than Restriction, of Pre-Existing Rights

International human rights law, in short, is unequivocal in indicating that limitations or restrictions on the exercise of guaranteed rights are to be narrowly interpreted. This ensues, to begin with, from interpretative principles enshrined in human rights treaties themselves.[133] As maintained elsewhere, the narrow interpretation of restrictions to the exercise of recognized rights is sanctioned by the application of the test of primacy of the most favourable norm to the alleged victims in respect of the same rights guaranteed by two or more human rights treaties to which the State concerned is a Party. This test therefore discards undue limitations or restrictions to the exercise of a given right (recognized in another treaty to a lesser extent).[134]

The international supervisory bodies themselves have made statements to that effect. For instance, the European Court of Human Rights held in its

[125] Cf. F. Doré, "Conséquences des exigences d'un environnement équilibré et sain sur la définition, la portée et les limitations des différents droits de l'homme - Rapport introductif", *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 3–5, 7–12 and 14 (mimeographed, restricted circulation); and cf. F. Doré, [Interventions] in ibid., pp.25–27 and 37–38 (mimeographed, restricted circulation).

[126] Cf. F. Doré, "Conséquences des exigences...", *supra* note 125, pp.16–19; F. Doré, [Intervention] *supra* note 125, p.27.

[127] Cf., to this effect, A.C. Kiss, [Interventions] in *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 43–45; and in *Résumé des débats*, ibid., p. 20 (mimeographed, restricted circulation).

[128] P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", in *I Conférence européenne ..., supra* note 127, p.26.

[129] M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, pp. 95–96.

[130] Cf., to this effect, K. Vasak, [Interventions] in *I Conférence européenne..., supra* note 127, pp. 68–69; and in *Résumé des débats*, ibid., p.22.

[131] *I Conférence européenne..., cit supra* note 127, *Conclusions*, pp. 72–73 (mimeographed, restricted circulation).

[132] Ibid., p.73; and cf. F. Doré, "Conséquences des exigences...", *op. cit. supra* note 125, pp.21–22 (mimeographed, restricted circulation).

[133] E.g., U.N. Covenant on Civil and Political Rights, Article 5(1); American Convention on Human Rights, Article 29.

[134] A.A. Cançado Trindade, "Co-existence and Co-ordination...", *supra* note 2, p.104, and cf. pp., 104–108.

judgment in the *Golder v. United Kingdom* case (1975) that there was no room for implied limitations under the European Convention on Human Rights. The same was upheld by the Inter-American Court of Human Rights in its Advisory Opinion on *Compulsory Membership in an Association of Journalists* (1985) and on the *Word "Laws" in Article 30 of the American Convention on Human Rights* (1986). Likewise, in its Report of 1987 on a recent case concerning the observance by the Federal Republic of Germany of the 1958 ILO Discrimination (Employment and Occupation) Convention (n.111), the Commission of Inquiry (appointed under Article 26 of the ILO Constitution) made clear that no implied exceptions were admissible under ILO Convention n.111.[135]

The gradual recognition of "new" human rights cannot possibly have the effect of lowering the degree of protection accorded to existing rights. That would simply go against the course of historical evolution of the process of expansion of international human rights law, which has consistently pointed towards the enlargement, improvement and strengthening of the degree and extent of protection of recognized rights. In conclusion, the only permissible limits to the exercise of recognized rights are those expressly provided for under human rights treaties themselves (namely, as limitations or restrictions; as exceptions; as derogations; or as reservations). Such limits are to be restrictively interpreted, always having regard to the achievement of the object and purpose of the treaty.

It is regrettable that the recognition of the right to a healthy environment has led some to the misunderstanding that it might clash with other rights or the object of other rights. This can only result from an inadequately fragmented or atomized conception of the corpus of international human rights law. Instead, human rights are indivisible and the mechanisms devoted to their protection complement each other, so as to expand and strengthen the degree of the protection due. Rights belonging to distinct "categories" have more in common than one may *prima facie* assume, quite apart from the fact of their being interrelated.

The emergence of "new" rights is followed by their "adaptation" to the corpus of existing rights and their means of implementation. No restrictions on existing rights can be justified by the recognition of "new" rights, as these cannot possibly have been articulated to lower the prevailing degree of protection. Rights belonging to such distinct domains as the civil and political, or the economic, social and cultural, have found their way to co-existence. Likewise, as regards newly-emerged rights, what may at first sight appear as restrictions on pre-existing rights are in reality no more than needed adjustments entailed by the "new" rights.[136]

[135] Cases cited in ibid., pp. 106–107 and 116.

[136] M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, p. 96, and cf. pp. 94–95.

Given the continuing expansion of international human rights law and the multiplicity of co-existing rights, in some circumstances it may be necessary for "priorities ... to be set and limited resources devoted to fulfilling one right which is at more risk or more significant in the circumstances than another".[137] This does not mean that the other rights are restricted, contradicted or ignored; a balance between the various recognized rights is set by the human rights treaties themselves, which indicate the considerations relevant to restrictions or limitations on the recognized rights, including in times of public emergency.[138] Restrictions, as already pointed out, are to be restrictively interpreted.

Here, a key role is reserved to the international supervisory bodies themselves. This issue of the balancing between rights may arise not only with regard to such "new" rights as the right to a healthy environment, but also between any other rights (e.g., reconciling the right to freedom of expression and the right to privacy, the freedoms of association and of movement, the right to property and certain social rights, and so on).[139] Furthermore, the recognition of such "new" rights as the right to a healthy environment cannot have the effect of restricting, but only of complementing, enriching and enhancing pre-existing rights (e.g., the right to work, the freedom of movement, the right to education, the right of participation, the right to information, etc.).[140]

One last remark: it should not pass unnoticed that rights that are at the basis of the *ratio legis* of both environmental protection and human rights protection – such as the right to life and the right not to be subjected to inhuman or degrading treatment – are asserted by human rights treaties[141] as non-derogable. They admit of no restrictions whatsoever; they are truly fundamental rights. As for the other recognized rights, in the "balancing" between them dictated by circumstances, "new" rights such as the right to a healthy environment have emerged ultimately to enhance rather than to restrict, in the same way as they enhance the fundamental non-derogable rights.

[137] J. Crawford, "The Rights of Peoples: Some Conclusions", in J. Crawford (ed.) *The Rights of Peoples*, Oxford, Clarendon Press, 1988, p.167.

[138] Ibid., pp. 167–168.

[139] Cf. ibid., p.168.

[140] M. Ali Mekouar, *op. cit. supra* note 136, pp. 96–100 and 103–104.

[141] E.g., U.N. Covenant on Civil and Political Rights, Article 4(2); European Convention on Human Rights, Article 15(2); American Convention on Human Rights, Article 27.

MARK DOWIE · WORLD POLICY JOURNAL

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The new face of environmentalism

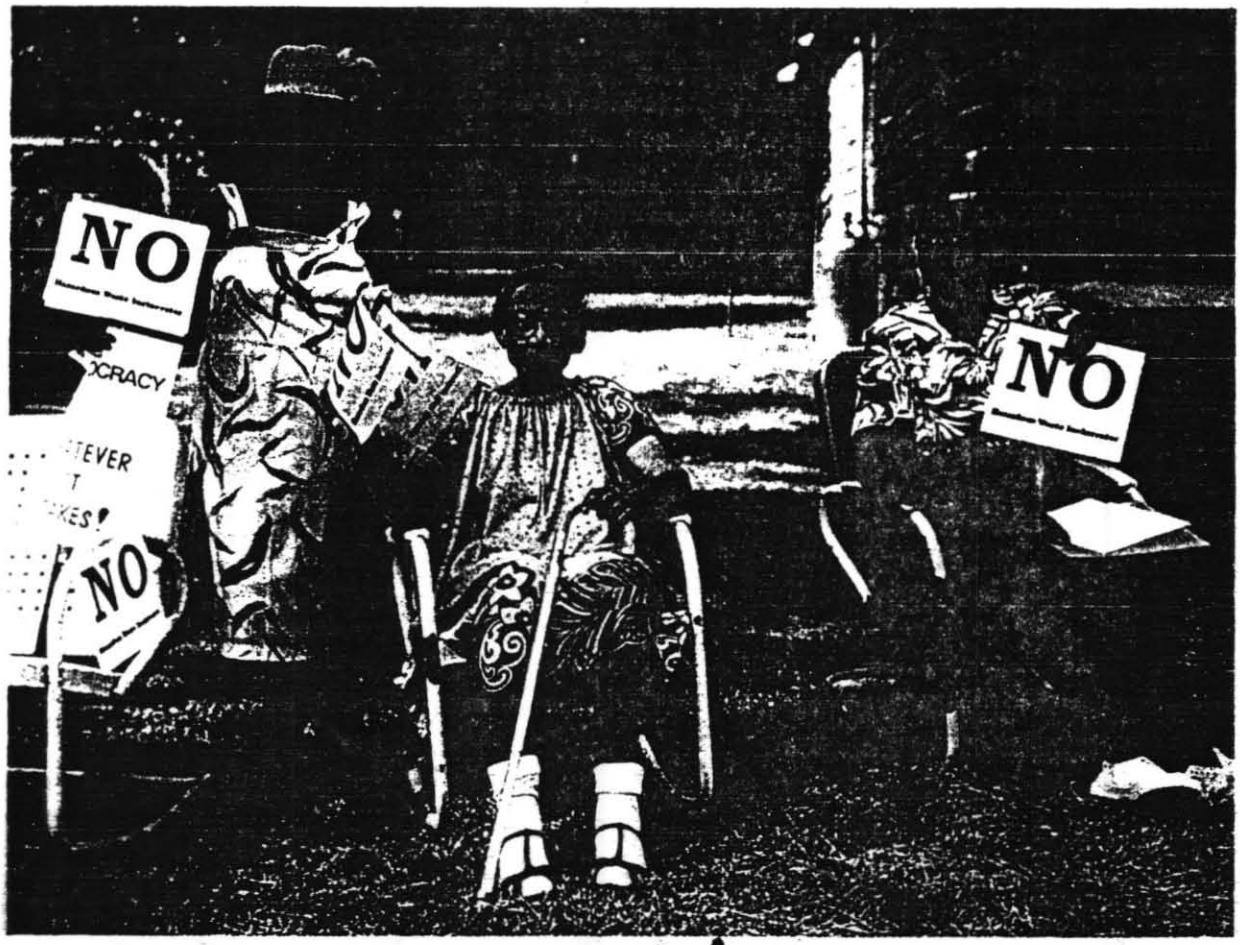
As big environmental organizations dodder, the movement's energy shifts to the grass roots

Think back 20 years. Environmentalism was winning the hearts of Americans everywhere, with legions of activists coming to the rescue with lasting calls to clean up our land and water and air. Eco-activists stormed Washington, winning powerful new legal and legislative remedies.

Then what happened? Not enough, writes noted investigative reporter Mark Dowie. The big environmental groups got stodgy, mired in Potomac power plays with big business and big government. Dowie credits the nation's thousands of grass-roots groups with keeping environmental hope alive. And if a rambunctious Arkansas citizen's group profiled here is the role model, hope is very *much* alive.

All is not well in our biosphere. The maladies are well documented and appear to be spreading. The atmospheric concentration of carbon dioxide has increased 25 percent over the past century and is now growing at double that rate. The ozone is becoming depleted, greatly increasing skin cancer risks. Flotillas of garbage ride the currents of every ocean. Acid rain is killing lakes on every continent. Dozens of species become extinct every month as deserts in one hemisphere expand and forests shrink in another.

The United States, where almost everyone claims to be an environmentalist, suffers further degradations. Millions of tons of toxic and radioactive waste sit in "storage" with no place left to put them and no known means to recycle them. Landfills are leaking, lakes and bays are dying, groundwater aquifers are poisoned. Every year 2.7 billion pounds of toxics are legally released into our atmosphere, and 150 million American citizens live in communities that don't meet federal air quality standards. Prognoses for the future range from critical to terminal, depending on the



The new environmentalists: Residents of Woodland, North Carolina, oppose a toxic incinerator planned for their community.

ecologist consulted. How can all this be happening when environmentalism has become so entrenched in our culture? Everywhere we turn, citizens are recycling, businesses are bragging about their environmental policies, and politicians of all ideological stripes are discussing ecological concerns in the same reverential tones once confined to discussions of motherhood. Why, after two decades of intensive, well-funded activity, hasn't the American environmental movement made far more significant progress?

Any thoughtful look at the American environmental movement as a whole would reveal cause for hope. It is vast, ideologically diverse, and draws on the energy of millions of people with plenty of passion, determination, and vitality. But, unfortunately, the movement rarely taps the energy of its grass-roots supporters. Environmentalism's financial resources and decision making are concentrated in a dozen or so large national organizations—including the Environmental Defense Fund, the National Wildlife Federation, the Wilderness Society, the Audubon Society, the Natural Resources Defense Council, the Sierra Club, Friends of the Earth, the Nature Conservancy, the World Wildlife Fund, the World Resources Institute, and the National Parks and Conservation Association—all centered, if not headquartered, in Washington, D.C. These groups, most of them quasi-membership organizations staffed by lawyers and management school graduates, have led the U.S. environmental effort over the past 20 years.

While "the nationals," as they are known, can take credit for many of this century's environmental

Why, after two decades of well-funded activity, hasn't the environmental movement made more progress?

accomplishments, they must also share the blame for the troubling setbacks the environment has suffered, particularly during the past 10 years, when so many of the movement's earlier triumphs were undone by the Reagan and Bush administrations. During those years, when environmental conditions and political circumstances required new strategies and tougher tactics,

We Shall Overcome (clockwise from top): Local residents join with actor Martin Sheen to protest a hazardous waste incinerator in East Liverpool, Ohio; opponents of a nuclear dump in Hillsboro, New Hampshire, and residents of East Harlem in New York City draw attention to pollution in their neighborhood.

most of the mainstream organizations lost the momentum they had developed over the previous decade. In a desperate drive to win respectability and access around Washington, these groups pursued a course of accommodation and capitulation with elected officials, regulators, and polluters.

In the face of worsening conditions all over the planet, rapid and radical changes must be made in the priorities, structure, and tactics of the national environmental organizations. Otherwise, as the space for compromise narrows, the nationals will continue their evolution toward becoming a weak and superfluous interest group, absorbing almost 90 percent of environmental contributions and doing less and less with that money to protect the environment.

The tactics needed to revive the environmental crusade—less reliance on regulatory legislation and more direct confrontation with polluters—are being pursued today only at the grass-roots level of the movement. Mainstream environmentalists need to abandon their faith in the ability to contain pollution and adopt, instead, an approach that favors preventing pollution. Mainstream leaders must also question whether current economic policies are compatible with the goal of a healthy environment. Time is running out for a movement that refuses to take a new look at its mission.

To be fair, the achievements of the national environmental organizations have not been insignificant. By educating their vast memberships

and the public at large, organizations such as the Sierra Club, the Natural Resources Defense Council, the Audubon Society, and the Wilderness Society have placed the environment near the top of the national political agenda.

Tens of millions of acres have been added to the federal wilderness system, environmental impact assessments are now required for all major developments, and several lakes that were declared dead are living again. The nationals can also take credit for lowering the lead content of blood, saving several species from extinction, and virtually eliminating strontium-90 from cow's milk and children's bones.

However, the environmental legislation that emerged in the movement's early days was filled with loopholes that could be exploited by the battalion of lobbyists that industry sent to Washington. In response, the movement concentrated its energies in Washington to protect its gains, hiring more lawyers and business school graduates to replace the impassioned amateurs who had once run their organizations.

To grass-roots activists around the country, the environmental movement began to look less like a social cause and more like any other special interest group playing by the rules and in the style of Washington, D.C

Compromise, of course, is the lifeblood of democratic government and a necessary pattern of any strategy for social change. But when Reagan and company took over Washington in 1981, they made it clear they intended to make no compromises with the Sierra Club and other environmental groups they had campaigned against as "elitists."

The nationals' response was weak and inadequate. Their retreat, going on at the same time as the federal environmental enforcement mechanism was being gutted under James Watt, was symbolized in a 1986 report, "An Environmental Agenda for the Future," issued by a group of ten environmental organizations (G-10). The report conceded a lot of ground to the conservatives, treating environmental pollution as a technological rather than a political challenge. The implied solutions to all ecological problems were good science and resource management. Controversial subjects and sacred cows, such as nuclear energy, were avoided completely.

The G-10 report authors seemed fearful of alienating "friends" they had made on Capitol Hill and in industry. They refused to criticize U.S. dependency on petrochemicals or the nation's disastrous transportation policy and offered no strong recommendations in support of increased reliance on renewable energy, organic farming, sustainable-yield logging, or mass transit. Ironically, as the national environmental organizations grew more timid in their tactics and goals, their direct mail solicitations to the public grew tougher and more outspoken.

In more than 100 million prospect letters mailed in the early Reagan years, G-10 groups exploited the "Watt factor"—and citizens responded. The membership rolls of these organizations skyrocketed, and millions of dollars poured into environmental coffers. But was this money wisely spent?

The big Washington eco-groups pursued a course of accommodation with officials, regulators, and polluters.

More lobbyists and lawyers were hired. More amendments were drafted and lawsuits filed. On the battlefield, however, little changed. The legislative/litigative strategy remained central. In the face of the clear Reagan assault, there had never been a better

A contingent of protestors, aged 63 to 87, handcuffed themselves to a bridge in Caneadea, New York, to block access to a proposed nuclear waste dump. They raised a banner proclaiming themselves "Grandparents for the Future." All were arrested. In response to this and other protests in the area, the state of New York is suing the federal government over nuclear waste siting policies.

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time in the history of the environmental movement to initiate aggressive litigation against intransigent regulators, conduct mass demonstrations, organize consumer boycotts, file shareholder suits, and impose non-violent direct action against polluters. Instead the environmental mainstream blinked.

The main problem with emphasizing regulatory legislation is that it stimulates a potent antibody—the industrial lobby. No matter how big and clever environmental groups become, when it comes to lobbying Congress they will always be outmaneuvered and outspent by chemical manufacturers, oil companies, big agriculture, timber interests, and their respective political action committees.

Rubacalua Macias, member of a church-based community organization in El Povenir, Mexico, fights pollution on both sides of the Rio Grande.

Some environmentalists are finally beginning to realize that they can't compete with the industrial lobby on the playing fields of Capitol Hill. A few, most notably the Sierra Club and Friends of the Earth, are beginning to consider more confrontational tactics. Unfortunately, most of the G-10 organizations are moving in the opposite direction. "Conservationists have just got to learn to work with industry," proclaimed Audubon's Don Naish when Mobil Oil was allowed to drill for oil under an Audubon bird sanctuary in Michigan. (Audubon today collects over $400,000 a year from that and similar lease agreements.) The Audubon-Mobil accord was symptomatic of a lamentable new trend in U.S. environmental history. After having acquiesed to the political "realities" of Washington, the environmental movement is now accommodating the economic "realities" of Wall Street as well.

In the early part of this century, the first wave of modern environmentalism ushered in the era of land and wildlife conservation; the second wave arrived with Earth Day and the landmark pollution

The grass-roots anti-environmental movement

The wise-use movement takes aim at "environmental elitists"

A DETERMINED BAND OF ACTIVISTS IS WORKING—with help from the Rev. Sun Myung Moon's Unification Church and oil, mineral, and timber companies—to block environmentalists who wish to promote more sustainable management of America's public lands. The coalition hopes to unite business interests with farmers, ranchers, snowmobilers, motorcyclists, and hunters. By some estimates, that's a potential anti-environmental constituency of more than 50 million Americans.

This anti-environmental movement rallies supporters under the banner of "wise use" or "multiple use" of public lands. Wise-use activists employ a number of familiar right-wing tricks to stampede people into action. They equate environmental protection with lost jobs, question the Christian morality of their opponents, raise gas-guzzling to the level of a constitutional right, and elevate anti-intellectualism to a virtue.

Conservative activists Alan Gottlieb and Ron Arnold coined the term "wise use." In 1989 they published a slim volume called *The Wise Use Agenda* that lists 25 goals, including: open all public lands—including wilderness areas and national parks—to mineral and energy production; rewrite the Endangered Species Act to remove such "non-adaptive species as the California condor"; make almost anyone protesting corporate activities liable for civil damages; prescribe immediate logging of all old-growth forests; and build national-park concessions under the direction of "private firms with expertise in people moving such as Walt Disney."

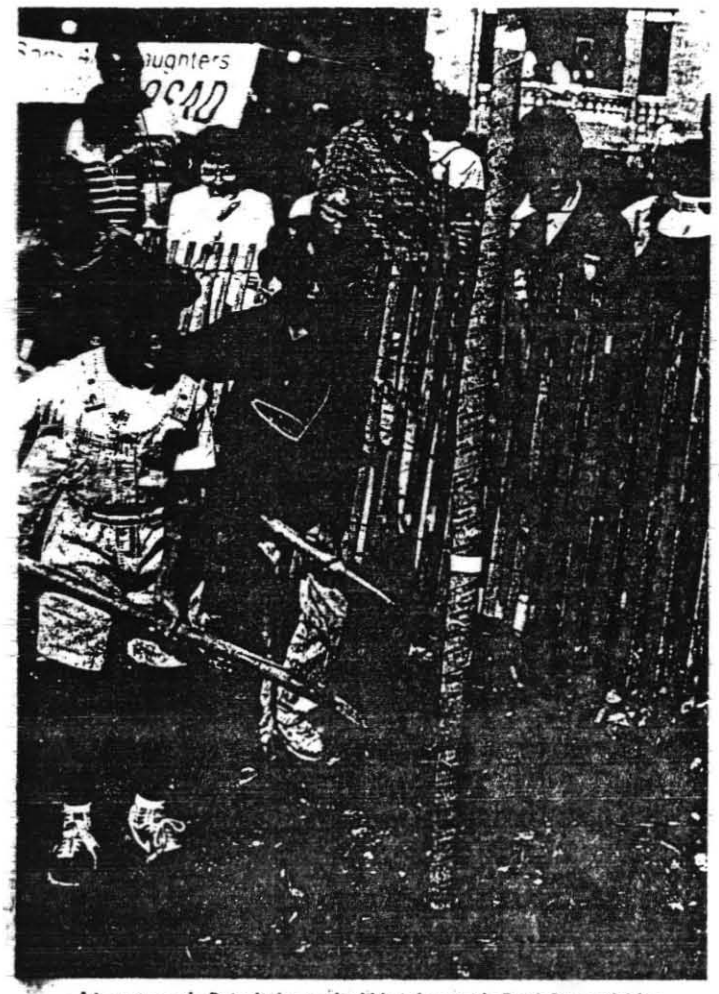
Who'd sign on to such an agenda? George Bush, for one. The *Agenda*'s cover features a photo of Gottlieb and Bush in a warm embrace. Also listed inside are sympathetic organizations such as the Du Pont company, the National Rifle Association, James Watt's Mountain States Legal Foundation, and Exxon Corporation's exploration and drilling subsidiary Exxon Co. USA. But some 200 tiny clubs signed on, too, mainly recreationists

a small fraction of which are currently regulated.

This points to a deeper problem with the idea of pollution credits: It is a piecemeal approach to environmental protection. If you really want to eliminate hazardous substances, you have to eliminate them at the source, which involves looking at the nature of the production technology itself. It would be far more effective, for instance, to encourage increased reliance on public transportation within urban areas than to encourage the auto industry to lower carbon-dioxide emissions.

Doris McFadden and Lora Poncik of Defenders of the Environment investigate toxic seepage in Brazoria County, Texas.

Blue-collar environmentalists who struggle against polluters close to home are particularly incensed by the third-wavers' assumption that industry has a preordained right to pollute their neighborhoods. Environmental organizations adopting market-based tactics risk losing the confidence of supporters at the grass-roots level. Yet they will gain new supporters. Some of the worst environmental offenders—Du Pont, Chevron, Monsanto, and Waste Management Corporation—have become some of the largest environmental donors. Third-wave organizations, particularly EDF, NWF, and the World Wildlife Fund, are among the largest recipients of corporate largess. Jay Hair at NWF invented a particularly creative mechanism to attract corporate money, the Corporate Conservation Council, to which Du Pont, Monsanto, and others pay $10,000 membership fees for the right to attend occasional enviro-seminars. Last year the World Wildlife Fund received donations of over $50,000 each from the Chevron and Exxon corporations. These funding sources are sure to have an impact on the policies and directions of these organizations.



A tree grows in Detroit: inner city kids take part in Earth Day activities.

But the G-10 environmental organizations—despite their financial might and connections on Capitol Hill and corporate boardrooms—do not reflect the full extent of America's environmental movement.

The heart of American environmentalism is the thousands of regional, local, and often ad hoc groups that spring up almost spontaneously to confront a particular environmental assault—a toxic-waste dump in rural Arkansas, an ocean incinerator off the coast of Texas, a pesticide sprayer in California's Central Valley, a refinery in New Jersey, or a shipment of hot nuclear waste through small towns in Wyoming. In recent years, grass-roots environmental groups have popped up in many of the low-income, blue-collar neighborhoods that suffer from the highest concentrations of toxic pollution. Unlike the mainstreamers, a majority of grass-roots environmentalists are women and a significant number are people of color.

Grass-roots activists complain that the national organizations are arrogant, elitist, insensitive to local efforts, and more concerned with wildlife than with human life. At best the nationals are seen as service organizations providing occasional legal or moral support to grass-roots projects. When nationals do get involved in local campaigns, however, decisions are often made in Washington, where deals are struck in private without local consultation and without concern for local consequences. Sometimes national organizations even take undeserved credit for grass-roots triumphs.

In a particularly egregious example, the

Environmental Defense Fund began negotiations with McDonald's in 1990 over the use of styrofoam containers only after Lois Gibbs, the pioneer Love Canal activist who founded Citizen's Clearinghouse for Hazardous Wastes, had been conducting a consumer campaign

When it comes to lobbying Congress, environmental groups will always be outspent.

against the fast-food chain for several months. When she discovered that McDonald's was planning to place small incinerators behind every outlet to burn styrofoam instead of sending it to landfills, Gibbs persuaded children from every state to send their used containers to the corporate headquarters. Every day, thousands of smelly styrofoam "clamshells" inundated the McDonald's corporate mail room. In desperation, McDonald's approached EDF's Fred Krupp, who quickly negotiated an agreement in which McDonald's agreed to switch to coated paper containers (only a slight

Suburban families in Pasadena, California, protest pesticide use near their homes.

ecological improvement over styrofoam). Not only did Krupp negotiate a soft deal, but EDF took credit in future promotions and press releases for McDonald's decision, never mentioning the indispensable role played by Gibbs and aggressive consumer activism

Without a deep organizational and cultural transformation, then, the mainstream environmental movement is unlikely to transcend its current status as a narrowly focused interest group of the white upper middle class. This limits its public appeal, political strength, and overall vision. To make an effective start in reversing the ecological calamities at home and abroad, the American environmental movement must develop into a broad-based, multiethnic movement that takes a long-term global view, challenges prevailing economic assumptions, promotes environmental protection as an extension of human rights, and engages in direct action when necessary. It must become, in short, a movement that expresses the urgency of grassroots environmental causes such as Love Canal and applies these three lessons to its overall strategies:

• Politicians cannot be trusted to solve environmental crises. Overreliance on Washington for solving problems is what allowed Ronald Reagan and George Bush to be so effective in stymieing environmental progress

• Controlling pollution, as opposed to eliminating pollutants, is a waste of time. Barry Commoner, the environmental scientist, observes that lead has been sharply reduced in the atmosphere only because the government eliminated, not merely reduced, its use in gasoline and paint. To ensure the elimination rather than mere reduction of hazardous by-products, the use of environmental impact statements must be extended not only to construction projects, but also to new inventions and new technologies.

• Just as the civil rights movement challenged the basic orientation of all institutions, environmentalists need to question the basic economic orientation of all industrial societies (capitalist and socialist)—even if it means losing corporate and conservative foundation support. With prevailing economic systems in various degrees of disarray, the entire environmental movement—with its multipartisan appeal—is uniquely positioned to serve as a vehicle for a newly ordered society

Environmental Resource Guide

Citizen's Clearinghouse for Hazardous Wastes, Box 6806, Falls Church, VA 22040; 703/237-2249. Telephone referral to a contact person in each state.

National Toxics Campaign, 1168 Commonwealth Av., Boston, MA 02134; 617/232-0327 Telephone referral to regional contact people.

***Saving the Neighborhood: You Can Fight Developers and Win!* by Peggy Robin ($16.95, Woodbine House, 5615 Fishers Lane, Rockville, MD 20852; 301/468-8800). A how-to guide on having a say in what happens to your community**

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HUMAN RIGHTS QUARTERLY

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Indigenous Self-Determination and Decolonization of the International Imagination: A Plea[1]

*Craig Scott**

> [I]t could be said that at heart of all the violations of our human rights has been the failure to respect our integrity, and the insistence in speaking for us, defining our needs and controlling our lives. Self determination is the river in which all other rights swim.
>
> Michael Dodson, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner[2]

I. HUMAN RIGHTS AND DIALOGUES OF RECOGNITION

The most basic point I would like to make is that the draft United Nations Declaration on the Rights of Indigenous Peoples (draft Declaration) is about recognition and about being human. It is about the right to be recognized as human whatever one's difference, rather than having difference serve as a basis for exclusion from the rights to which all humans are supposed to be universally entitled.

Human rights have developed within the United Nations through a constant attention to two questions. The first question: what interests are so important that they are worthy of protection as universal values? We can call this the *freedom* question. The second question: who is worthy of recognition as being fully human? We can call this the *equality* question.

In fact, the content of human rights has evolved as a kind of constant dialogue between this freedom question and this equality question. Freedom says there should be a right to vote; equality replies: then, how can you exclude women? Freedom says that there should be a right to protection from physical harm; equality asks: so, why do you exclude children? Freedom says that there is a right to a fair hearing; equality responds: then, how is it that you can exclude refugees? Freedom says that there should be a right to health; equality replies: then, why is it that the poor are excluded? Freedom says that there should be fair working conditions; equality asks: how can it be that this right is less available to migrant workers?

For a half century, throughout the processes of the United Nations, freedom has also said that a people has the right to self-determination. All

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1. This contribution to the *Human Rights Quarterly* reproduces an intervention by the author on 23 November 1995 at the first session of the Open-Ended Inter-Sessional Working Group established in accordance with United Nations Commission on Human Rights, Resolution 1995/32 (CHR Working Group). *See* U.N. Doc. E/CN.4/1995/L.11/Add.2 (3 Mar. 1995), *reprinted in* 34 I.L.M. 535 (1995). The first session of the CHR Working Group was held from 20 November through 1 December 1995. The author attended the first session as an academic observer and member of the Delegation of the Grand Council of the Crees.

   Resolution 1995/32 of the UN Commission on Human Rights (UNCHR) assigned this working group the mandate of elaborating a draft declaration for consideration and adoption by the UN General Assembly on the basis of the draft United Nations Declaration on the Rights of Indigenous Peoples (draft Declaration), prepared over the past decade by the Working Group on Indigenous Populations (WGIP), and adopted without amendment by the UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities. *See* U.N. Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994), *reprinted in* 34 I.L.M. 541 (1995).

   Resolution 1995/32 envisages that the CHR Working Group will be structured so as to include the participation of delegations of indigenous peoples' organizations. The first session consisted of an exchange of views on the entire text of the draft Declaration amongst the state and indigenous delegations. No substantive decisions on the draft text were made at this first session. Written submissions received prior to the start of the session were issued as official UN documents, but submissions to the working group at the session itself were not issued as official documents. No official transcript (i.e., Summary Record) was kept of the oral interventions at the first session. Documents issued with respect to the CHR Working Group appear in the UN document series E/CN.4/1995[et. seq.]/WG.15.

   To no one's surprise, the aspect of the WGIP draft Declaration that attracted the most attention of the assembled delegates was draft Article 3, which reads: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." U.N. Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 Oct. 1994), *supra*. Draft Article 3 precisely tracks the wording of common Article 1, paragraph 1, found in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, except that common Article 1, paragraph 1, begins with: "All peoples. . . ." International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, U.N.T.S. 999 171 (*entered into force* 23 Mar. 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). It is primarily draft Article 3 of the draft Declaration which is the subject of the author's intervention at the first session of the CHR Working Group.

   The views contained herein do not necessarily represent the views of the Grand Council of the Crees or any other indigenous people's organization. The author would like to thank Ambassador Ted Moses for inviting the author to contribute to the CHR Working Group proceedings. He would also like to acknowledge the assistance of the Social Sciences and Humanities Research Council of Canada.

2. Statement of 24 November 1995, to the first session of the CHR Working Group (on file with *Human Rights Quarterly*).

peoples. The prevailing understanding at the time of the drafting of the UN Charter—and I would emphasize that this was the understanding of the states that dominated that process—was that the right of peoples to self-determination contained in the Charter was, in essence, another way of referring to the right of the populations of current states (a good number of them colonial powers) to their sovereignty. Their own sovereignty. Almost from the first day after the adoption of the UN Charter, equality began to ask questions. The answers always were resisted at first, but, with time, the moral force of the equality argument resulted in the gradual inclusion of previously-excluded societies within the prevailing understandings of those entitled to be regarded as peoples.

However, the lines of arbitrary exclusion were not erased. They merely shifted. The understanding of colonialism was artificially narrowed to include only the most recent wave of colonization, primarily in Africa and Asia. In the meantime, old and new states began to argue that self-determination after decolonization was to mean either the right of populations of entire states to freedom from external domination and interference, or the right of entire populations to freedom from undemocratic rule (as defined in terms of liberal representative democracy of the one person, one vote kind). A few further concessions were made, namely in the case of minority racist rule (Namibia, South Africa, Rhodesia) and also in the case of the Palestinian people who the UN, in the late 1960s, began to treat as a people and no longer as merely falling into the category of refugees.

But the moral force of the argument based on equality and consistency cannot forever be kept barricaded behind arbitrary lines that continue to divide the world into the human and the not-so-human. Self-determination of peoples, as the UN has many times declared, is a *human* right (a collective human right, contrary to the view advanced by the honorable Delegate of Japan this morning that the United Nations has only ever recognized the existence of the rights of individuals).[3] Yet, some peoples are still being viewed as benefiting from this right while others, including peoples who are also indigenous peoples, are not.

Some are human; some are not. Harsh as it sounds, this is what it amounts to. Some state delegations would argue that other human rights categories are more appropriate, such as the rights of "minorities" or of "people" or simply of "individuals." These delegations are obviously sincere in their belief that this does treat indigenous persons and peoples as fully

3. Oral intervention of Japan, recorded by the author; no written version available. For a pre-session submission by Japan that makes a similar point, see *Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, Information Received From Governments: Addendum*, U.N. Doc. E/CN.4/1995/WG.15/2/Add.1, submission of Japan, at 2 (1995).

human. Yet, I would urge delegates to see that this kind of categorical allocation is ultimately a form of categorical denial. It is a denial of indigenous peoples' own self-conception, fundamental to their members' identity (their identity as individuals, I might emphasize) and a denial of the inconvenient social, historical and political fact of their peoplehood. In the end, it amounts to a form not just of nonrecognition, but, more seriously, of misrecognition.

And there can be no doubt that the substitution of the expression "indigenous people" for the expression "indigenous peoples" would be a profound case of misrecognition. It is not simply a question of Members of the United Nations wishing to avoid certain feared implications of a right to self-determination, namely a right to secede from existing states—a fear to which I shall return. It is also a question of using a term which, in English in any case, is the plural form of the word "person" or the word "individual." As such, the use of the word "people" in this fashion denies the collective dimensions of indigenous rights, collective rights which are fundamental to many indigenous communities and are certainly central to the draft Declaration that is currently before us.

II. DISCRIMINATORY EXCLUSION

Earlier, Ambassador Moses of the Grand Council of the Crees drew the attention of the CHR Working Group to the definition of racial discrimination found in Article 1(1) of the Convention on the Elimination of Racial Discrimination.[4] This definition must surely be regarded as reflective of a customary legal obligation on all states. It reads (and I read it once again because its message needs reiteration):

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[5]

The exclusion of an indigenous people from the status of being a "people" has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination. It is important to acknowledge that, for many

4. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965 (*entered into force* 4 Jan. 1969), 660 U.N.T.S. 195.
5. *Id.* at art. 1, ¶ 1.

members of state delegations in this room, the struggle against racial discrimination is simultaneously a profound personal commitment and a central plank of state policy. The United Nations itself has played a role of high leadership over the decades on the question of racial discrimination, notably in relation to helping rid the world of (second wave) colonialism and apartheid. Once UN delegates are made aware that the exclusion of indigenous peoples from the right to self-determination (which, it bears repeating, is the *human* right to self-determination) is a distinction that is discriminatory, Member States of the United Nations will surely wish to rectify this inconsistency of treatment. They will want to make such a rectification not least because they will realize that what at one point is discriminatory only in effect will become discriminatory in purpose if a conscious decision has been taken not to remedy such effects-based discrimination once the existence of the exclusionary effects has been made known to them.

III. DECOLONIZING OUR IMAGINATIONS

Many states are of course resisting the recognition of the right to self-determination because they understand that right to entail a right to secede and to do so unilaterally. International law on self-determination nowhere says that all peoples have the right to secede from existing states by virtue only of the right to self-determination. In this respect, we are all perhaps living a bit too much in the past. By equating all self-determination questions with the historically-specific question of Twentieth Century African, Asian, Pacific, and Caribbean decolonization and by then equating decolonization with secession, we are closing off a creative variety of possible futures—what the Friendly Relations Declaration of 1970 refers to as the choice of "other political status."[6] I would venture to say that we have actually allowed a kind of new colonization to take place—a colonization of our minds and our imaginations. In particular, we are closing our minds to the pragmatic (and I emphasize this word—pragmatic), yet creative, possibilities of the draft Declaration.

It is important to note, in this regard, that indigenous peoples have often sent a message, both in the past and here at this meeting, that, for some

6. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, *adopted* 24 Oct. 1970, G.A. Res. 2625 (Annex), U.N. GAOR, 25th Sess., Supp. (No. 28), at 122, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970).

reason, has not been heard by a number of state delegations. If one listens, one can often hear the message that the right of a people to self-determination is not a right for peoples to determine their status without consideration of the rights of other peoples with whom they are presently connected and with whom they will continue to be connected in the future. For we must realize that peoples, no less than individuals, exist and thrive only in dialogue with each other. Self-determination necessarily involves engagement with and responsibility to others (which includes responsibility for the implications of one's preferred choices for others). Self-determination thus has a necessary procedural dimension. The need and the requirement in an interdependent world for peoples to negotiate peacefully, and in good faith, the ways in which their respective jurisdictional powers and obligations are to be allocated and are to interact, as interact they necessarily must.

We have to move beyond the unimaginative, indeed sterile, view that peoples' rights to self-determination are mutually exclusive and the view that, somehow, recognition by one people of another people's rights entails the exclusion of the first people's own rights. In this regard, it does not help to hold onto certain dichotomies. According to such dichotomies, either you are this people or you are that people, not, Heaven forbid, both. Either you are within this state's jurisdiction or you are outside this state's jurisdiction, not, Heaven forbid, both. This kind of approach to the question of self-determination is a recipe for futility and even, I fear, conflict. We need to begin to think of self-determination in terms of peoples existing in relationship with each other. It is the process of negotiating the nature of such relationships which is part of, indeed at the very core of, what it means to be a self-determining people. Viewed in this light, express recognition of the right of indigenous peoples to self-determination represents not a threat, but rather an opportunity for the United Nations and its members to help set a new constructive spirit for our all-too-turbulent times.

IV. A PLEA

It is precisely in this spirit that I would ask, urge, indeed plead with delegations of the states gathered in this room to approach the task before it. The WGIP draft Declaration is perhaps the most representative document that the United Nations has ever produced. Representative in the sense that the document's normative statements reflect, in a more than token way, the experience, perspectives, and contributions of indigenous peoples. In a word, it is a document that was produced in a decade-long spirit of equal dialogue and mutual recognition. I would, accordingly, like to echo the

proposal made at the beginning of this week by the Four Directions Council, that the CHR Working Group should approach the WGIP draft Declaration before it on the basis of a high presumption of validity of its provisions.[7] In light of what I have tried to communicate about the right to self-determination, such a high presumption must apply to Article 3 of the WGIP draft Declaration—the right of all peoples to self-determination.

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7. Oral intervention of the Four Directions Council, recorded by the author; no written version available.

G.R. No. 101083. July 30, 1993.*

JUAN ANTONIO, ANNA ROSARIO and JOSE ALFONSO, all surnamed OPOSA, minors, and represented by their parents ANTONIO and RIZALINA OPOSA, ROBERTA NICOLE SADIUA, minor, represented by her parents CALVIN and ROBERTA SADIUA, CARLO, AMANDA SALUD and PATRISHA, all surnamed FLORES, minors and represented by their parents ENRICO and NIDA FLORES, GIANINA DITA R. FORTUN, minor, represented by her parents SIGFRID and DOLORES FORTUN, GEORGE II and MA. CONCEPCION, all surnamed MISA, minors and represented by their parents GEORGE and MYRA MISA, BENJAMIN ALAN V. PESIGAN, minor, represented by his parents ANTONIO and ALICE PESIGAN, JOVIE MARIE ALFARO, minor, represented by her parents JOSE and MARIA VIOLETA ALFARO, MARIA CONCEPCION T. CASTRO, minor, represented by her parents FREDENIL and JANE CASTRO, JOHANNA DESAMPARADO, minor, represented by her parents JOSE and ANGELA DESAMPARADO, CARLO JOAQUIN T. NARVASA, minor, represented by his parents GREGORIO II and CRISTINE CHARITY NARVASA, MA. MARGARITA, JESUS IGNACIO, MA. ANGELA and MARIE GABRIELLE, all surnamed SAENZ, minors, represented by their parents ROBERTO and AURORA SAENZ, KRISTINE, MARY ELLEN, MAY, GOLDA MARTHE and DAVID IAN, all surnamed KING, minors, represented by their parents MARIO and HAYDEE KING, DAVID, FRANCISCO and THERESE VICTORIA, all surnamed ENDRIGA, minors, represented by their parents BALTAZAR and TERESITA ENDRIGA, JOSE MA. and REGINA MA., all surnamed ABAYA, minors, represented by their parents ANTONIO and MARICA ABAYA, MARILIN, MARIO, JR. and MARIETTE, all surnamed CARDAMA, minors, represented by their parents MARIO and LINA CARDAMA, CLARISSA, ANN MARIE, NAGEL and IMEE LYN, all surnamed OPOSA, minors and represented by their parents RICARDO and MARISSA OPOSA, PHILIP JOSEPH, STEPHEN JOHN and ISAIAH JAMES, all surnamed QUIPIT, minors, represented by their parents JOSE MAX and VILMI QUIPIT, BUGHAW CIELO, CRISANTO, ANNA, DANIEL and FRANCISCO, all surnamed BIBAL, minors, represented by their parents FRANCISCO, JR. and MILAGROS BIBAL, and THE PHILIPPINE ECOLOGICAL NETWORK, INC., petitioners, *vs* THE HONORABLE FULGENCIO S. FACTORAN, JR., in his capacity as the Secretary of the Department of Environment and Natural Resources, and THE HONORABLE ERIBERTO U. ROSARIO, Presiding Judge of the RTC, Makati, Branch 66, respondents.

* EN BANC.

Remedial Law; Actions; Class Suit; The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines; All the requisites for the filing of a valid class suit under Section 12 Rule 3 of the Revised Rules of Court are present.—Petitioners instituted Civil Case No. 90-777 as a class suit. The original defendant and the present respondents did not take issue with this matter. Nevertheless, We hereby rule that the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. We likewise declare that the plaintiffs therein are numerous and representative enough to ensure the full protection of all concerned interests. Hence, all the requisites for the filing of a valid class suit under Section 12, Rule 3 of the Revised Rules of Court are present both in the said civil case and in the instant petition, the latter being but an incident to the former.

Same; Same; Same; Same; Petitioners' personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.—This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature."

ers dramatically associate with the twin concepts of "inter-generational responsibility" and "inter-generational justice." Specifically, it touches on the issue of whether the said petitioners have a cause of action to "prevent the misappropriation or impairment" of Philippine rainforests and "arrest the unabated hemorrhage of the country's vital life-support systems and continued rape of Mother Earth."

The controversy has its genesis in Civil Case No. 90-777 which was filed before Branch 66 (Makati, Metro Manila) of the Regional Trial Court (RTC), National Capital Judicial Region. The principal plaintiffs therein, now the principal petitioners, are all minors duly represented and joined by their respective parents. Impleaded as an additional plaintiff is the Philippine Ecological Network, Inc. (PENI), a domestic, non-stock and non-profit corporation organized for the purpose of, *inter alia*, engaging in concerted action geared for the protection of our environment and natural resources. The original defendant was the Honorable Fulgencio S. Factoran, Jr., then Secretary of the Department of Environment and Natural Resources (DENR). His substitution in this petition by the new Secretary, the Honorable Angel C. Alcala, was subsequently ordered upon proper motion by the petitioners.[1] The complaint[2] was instituted as a taxpayers' class suit[3] and alleges that the plaintiffs "are all citizens of the Republic of the Philippines, taxpayers, and entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical rainforests." The same was filed for themselves and others who are equally concerned about the preservation of said resource but are "so numerous that it is impracticable to bring them all before the Court." The minors further asseverate that they "represent their generation as well as generation yet unborn."[4] Consequently, it is prayed for that judgment be rendered:

"x x x ordering defendant, his agents, representatives and other persons acting in his behalf to–

(1) Cancel all existing timber license agreements in the country;

(2) Cease and desist from receiving, accepting, processing, renewing or approving new timber license agreements."

and granting the plaintiffs "x x x such other reliefs just and equitable under the premises."[5]

The complaint starts off with the general averments that the Philippine archipelago of 7,100 islands has a land area of thirty million (30,000.00) hectares and is endowed with rich, lush and verdant rainforests in which varied, rare and unique species of flora and fauna may be found; these rainforests contain a genetic, biological and chemical pool which is irreplaceable; they are also the habitat of indigenous Philippine cultures which have existed, endured and flourished since time immemorial; scientific evidence reveals that in order to maintain a balanced and healthful ecology, the country's land area should be utilized on the basis of a ratio of fifty-four per cent (54%) for forest cover and forty-six per cent (46%) for agricultural, residential, industrial, commercial and other uses; the distortion and disturbance of this balance as a consequence of deforestation have resulted in a host of environmental tragedies, such as (a) water shortages resulting from the drying up of the water table, otherwise known as the "aquifer," as well as of rivers, brooks and streams, (b) salinization of the water table as a result of the intrusion therein of salt water, incontrovertible examples of which may be found in the island of Cebu and the Municipality of Bacoor, Cavite, (c) massive erosion and the consequential loss of soil fertility and agricultural productivity, with the volume of soil eroded estimated at one billion (1,000,000,000) cubic meters per annum—approximately the size of the entire island of Catanduanes, (d) the endangering and extinction of the country's unique, rare and varied flora and fauna, (e) the disturbance and dislocation of cultural communities, including the disappearance of the Filipino's indigenous cultures, (f) the siltation of rivers and seabeds and consequential destruction of corals and other aquatic life leading to a critical reduction in marine resource productivity, (g) recurrent spells of drought as is presently experienced by the entire

[1] Rollo, 164; 186.
[2] *Id.*, 62-65, exclusive of annexes.
[3] Under Section 12, Rule 3, Revised Rules of Court.
[4] Rollo, 67.
[5] *Id.*, 74.

the State to—

a. effect 'a more equitable distribution of opportunities, income and wealth' and 'make full and efficient use of natural resources (sic)'. (Section 1, Article XII of the Constitution);

b. 'protect the nation's marine wealth.' (Section 2, *ibid*);

c. 'conserve and promote the nation's cultural heritage and resources (sic).' (Section 14, Article XIV, *id.*);

d. 'protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.' (Section 16, Article II. *id.*)

21. Finally, defendant's act is contrary to the highest law of humankind—the natural law—and violative of plaintiffs' right to self-preservation and perpetuation.

22. There is no other plain, speedy and adequate remedy in law other than the instant action to arrest the unabated hemorrhage of the country's vital life-support systems and continued rape of Mother Earth."[6]

On 22 June 1990, the original defendant, Secretary Factoran, Jr., filed a Motion to Dismiss the complaint based on two (2) grounds, namely: (1) the plaintiffs have no cause of action against him and (2) the issue raised by the plaintiffs is a political question which properly pertains to the legislative or executive branches of Government. In their 12 July 1990 Opposition to the Motion, the petitioners maintain that (1) the complaint shows a clear and unmistakable cause of action, (2) the motion is dilatory and (3) the action presents a justiciable question as it involves the defendant's abuse of discretion.

On 18 July 1991, respondent Judge issued an order granting the aforementioned motion to dismiss.[7] In the said order, not only is the defendant's claim—that the complaint states no cause of action against him and that it raises a political question—sustained, the respondent Judge further ruled that the granting of the reliefs prayed for would result in the impairment of contracts which is prohibited by the fundamental law of the land.

Plaintiffs thus filed the instant special civil action for *certiorari* under Rule 65 of the Revised Rules of Court and ask this

[6] Rollo, 70-73.

[7] Annex "B" of Petition; *Id.*, 43-44.

Court to rescind and set aside the dismissal order on the ground that the respondent Judge gravely abused his discretion in dismissing the action. Again, the parents of the plaintiffs-minors not only represent their children, but have also joined the latter in this case.[8]

On 14 May 1992, We resolved to give due course to the petition and required the parties to submit their respective Memoranda after the Office of the Solicitor General (OSG) filed a Comment in behalf of the respondents and the petitioners filed a reply thereto.

Petitioners contend that the complaint clearly and unmistakably states a cause of action as it contains sufficient allegations concerning their right to a sound environment based on Articles 19, 20 and 21 of the Civil Code (Human Relations), Section 4 of Executive Order (E.O.) No. 192 creating the DENR, Section 3 of Presidential Decree (P.D.) No. 1151 (Philippine Environmental Policy), Section 16, Article II of the 1987 Constitution recognizing the right of the people to a balanced and healthful ecology, the concept of generational genocide in Criminal Law and the concept of man's inalienable right to self-preservation and self-perpetuation embodied in natural law. Petitioners likewise rely on the respondent's correlative obligation, per Section 4 of E.O. No. 192, to safeguard the people's right to a healthful environment.

It is further claimed that the issue of the respondent Secretary's alleged grave abuse of discretion in granting Timber License Agreements (TLAs) to cover more areas for logging than what is available involves a judicial question.

Anent the invocation by the respondent Judge of the Constitution's non-impairment clause, petitioners maintain that the same does not apply in this case because TLAs are not contracts. They likewise submit that even if TLAs may be considered protected by the said clause, it is well settled that they may still be revoked by the State when public interest so requires.

On the other hand, the respondents aver that the petitioners failed to allege in their complaint a specific legal right violated by the respondent Secretary for which any relief is provided by law. They see nothing in the complaint but vague and nebulous

[8] Paragraph 7, Petition, 6; Rollo, 20.

vague conclusions based on unverified data. In fine, plaintiffs fail to state a cause of action in its Complaint against the herein defendant.

Furthermore, the Court firmly believes that the matter before it, being impressed with political color and involving a matter of public policy, may not be taken cognizance of by this Court without doing violence to the sacred principle of 'Separation of Powers' of the three (3) co-equal branches of the Government.

The Court is likewise of the impression that it cannot, no matter how we stretch our jurisdiction, grant the reliefs prayed for by the plaintiffs, i.e, to cancel all existing timber license agreements in the country and to cease and desist from receiving, accepting, processing renewing or approving new timber license agreements. For to do otherwise would amount to 'impairment of contracts' abhored (sic) by the fundamental law."[11]

We do not agree with the trial court's conclusion that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed, and that the complaint is replete with vague assumptions and conclusions based on unverified data. A reading of the complaint itself belies these conclusions.

The complaint focuses on one specific fundamental legal right—the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

"SEC. 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

This right unites with the right to health which is provided for in the preceding section of the same article:

"SEC. 15. The State shall protect and promote the right to health of the people and instill health consciousness among them."

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and

[11] Annex "B" of Petition; Rollo, 43-44.

not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners —the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come—generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment. During the debates on this right in one of the plenary sessions of the 1986 Constitutional Commission, the following exchange transpired between Commissioner Wilfrido Villacorta and Commissioner Adolfo Azcuna who sponsored the section in question:

"MR. VILLACORTA:

Does this section mandate the State to provide sanctions against all forms of pollution—air, water and noise pollution?

MR. AZCUNA:

Yes, Madam President. The right to healthful (sic) environment necessarily carries with it the correlative duty of not impairing the same and, therefore, sanctions may be provided for impairment of environmental balance."[12]

The said right implies, among many other things, the judicious management and conservation of the country's forests

[12] Record of the Constitutional Commission, vol. 4, 913.

economic and other requirements of present and future generations of Filipinos, and (c) to insure the attainment of an environmental quality that is conducive to a life of dignity and well-being."[16] As its goal, it speaks of the "responsibilities of each generation as trustee and guardian of the environment for succeeding generations."[17] The latter statute, on the other hand, gave flesh to the said policy.

Thus, the right of the petitioners (and all those they represent) to a balanced and healthful ecology is as clear as the DENR's duty—under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987—to protect and advance the said right.

A denial or violation of that right by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action. Petitioners maintain that the granting of the TLAs, which they claim was done with grave abuse of discretion, violated their right to a balanced and healthful ecology; hence, the full protection thereof requires that no further TLAs should be renewed or granted.

A cause of action is defined as:

> "x x x an act or omission of one party in violation of the legal right or rights of the other; and its essential elements are legal right of the plaintiff, correlative obligation of the defendant, and act or omission of the defendant in violation of said legal right."[18]

It is settled in this jurisdiction that in a motion to dismiss based on the ground that the complaint fails to state a cause of action,[19] the question submitted to the court for resolution involves the sufficiency of the facts alleged in the complaint itself. No other matter should be considered; furthermore, the truth of

[16] Section 1.

[17] Section 2.

[18] Ma-ao Sugar Central Co. vs. Barrios, 79 Phil. 666 [1947]; Community Investment and Finance Corp. vs. Garcia, 88 Phil. 215 [1951]; Remitere vs. Vda. de Yulo, 16 SCRA 251 [1966]; Caseñas vs. Rosales, 19 SCRA 462 [1967]; Virata vs. Sandiganbayan, 202 SCRA 680 [1991]; Madrona vs. Rosal, 204 SCRA 1 [1991].

[19] Section 1(q), Rule 16, Revised Rules of Court.

falsity of the said allegations is beside the po[illegible] or the tru[illegible] thereof is deemed hypothetically admitted. The only issue to be resolved in such a case is: admitting such alleged facts to be true, may the court render a valid judgment in accordance with the prayer in the complaint?[20] In *Militante vs. Edrosolano*,[21] this Court laid down the rule that the judiciary should "exercise the utmost care and circumspection in passing upon a motion to dismiss on the ground of the absence thereof (cause of action) lest, by its failure to manifest a correct appreciation of the facts alleged and deemed hypothetically admitted, what the law grants or recognizes is effectively nullified. If that happens, there is a blot on the legal order. The law itself stands in disrepute."

After a careful examination of the petitioners' complaint, We find the statements under the introductory affirmative allegations, as well as the specific averments under the sub-heading CAUSE OF ACTION, to be adequate enough to show, *prima facie*, the claimed violation of their rights. On the basis thereof, they may thus be granted, wholly or partly, the reliefs prayed for. It bears stressing, however, that insofar as the cancellation of the TLAs is concerned, there is the need to implead, as party defendants, the grantees thereof for they are indispensable parties.

The foregoing considered, Civil Case No. 90-777 cannot be said to raise a political question. Policy formulation or determination by the executive or legislative branches of Government is not squarely put in issue. What is principally involved is the enforcement of a right *vis-a-vis* policies already formulated and expressed in legislation. It must, nonetheless, be emphasized that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review. The second paragraph of section 1, Article VIII of the Constitution states that:

> "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave

[20] Adamos vs. J.M. Tuason and Co., Inc. 25 SCRA 529 [1968]; Virata vs. Sandiganbayan, *supra*; Madrona vs. Rosal, *supra*.

[21] 39 SCRA 473, 479 [1971].

'A license is merely a permit or privilege to do what otherwise would be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right, nor is it taxation' (37 C.J. 168). Thus, this Court held that the granting of license does not create irrevocable rights, neither is it property or property rights (People vs. Ong Tin, 54 O.G. 7576). x x x"

We reiterated this pronouncement in *Felipe Ysmael, Jr. & Co., Inc. vs. Deputy Executive Secretary:*[26]

"x x x Timber licenses, permits and license agreements are the principal instruments by which the State regulates the utilization and disposition of forest resources to the end that public welfare is promoted. And it can hardly be gainsaid that they merely evidence a privilege granted by the State to qualified entities, and do not vest in the latter a permanent or irrevocable right to the particular concession area and the forest products therein. They may be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so require. Thus, they are not deemed contracts within the purview of the due process of law clause [*See* Sections 3(ee) and 20 of Pres. Decree No. 705, as amended. *Also*, Tan v. Director of Forestry, G.R. No. L-24548, October 27, 1983, 125 SCRA 302]."

Since timber licenses are not contracts, the non-impairment clause, which reads:

"SEC. 10. No law impairing, the obligation of contracts shall be passed."[27]

cannot be invoked.

In the second place, even if it is to be assumed that the same are contracts, the instant case does not involve a law or even an executive issuance declaring the cancellation or modification of existing timber licenses. Hence, the non-impairment clause cannot as yet be invoked. Nevertheless, granting further that a law has actually been passed mandating cancellations or modifications, the same cannot still be stigmatized as a violation of the

[26] 190 SCRA 673, 684 (1990).
[27] Article III, 1987 Constitution.

non-impairment clause. This is because by its very nature and purpose, such a law could have only been passed in the exercise of the police power of the state for the purpose of advancing the right of the people to a balanced and healthful ecology, promoting their health and enhancing the general welfare. In *Abe vs. Foster Wheeler Corp.*,[28] this Court stated:

"The freedom of contract, under our system of government, is not meant to be absolute. The same is understood to be subject to reasonable legislative regulation aimed at the promotion of public health, moral, safety and welfare. In other words, the constitutional guaranty of non-impairment of obligations of contract is limited by the exercise of the police power of the State, in the interest of public health, safety, moral and general welfare."

The reason for this is emphatically set forth in *Nebia vs. New York,*[29] quoted in *Philippine American Life Insurance Co. vs. Auditor General,*[30] to wit:

"'Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.'"

In short, the non-impairment clause must yield to the police power of the state.[31]

Finally, it is difficult to imagine, as the trial court did, how the non-impairment clause could apply with respect to the prayer to

[28] 110 Phil. 198, 203 [1960]; footnotes omitted.
[29] 291 U.S. 502, 523, 78 L. ed. 940, 947-949.
[30] 22 SCRA 135, 146-147 [1968].
[31] Ongsiako vs. Gamboa, 86 Phil. 50 [1950]; Abe vs. Foster Wheeler Corp., *supra.*; Phil. American Life Insurance Co. vs. Auditor General, *supra.*; Alalayan vs. NPC, 24 SCRA 172 [1968]; Victoriano vs. Elizalde Rope Workers' Union, 59 SCRA 54 1[974]; Kabiling vs. National Housing Authority, 156 SCRA 623 [1987].

by the Court: Section 3, Executive Order No. 192 dated 10 June 1987; Section 1, Title XIV, Book IV of the 1987 Administrative Code; and P.D. No. 1151, dated 6 June 1977—all appear to be formulations of *policy*, as general and abstract as the constitutional statements of basic policy in Article II, Sections 16 ("the right—to a balanced and healthful ecology") and 15 ("the right to health").

P.D. No. 1152, also dated 6 June 1977, entitled "The Philippine Environment Code," is, upon the other hand, a compendious collection of more "specific environment management policies" and "environment quality standards" (fourth "Whereas" clause, Preamble) relating to an extremely wide range of topics:

(a) air quality management;
(b) water quality management:
(c) land use management;
(d) natural resources management and conservation embracing:

(i) fisheries and aquatic resources;
(ii) wild life;
(iii) forestry and soil conservation;
(iv) flood control and natural calamities;
(v) energy development;
(vi) conservation and utilization of surface and ground water
(vii) mineral resources

Two (2) points are worth making in this connection. Firstly, neither petitioners nor the Court has identified the particular provision or provisions (if any) of the Philippine Environment Code which give rise to a specific legal right which petitioners are seeking to enforce. Secondly, the Philippine Environment Code identifies with notable care the particular government agency charged with the formulation and implementation of guidelines and programs dealing with each of the headings and sub-headings mentioned above. The Philippine Environment Code does not, in other words, appear to contemplate action on the part of *private persons* who are beneficiaries of implementation of that Code.

As a matter of logic, by finding petitioners' cause of action as anchored on a legal right comprised in the constitutional statements above noted, the Court is in effect saying that Section 15 (and Section 16) of Article II of the Constitution are self-executing and judicially enforceable even in their present form. The implications of this doctrine will have to be explored in future cases; those implications are too large and far-reaching in nature even to be hinted at here.

My suggestion is simply that petitioners must, before the trial court, show a more specific legal right—a right cast in language of a significantly lower order of generality than Article II (15) of the Constitution—that is or may be violated by the actions, or failures to act, imputed to the public respondent by petitioners so that the trial court can validly render judgment granting all or part of the relief prayed for. To my mind, the Court should be understood as simply saying that such a more specific legal right or rights *may* well exist in our *corpus* of law, considering the general policy principles found in the Constitution and the existence of the Philippine Environment Code, and that the trial court should have given petitioners an effective opportunity so to demonstrate, instead of aborting the proceedings on a motion to dismiss.

It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory *policy*, for at least two (2) reasons. One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter.

The second is a broader-gauge consideration—where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution which reads:

"Section 1. x x x

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a *grave abuse of discretion* amounting to lack or excess of jurisdiction *on the part of any branch or instrumentality of the Government.*" (Emphases supplied)

PROTECTION OF THE NATURAL ENVIRONMENT IN ARMED CONFLICTS– CHALLENGES AND RESPONSE UNDER INTERNATIONAL LAW

Noor. M. Bilal[*]

'Ecocide' is a recently coined word that denotes the multiple capacity that humans have developed to destroy the earth - or at least make it unfit for human life. The power of the countries is being judged by watching for increases in indexes such as productivity, exports and imports, and national wealth. The governments are being admired to have generated rapid economic development, and others are being criticized for letting their people stagnate and even regress. But of late, as we are going to enter the twenty first century, a realization has started that growth and productivity involve some negative and dangerous by-products. Most industrial national-states have become concerned about environmental pollution caused by automobile exhaust fumes, factories and waste products that are emitted into the atmosphere and into our seas and rivers. The air is becoming unfit to breathe and water unfit for use. Oil spills, deforestation and dangerous chemical waste products are turning lakes, rivers and beaches into vast disease infected sewers. Toxic by- products of industrial processes are threatening certain animal species with extinction and are slowly undermining the health and integrity of the human species.[1]

Two of the most pressing problems confronting the international community at the present time are those of development, and of the protection and improvement of the human environment. Both problems have been given priority within the frame work of the United Nations and other International bodies. The General Assembly has in a number of Resolutions proclaimed the inalienable right of all countries (particularly developing countries) to exercise permanent sovereignty over their natural resources in the interest of their national development. But the depletion of

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1 Lesterr R. Brown, " World without Borders" (New York, 1972) pp. 15-40

exhaustible natural resources represents one of the identifiable problems involved in the protection of the human environment. Thus principles 2 and 3 of the Declaration on the Human Environment adopted by the historic Stockholm conference provided that the natural resources of the earth must be safeguarded for the benefit of present and future generations.[2] Although the Stockholm Declaration had no legally binding force, it did draw the world's attention to the totality of environmental problems and addressed itself to the entire world, including the seas, oceans, individual people and states. The declaration clarified, thereby, that environmental protection is the problem of humankind.

The declaration also created the United Nations Environmental Programme (UNEP), which is responsible for promotion, co-ordination, stimulation, assistance (International or municipal, standardization, and every other conceivable activity helpful to further the protection of environment. UNEP has served primarily as a catalyst agency to encourage and co-ordinate national and regional environmental protection activities, rather itself engaging in implementation of environmental projects.[3]

In order to commemorate the tenth anniversary of the Stockholm Conference of 1972, 105 States assembled at Nairobi from 10th to 18th May, 1982, and adopted a special Declaration known as the 'Nairobi Declaration' on May 18, 1982.[4] Paragraph 5 of the Declaration stated that human environment would greatly benefit from an international atmosphere of peace and security, free from the threats of any war, 'especially nuclear war'.

ARMED CONFLICTS

War and various gradations of armed conflict have been our constant and destructive companions from the beginning of recorded history. Whatever, the cause of armed conflicts, the phenomenon of politically motivated violence has persisted through history and is not, as is frequently assumed, merely a by-product of existence of unaccountable nation-states operating in an anarchic international environment. Since August 6,1945, the date of the awesome nuclear explosion in Hiroshima, war has assumed a new and ominous dimension. Technological growth has managed to increase the

2 The U.N. Conference on the Human Environment (Stockholm, 5-16 June 1972; See UN Doc. A/Conf. 48/14/Rev./ I.

3 Starke. J.G, "Introduction to International Law, " (10th ed.), p. 413.

4 For the text of the Declaration, see the report of the Governing Council of UNEP on its tenth session (1982) pp. 49-51.

destructive capacity of nuclear weapons to self-defeating levels. When the capacity to destroy becomes so total that war entails the mutual annihilation of the belligerent populations, then war as an instrument of policy ceases to be a rational tool of state craft.[5]

In modern International relations, the emergence of the ever increasing lethal power of new weapons, led in the late 19th century (1899) to the first serious attempts to restrict war as a legal instrument and as legally accepted method for enforcing legal rights and changing the rules of war. The Hague Conference of 1899 represented the official realization of many attempts through law - making treaties designed to surround the institution of war with legal restrictions. The development and partial codification of the law of war and neutrality during the second half of the nineteenth century has led to the formation of certain principles which now are the basis of regulation of warfare by international law.

First, there is the obvious proposition that the conduct of belligerents is subject to the commands of law. Necessity in war does not overrule the obligations and prohibitions flowing from the law of war and neutrality. Action under military necessity amounts to taking measures which are indispensable for the over powering of the enemy, but at the same time are admissible in the light of the law and usages of war ;[6] secondly, technological progress and the invention of new weapons are more rapid than the development of law and its codification However, in the so-called unregulated cases, the belligerents do not keep full freedom of action.[7] This principle is supplemented by Article 22 of the Hague Regulations annexed to the Hague Convention no. IV..The right of belligerents to adopt means of injuring the enemy is not unlimited; Thirdly, there remains the principle of humanity and its consequences are manifold viz. belligerents are forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering.[8] Lastly, the law of war as it emerged from the ideas of the French Revolution and the codification movement at the turn of the present century is based on a clear distinction between the armed forces and the civilian population, and between defended and undefended positions.

5 Couloumbis, Wolf, "Introduction to International relations : Power and Justice". (3rd. Ed. 1986) p. 389.

6 Sorensen Max, "Manual of Public International Law", (1968) p. 800

7. "Martens" clause in the preamble to the Hague convention No. IV. (1907) on the Laws and Customs of war on land.

8 Art. 23 (e) of the Hague Regulations.

The 'law of war' consist of the limits set by international law within which the force required to harm the enemy may be used, and the principles, thereunder, governing the treatment of individuals in the course of war and armed conflict. In the absence of such rules, the barbarism and brutality of war would have known no bounds. The essential purpose of these rules is not to provide a code governing the 'game' of war, but for humanitarian reasons to reduce or limit the suffering of individuals, and to circumscribe the area within which the savagery of armed conflict is permissible . For this reason, they were sometimes know as the 'humanitarian law of war', or the rules of 'humanitarian warfare'.[9] The currently recognized title for these rules is 'International Humanitarian Law'. That is why the full name of the Geneva Conference of 1974-77 which adopted the protocols I and II in 1977[10] for updating the Geneva Red Cross Conventions of 1949, has been "The diplomatic Conference on the Reaffirmation and development of International Humanitarian Law Applicable in Armed Conflicts."

One of the most remarkable developments of the last decades, and which largely explains the replacement of the title, "Law or War", by the name, "International Humanitarian Law", has been the importation of human rights rules and standards into the law of armed conflicts.

HUMAN RIGHTS AND AN INDIVIDUAL'S RIGHT TO A CLEAN ENVIRONMENT

Although human rights and environmental protection are generally regarded as separate legal areas, there are many situations where the twain intersect. The complimentary nature of human rights and environmental protection can not be denied and as the human control over the environment increases, the distinction between them may cease to exist. Many governments and international bodies have already recognized the right of citizens to live in a healthy and clean environment as a species of basic human rights. But international law has yet to recognize a citizen's right to a decent, viable and healthy environment as a basic human right. Undoubtedly, the existence of such a right would immediately make each state accountable to the international community, if abuse of human rights occurs with respect to the matters relating to environment. Further, an international recognition of the right would enable an international supervision of a state's domestic

9 See Starke J.G., "Introduction to International Law," (10th ed.) p. 553.

10 Protocol I (1977) : International armed conflicts; Protocol II (1977) : Non-international armed conflicts.

environmental policies which might afford individual claimants an access to human rights institutions.

The World Commission on Environment and development has favoured the idea of establishing a right to a healthy environment as a fundamental right for all human beings. But it has also pointed out the inability of international law to include a right to a healthy environment as part of the basic human rights, because of the absence of a definition of such right in provisional rights in international treaties. The fact that no treaty refers explicitly to a right to decent environment is evident when we look at the principle I of the 1972 Stockholm Declaration which provides 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'.

Taking into account the fact that there exists no independent right to a decent environment, attempts have been made to derive environmental rights from other existing rights such as those relating to life, health and property. For example the Supreme Court of India in *Rural litigation and Environment Kendra v. State of U.P.* [11] observed that the right to a healthy environment constituted part and parcel of the rights to life and liberty embodied in Article 21 of the Constitution of India.[12] The Supreme Court ordered the closure of some of the limestone quarries in the Mussorie - Dehradun region of UP (India) on the ground that they disturbed the ecological balance and stated that:

> 'It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 embraces the protection and preservation of nature's gifts without (which) life can not be enjoyed'.

However, in practice, the international courts have not taken a positive approach in acknowledging this right. For example, when in an individual petition under Article 6 (1) of the 1966 UN Covenant on Civil and Political Rights, it was argued that the dumping of nuclear wastes in a Canadian town violated the right to life of its inhabitants and future generation, the application was dismissed on the ground that local remedies should have first been exhausted.[13]

11 AIR. 1988 S.C. 652.

12 Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

13 U.N. HRC Decision No. 67/1980 Canada (1990).

INTERNATIONAL STANDARDS ON PROTECTION OF THE ENVIRONMENT IN ARMED CONFLICT

International humanitarian law has always set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including the natural environment.[14] As early as 1868 the declaration of Saint Petersburg Stated that, 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy'.[15]

The Hague Regulations of 1907 developed the underlying idea of restraint and added:

> 'The right of belligerents to adopt means of injuring the enemy is not unlimited'

The Hague convention of 1899 and 1907 have been supplemented by the Geneva Protocol of 17 June 1925 relating to the use in war of asphyxiating, poisonous and other gases. An addition to the law restricting the freedom of parties in the use of violence was the Hague Convention of 14 May, 1954 for the protection of Cultural property in the event of armed conflict.[16] In 1977, a diplomatic conference, which had been meeting in ... since 1974, adopted new regulations (the two Protocols) to supplement the 1949 Geneva Conventions. They include humanitarian rules for conflicts hitherto considered internal wars; viz., Self-determination through wars against colonial domination., foreign occupations, and racist Government. The second protocol devotes itself in detail to the humanization of international wars, hitherto neglected by all other conventions,[17] though this broadening of the regulations grants protection only to victims of those kinds of conflicts whose definition is clearly dependent upon the politics of the day. This change reflects the view of a good number of states, which are mainly concerned about the international recognition of wars of liberation as 'legitimate' or 'just' wars, while being anxious to preserve their sovereign right to conduct their own internal conflicts unhampered by constraints of international law.

14 See Antoine Bouvier, "Recent Studies on the Protection of the Environment in Times of Armed Conflict," (1992).

15 Declaration renouncing the use, in times of war , , of Explosive projectiles under 400 gams. weight.

16 249 United Nations Treaty Series (UNTS) 240.

17 See Levi Werner, "contemporary International Law' (2nd Ed. 1991) p. 312.

ensure compliance with those obligations, for example incorporating them into military manuals.[25]

The ICRC experts re-examined various legal issues and identified areas where the applicable law ought to be strengthened.[26] One of the main proposals which was heavily favoured by experts was to establish guidelines on the protection of the environment, which governments should be encouraged to incorporate into their instructions to their armed forces, possibly by means of a manual on the law of armed conflict. This was finally endorsed by the General Assembly by inviting all states to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the ICRC and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.[27]

CONCLUSION

In the course of human quest to conquer nature, we have unleashed the forces which we are now finding difficult to control. This is more so both as regards the swiftness, and irrevocability of their effect on our fragile planet. The triggering of global ecological crisis in recent years has raised nagging questions not only as regards' developmental' paths the mankind has hitherto, followed but also its role as the sole arbiter for destinies of all the species on our fragile planet. The problem becomes more difficult and compounded during armed conflicts. Inspite of the prohibition contained in the Charter of the United nations,[28] states continue to wage wars and use force by invoking justifications as self-defence, self-preservation or necessity.

In modern international relations, the ever increasing lethal power of new weapons has enhanced considerably the chances of 'ecocide' and 'ecological warfare'. Though the conduct of the belligerents during an armed conflict is subject to the commands of law enunciated through different treaties and conventions and the necessity in war does not over rule the obligations and prohibitions flowing from the laws of wars, yet during the past fifty years we have witnessed the disregard or abandonment of these obligations, in

25 GA Res/ 47/37 (Nov. 25,1992).

26 ICRC, Second meeting of Experts on the Protection of the Environment in Times of Armed Conflict (April, 1993).

27 GA Res/ 49/50 (Dec. 9,1994).

28 Art. 2 (4) of the United nations Charter.

varying degrees, in the practice of belligerents. The process was started in the first world war; The beginning of economic warfare directed against whole populations, unrestricted sub-marine warfare, use of gases, systematic violations of certain provisions in the Hague Conventions. The process of undermining the fundamental principles of the law of war culminated in the abuses, lawlessness and atrocities of the second world war. Though the trials of war criminals constituted a major effort to vindicate the international law of war, yet, at the same time, the trials were an occasion for brining to light an impressive amount of evidence on the non observance of that law by many belligerents.

In the post Stockholm period, our attention has been focussed upon regulatory mechanisms for national and transnational environmental problems including during armed conflicts. The Rio Summit (1992) and various resolutions of the General Assembly thereafter, have provided further impetus to this process. As a result, the legal measures to protect the environment during armed conflicts are gradually getting crystallized into an evolving body of 'International Environmental Law during armed conflicts'. The law that is evolving is in large part 'soft' - composed of principles and standards of conduct not clearly accepted as obligatory, leaving large amounts of discretion to states. Softlaw instruments mainly comprise treaties with only soft obligations, non binding resolutions of international and regional organizations. The guidelines annexed with the Resolution No. 49/50 of the General Assembly have to be taken for what they are intended to be: a tool for making the existing international legal rules on the protection of the natural environment in times of armed conflict better known to those who must comply with them in the course of military operations. The guidelines are neither an international treaty nor the draft for the codification exercise. As a resume of the applicable rules, they deserve the widest dissemination and eventually scrupulous respect. But soft law even play an important role as it encompasses many international prescriptions, though, lacking requisite characteristics of international legal norms proper and are capable of producing effects. Of course 'softlaw' travels in tandem with the 'hardlaw'. In fact 'soft law' leaves large amounts of discretion to the states, standards are often vague and therefore, politically convenient to states.[29] It causes an opinion to coalesce and can be a very important catalyst in securing an agreement with a harder edge later.

29 See Geoffrey Palmer, 'New Ways to make International Environmental Law', 86 American Journal of International Law (1992) 269

The Central question remains about the permissibility of targets. 'Ecocide" can not be brought about but for attacks, upon objects and areas which, in fact, have no military significance or only such marginal significance -- what is traditionally called' "indiscriminate" warfare. If such warfare were to be deemed' acceptable, the world would see more 'ecocides' - while mankind's awareness increases the need to preserve the environment! if governments are determined to try to avoid 'ecocides' in future wars, agreements must be sought which clearly establish bans on "area bombing", "zonal bombing" and similar practices, which started in the second world war and have been questioned ever since. Further, in order to strengthen the grip of the laws of war over the violations during armed conflicts, there is need to recognize a citizens' right to a decent, viable and healthy environment as a basic human right and its violation as an offense against peace and humanity.

(A)

ADMINISTRATION OF JUSTICE TO VICTIMS OF MARITAL VIOLENCE: SOME ACHIEVEMENTS AND FAILURES

*Lalita Dhar**

At least there has been an agreement among all the men of all the ages for Vedic era[1] downwards to the times of Blackstone[2] that women be stripped of all their rights and remain the ward of the man. However, her miseries got multiplied by rapid process of industrialization and urbanization. Hence, a need arose to mitigate her sufferings within and outside the family. The political philosophers also felt constrained to arouse favourable public opinion which ultimately led to enactment of social welfare legislation.[3] As a result women felt emboldened to plead their case of gender domination and non discrimination effectively and asked for a comprehensive legislation to combat the problem of women's subjugation. However, whatsoever legislative measures[4] were adopted thereafter, fell far short of their expectations. Disappointment got aggravated by the unsympathetic attitude of the courts which persistently approved the doctrine of guardianship of

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1 The *Vedas* accorded an ideal position to a female. This nevertheless was by and large undone by *Smirtikars* especially by *Manu Samiriti*.

2 See, Blackstone, *Commentaries on the Laws of England* (1770). Although these are two different streams but the same got blended together after the colonial rule in India started. Both the systems emphasize on importance of 'converter' which resulted in negating women's independence.

3 The Act for Better Prevention and Punishment of Aggravated Assaults upon Women and Children, 1853; The Matrimonial Causes Act of 1878, allowed a wife to bring a complaint in her own right before a Magistrate, so as to enable her to be formally released from any obligation to live any longer with her husband.

4 As a result of crusade against gender domination, the provisions dealing with improving conditions of women especially in matrimony were incorporated in different legislations, nonetheless the same were insufficient to satiate them.

1 **PROTECTING THE RIGHT TO ENVIRONMENT: PROBLEMS, PITFALLS AND PROPOSALS**

M.K.Ramesh*

I. **Introduction:** The dominant Rights discourse, the world over, has been on emphasising political and civil rights. This is rooted in the Anglo-Saxon jurisprudence of a Rights discourse that has individual rights at the hub of relations between individual, society and the State. It is also based on the argument that political rights and civil rights - essentially the rights of the individual - are easily capable of protection and to oversee their enforcement. Economic, Social and Cultural rights (ESC rights for short), on the other hand, are vague and nebulous. Securing them requires a lot of preparation and planning on the part of governments. They necessitate accommodation of varied, and at times conflicting, interests as they are concerned principally with securing the rights of the collectivity. The world community of nations got sold to this idea and the "divisibility" of human rights was accomplished through a number of international instruments on human rights. While, realization of political and civil rights was pursued with great urgency ("here and now", as in "cash and carry"), ESC rights suffered with the consensus that they are to be "progressively realized". Such a pursuit of "basic rights" approach in preference to "basic needs" approach, has substantially contributed to the neglect of ESC rights. The neglect, besides undermining ESC rights, has weakened political and civil rights as well. The complementary characteristic of the two sets of rights requires to be appreciated and promoted.

There is thus the need for generation of legal knowledge supportive of strategies for securing ESC rights.

The artificiality of the division and prioritisation among the human rights became apparent within a couple of years after the conclusion of the two international covenants on human rights. The 1968 Tehran Conference on Human Rights declared, in unmistakable terms, the indivisibility and interdependence of all human rights. By putting environmental protection on the global agenda in the 1972 Stockholm Declaration on the Human environment, the community of nations began reflecting on the inter-connectedness of all human rights, while, at the same time, devising strategies for conserving and protecting environment. Global analysis, and expression of common concern of all issues affecting human rights began in the right earnest in the international deliberations culminating in a number of resolutions of the UN General Assembly.[1]

This position paper on Right to Environment is an attempt to emphasise the indivisibility of human rights. It is the thesis of this paper that the realization of the protection of the right to environment would enable securing a host of other rights - unnaturally classified as Political and Civil Rights and ESC rights. In this exercise, the relation between human rights and right to environment would be established at the very outset. Conceptualization of the content and the contours of the right would follow. Its articulation in legal instruments, through social movements, in community perceptions and within the globalization paradigm, forms an essential component of the

descriptions and manifestations of the right. This is followed by an examination of factors responsible for non-realization of the right and the tools and strategies employed in overcoming the hurdles. Judicial approach and activism in the concretization and enforcement of the right to environment would complete the analytical exercise. Reflections on the gains of the discussion on environment in the context of ESC rights and suggestions for better realization and effective enforcement of the right to environment form the concluding part of the effort.

Key issues and questions addressed here include -

i) Whether, pursuit of the realization of the right to environment facilitates actualization of a number of human rights, entitlements and needs ?

ii) How desirable and useful is the conceptualization of right to environment as a human right ? How adequate are the tools of human rights in the realization of right to environment ?

iii) How tangible is the right to environment ? What are the hurdles for its enforcement ? What are the strategies employed in overcoming the hurdles ?

iv) Are right to environment and right to development antithetical ? How are they addressed in different legal systems and with what results ?

v) In the pursuit of the right to environment how possible clashes with other rights avoided or reconciled ?

vi) How have the phenomena of Globalization and liberalization of economies impacted the right to environment ?

vii) How have the social movements influenced, enriched and enlarged the content and contours of the right ?

viii) What role the Courts of law have played in the concretization and the enforcement of the right ? What tools and strategies have emerged in the advocacy for the right ?

R47.

II. Protection of Human Rights and Environment - Common Grounds:

In the early eighties a prophecy was made. A prophecy, that brought to sharp focus the relation between human rights and the environment. Richard Falk, the author of such a prediction stated, "In an increasingly interdependent global setting, where elaborate technology is used and where even higher levels of industrialization are contemplated, environmental quality is a critical dimension of human dignity that may have a significant impact on the development, and even survival, of mankind."[2] Policy makers and popular movements alike, the world over, have started recognizing this interconnectedness.[3] Realization has dawned that abuse or denial of human rights leads to environmental problems and vice-versa.[4] The 1994 Final Report of the UN Sub-Commission on Human Rights and Environment emphasises this point. The document goes further to propose adoption of principles on Human Rights and Environment by the community of Nations.

Reference to a few illustrative examples will help in understanding the relation between the two: On April 26, 1986, the Nuclear disaster at Chernobyl released fifty million cusecs of radioactivity into the atmosphere. In less than a week several workmen, who were celebrating May Day in Czechoslovakia, were irradiated, seriously affecting their right to health, life and livelihood.[5] In Brazil Chico Mendes, a rubber tapper, was assasinated for having campaigned to save rain forests by the powerful logging interests.[6] A peculiar virus destroyed aqua farms, degraded the land on which such a cultivation was

practiced and destroyed the very source of sustenance of those dependent on aquaculture in Philippines.[7] And, again in Philippines indiscriminate logging reduced the Palawan forest cover by more than a third of its area in less than two decades. This ecological damage literally obliterated the indigenous people belonging to the Tagbanuwa and Batak tribes, putting to risk extinction several species of endangered birds and mammals in the forest.[8]

In the movements aimed at protecting human rights and environment one can discern several things in common. Both, in terms of approach and in the achievement of desired goals they are alike. They create in roads in the reserved domain of domestic jurisdiction (which is an attribute of sovereignty of the State) and aim at containment of unbridled exercise of power by the agencies of State and private operators. One can discern this in the working and methodological approaches adopted by International NGOs like Amnesty (to protect human rights) and Greenpeace (to save the environment). At times, protection of environment leads to protection of human rights also. Instances abound in India, of a number of environmental movements while protecting and conserving environment, succeeding in securing human rights as well. The "Chipko" ("hug the tree") movement of Sundarlal Bahuguna, that succeeded in preventing forest destruction in the Himalayas, is one illustration.[9] The "Kittiko, Hatchiko" ("Pluck and Plant") movement at a Kusnur, a small village in Karnataka, that led to plucking of Eucalyptus plants being grown to serve as raw-material for a pulpwood industry and planting of saplings of fruit-bearing plants, to

save common property of the local community, is another illustrative example.[10]

The bond between human rights and environment may be visualized in a number of ways.[11] One of the ways is to perceive environmental protection as the means for satisfying human rights standards. As degradation of environment directly affects human rights to life, health and livelihood, creation of proper protective mechanisms for conserving and improving environment would help protect human rights as well. The case of **Nauru v. Australia** (1993 ICJ)[12] is illustrative of this approach. The two States, in the case, agreed to work together to restore the fragile eco-system of Nauru by rehabilitating the worked out phosphate lands there. In such an effort, restoration of the lifestyles of the local communities and protection of their interests over their native lands was contemplated.

Similarly, human rights protection may enable better protection and conservation of environment, securing political and civil rights, while paying due attention to economic, social and cultural rights, sets the stage for paying greater attention to and better protection of the environment. Restriction or violation of human rights have, more often than not, resulted in environmental degradation. Encroachments denudation and destruction of forests have often resulted from denial of enjoyment of traditional rights of freedom of movement inside forests and earning livelihood from minor forest produce for the local communities. At times, what appears, on surface, as a

case of human rights violation, would have something to do with affecting environmental protection, deep within. This is substantiated by the following instances: Barbara D'Achille, an environmental reporter, got killed by shining Path Gunerrillas after her writings appeared criticising their gross abuse of environment, in Peru.[13] Kristof Gorlick was imprisoned for having cautioned his fellow workers about contaminated ground water in Krakow, Poland.[14]

The foregoing analysis clearly establishes the intimate relationship between human rights and protection of environment. There is thus enough justification in the argument that protection of human rights means preservation of the environment, and safeguarding the environment means respect for human rights. The next enquiry is as to viewing right to environment as a human right. This is addressed in the following chapter.

III. Right to Environment: Concept, Contour, Content and Perspectives:

Having established the links between human rights and environment, the enquiry then shifts to the very notion of right to environment, its nature and content. Without straighaway getting into answering the complicated question of whether right environment is a moral, legal, natural or human right,[15] if one were to attempt defining it, a very interesting situation emerges: that the notion cannot be defined in precise terms (!) as the following analysis would reveal:

Viewed in terms of objects, right to environment may mean its protection and conservation to provide better and equitable access to human beings over resources. This is the other way of saying that by protecting the environment human beings get automatically protected as they are inseparable components of the environment itself. Such an object became evident in the 1972 Stockholm Declaration on Human Environment in the form of the very first principle that read, "Man has a fundamental right to freedom, to equality, to satisfactory living conditions, in an environment the quality of which enables him to live in dignity and in well-being". This description of the right appears quite apt as an environment degraded by pollution and loss of bio-diversity is opposed to satisfactory living conditions and development of human personality.[16]

The object of protection of environment is not for the purpose of exclusive appropriation and exploitation by the current generation of humans. In fact, the protection is for

the benefit of the generations subsequent also. The current generation is expected to conserve it as a trustee would. The Stockholm declaration also expressed this intent by adding a temporal dimension to human rights in these words, "man has the solemn duty to protect environment for present and future generations. Guaranteeing human rights for the future implies that natural resources are to be so managed as not to exhaust them.[17]

This leads to the question - whose right is it, any way ? that of the individual ? Or, that which belongs to groups ? In the African Charter on Human and Peoples' Rights, the right to "a general satisfactory environment" is vested in "all peoples". But, the domestic laws of the countries in the world by and large, have referred to this right as an individual right. If one were to examine this in the common law context, the right may at times be viewed both as that of an individual and that of a collectivity as well. This situation usually occurs in cases concerning nuisance. The case of **Ram Baj Singh v. Babulal,**[18] illustrates this point. In the case, the atmospheric pollution caused by the operations of a brick-grinding machine was held to adversely affect both the medical practitioner, whose consulting chambers was located close to that place, and his patients. Traditional and customary law, especially in the third world, the right over certain resources are considered as those belonging to groups and local communities. Access to and use of common property resources (like grazing fields, sacred groves, ponds etc) are traditional vested in a group of people.

Indigenous life styles and use of resources by them exemplifies this point.

Turning to the question as to whose duty it is to respect this right the answer, in general, would be that it is the duty of the State (like in case of all human rights) to respect, protect and enforce the right to environment. The State may be required to compensate for the losses suffered as a result of its failure to enforce this right. The State may be held liable, even when the loss is occasioned by the conduct of a public limited company receiving state assistance and functioning under its control and authority. This was emphatically laid down in the case concerning Oleum Gas leak from **Shriram Foods and Fertilizers Industries**[19] by the highest Court of India. Similar trend in judicial approach can be made out in Europe as well, in a regional institutional frame. The decisions handed down by the European Court of Justice in **Francovich,**[20] and by the European Court of Human Rights in **Lopez Ostra,**[21] cases, indicate the developments in this direction.

Indian Supreme Court has gone a step ahead in enforcing the right to environment as a fundamental right even against private operators. In the **Ganga Pollution (Tanneries) Case,**[22] the Court issued certain orders over private tanneries in order to bring down water pollution caused by them. In what was popularly referred to as **Asbestos Industries Case,**[23] orders were issued against asbestos-related industries to introduce certain safety measures to control occupation-related health hazards.

The UN Charter on Economic Rights and Duties of States, 1974 imposes a responsibility on all States to protect and preserve the environment for the present and future generations.[24] The 1980 and 1989 resolutions of UN General Assembly, echo this sentiment. The Indian Constitution stretches and expands on this notion of duty of State.

In the constitutional scheme of India, it is the duty of both the State and the citizens to protect environment. It is a Directive Principle of State policy for the State to "endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."[25] It is the fundamental duty of every citizen "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."[26]

The difficulty in comprehending the nature and scope of the right and clarification as to a proper understannding of the concept itself may be sought by reference to its articulation in legal instruments.

Articulation in Legal Instruments: As one begins examining the content of the right as expressed in instruments of law all over the world, a bewildering array of expressions emerge describing different strands of the concept. At the international level, about 900 bilateral treaties, 300 multilateral treaties and over 200 texts of international organizations providing for protection of different aspects of environment[27] (like, oceans, wild life, biodiversity, atmosphere, fresh waters, marine

creatures, coastal zones etc) contribute to the definitional discourse on the right to environment. Reference to some of these legal instruments may illuminate the understanding of the right. While in some treaties right to environment convey protection of 'human life' (- like, the ones prohibiting: emplacement of nuclear weapons on the sea-bed;[28] Bacteriological and Toxic weapons;[29] Hostile Use of Environmental Modification Techniques[30] and marine Pollution),[31] 'human health' Constitutes the right in a few others (like, the treaties concerning protecting the Ozone layer)[32] and 'Conservation and Protection of Cultural heritage of humankind' in yet other environmental law treaties.[33] The access to, use, enjoyment and management of natural resources, while remaining aspects of right to environment, have also become the obligation and duty of the human kind in international instruments. For, they are the "common heritage" (in the contexts of international law of the Sea and Air and Space) and "common concern" (in the contexts of conventions on protection of Ozone layer[34] and Biodiversity Conservation)[35] of humankind. Another dimension of the right became manifest when in 1982 the U.N. General Assembly declared, "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."[36]

At the regional level, the legal instrument for the protection of human rights within the Council of Europe frame,[37] do not refer to the notion of environment or its protection.

However, Article 11 of the European Social Charter refers to "the right to protection of health", implying an obligation on the part of the State to take care so as to ensure damage to environment does not adversely affect the health of the people. The Council of the OECD has incorporated in its working, the principle of the right to information and participation to the public in decision-making processes related to the prevention of, and response to, accidents involving hazardous substances and the decision on the exchange of information concerning accidents capable of causing transfrontier damage.[38] The human health-centred right to environment is evident also in the European Charter on Environment and Health of 1989. As stated earlier, the African Charter on Human and Peoples' Rights speaks in terms of the right of the peoples to "a general satisfactory environment favourable to their development". The right to environment, in the African context, is thus not confined to the individual, but belonging to the collectivity that leads to their overall development. In the American Convention on Human Rights, the right to environment conveys the meanings "right to health" and the "right to healthy environment.[39]

National Constitutions have used qualifying expressions that hover round human needs, entitlements and their dependence on environment. The Spanish Constitution refers to an "environment suitable to the development of the person".[40] The Peruvian Constitution contains everyone's right "to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature.[41] The Constitution of Honduras speaks of maintaining

"a satisfactory environment for the protection of everyone's health." The South Korean Constitution declares a right "to a healthy and pleasant environment."[42] Profuse references to a "clean", "healthy", "decent", "viable", "satisfactory", "ecologically balanced", or "sustainable" environment[43] and an environment "suitable for the development of the person"[44] do get mentioned in a number of Constitutions. From these delightfully vague and general articulation of the right, a little more precise formulation can be found in certain other Constitutions when they refer to an environment, "free from contamination",[45] emphasising clean and pollution free environment.

A paradigmatic shift in the perception, in the right to environment, could be noticed in ancient Indian approach to man-nature relationship. The ancient Indian tradition sanctified the five elements of nature (air, water, sky, light and earth) by divine presence and human gratitude for the bounty of nature found expression in the chanting of prayers as found in great measure in Vedic literature. Right to environment, acquired an altogether different meaning in Indian Jurisprudence. It focussed on duty of the individual and the collectively to protect, conserve and judiciously manage the natural resources. It was a culture of sacrifice, renunciation and controlled consumption.[46] Kautilyan jurisprudence also emphasised this duty of the people in protecting and conserving the environment. It also prescribed penalties for non-observance of the obligation.[47] With such a rich tradition of concern for the protection of environment, it is surprising that the

Constitution of independent India did not, at its inauguration, contain any reference to its protection at all. This anomaly has provoked Dr. Upendra Baxi to remark that the Constitution remained "environment-blind"[48] for well over a quarter century, since its adoption. It was only through an amendment to the Constitution in 1976, the duty, of the State and its citizens, to protect, conserve and improve the environment, found clear expression in its scheme.

Since the obligation to protect the environment is only a directive principle (for the State) and a non-justiciable fundamental duty (for the citizen), enforcing the same is problematic. However, the higher judiciary in India has been able to read these provisions into some of the Fundamental Rights as to make them enforceable. Their innovative elucidations have become the content of the right to environment and contributed to the jurisprudential corpus in India. Invariably, the interpretations have to a large extent been concerning the fundamental right to life under Article 21. The formulations have veered between too general and vague expression of the right to great levels of precision. A few illustrative examples would explain the position: In the **Rural Litigation and Entitlement Kendra v. Uttar Pradesh,**[49] the Supreme Court referred to the right as an entitlement to "ecological balance". A little clarity was given to this when the Court held in **T.Damodar Rao v. Municipal Corporation of Hyderabad,**[50] that it was "the legitimate duty of the Courts to forbid all action of the State and the citizen from upsetting the environmental balance." The Court, in the case thwarted the

designs of the corporation from converting the land earmarked for residential park into a land to build houses upon it. Such an effort of the corporation, the Court held, violated the citizens' fundamental right to live in a well planned hygenic environment, besides violating planning laws.[51] On the other hand, there is also case law to indicate preference of economic gains to ecological concerns in the pronouncements of the Supreme Court. In **Sachidanand Pandey v. State of West Bengal**,[52] the decision of the State Government to allot a portion of the land belonging to the Zoological Garden to the Taj Group of Hotels was challenged by the workmen there on the ground that such a measure would adversely affect the life and well being of the animal species in the Zoo. The Court rejected the contention of the workmen by holding that the proposed action of the State promoted tourism industry that promised increased revenue for the State. Similarly, expression of concern that the launching of the Konkan Railway project would have adverse impact on the fragile coastal eco-system was underplayed by the Bombay High Court in the case of **Goa Foundation v. Konkan Railway Corporation.**[53] The Court refused to go into the merits of the policy decisions taken with regard to developmental activities by the State as, in its opinion, they were taken with due consideration of balancing the interests of the people with that of the need to maintain ecological balance.

In a host of cases, right to environment took the form of the right to 'pollution free environment'. So, right to life included the right to a 'healthy and clean environment' in **Subhash Kumar v. Bihar**. The Court held that the right exists

whenever an activity endangers or impairs the quality of life in derogation of laws.[54] In the case of **Charanlal Sahu v. Union of India,**[55] the Court required the State to take effective measures to protect the right to 'pollution free air and water'.

The right to an aspect of right to life is also referred to such a condition that would ensure 'protection of life' and a 'quality of life' as would make the very right meaningful. Protection of life includes all such insulations as are required to overcome immediate threats to survival. In **Attakoya Thangal's Case,**[56] the threat was in the form of a government scheme to draw out ground water with the help of mechanical pumps in the Lakshadweep islands. This was perceived as an act that would deplete the only fresh water source in the island beyond repair. The apprehension was confirmed by the scientific studies carried out in that regard. The Kerala High Court had no hesitation in stalling the implementation of the scheme as it directly threatened the very survival of the local residents by denying their right to 'clean and potable water'. In the **Shriram** case, discussed earlier,[57] the escape of oleum gas exposing the local residents to immediate injury was held as violation of the right to life by the highest Court. The Kerala High Court in **Mathew Lukose v. Kerala State Pollution Board,**[58] held the discharge of effluents by a chemical company, even when it was on one's own premises as violating the right to 'clean air, water and wholesome environment', the attributes of the right to life. The reasoning was that its percolation adversely affected the quality of subterranean water table, from which water was being drawn for the use of neighbours as well.

The requirement of ensuring 'quality of life' to enjoy wholesome environment has prompted the Courts ordering for providing certain amenities. While ordering the municipal authorities to provide the necessary amenities for satisfactory sanitary conditions to the local residents, the Supreme Court categorically asserted that budgetary constraints and limited allocations should not come in the way of satisfying the minimum livable conditions for the people, in the **Ratlam Municipal Corporation Case.**[59] Poor sanitary conditions were held, in **L.K.Koolwal v. State of Rajasthan,**[60] to be violative of the right to health, sanitation and preservation of environment due to the 'slow poisoning' of the residents of the Jaipur city. In the **Ganga Pollution cases,**[61] a series of orders issued by the Supreme Court against a number of municipalities and tanneries to clean up the river Ganga, was meant to provide a pollution-free environment and improve the quality of life of the people living close to and on the banks of the holy river.

Right to environment is also interpreted to include the right to 'environmental information' by the Courts. The right flows from the fundamental right of freedom of speech and expression.[62] The logic is that the public access to environmental information and public influence in decision-making results in a more equitable distribution of natural resources.[63] In **Bombay Environmental Action Group v. Pune Contonment Board,**[64] the Bombay High Court recognized the right of a responsible environmental group to examine municipal records of granting permission to private builders, without the requirement of proof of government irregularity. The decision,

transformed "the right to know from judicial rhetoric into a substantive, enforceable right."[65] The Pollution Control Laws in India also oblige pollution Control Boards to reveal pertinent official records to facilitate prosecution of polluters by citizens.[66]

Thus, the legal definitional discourse on right to environment predominantly centres round fundamental right to life and rights to health and information.

Indigenous Vision: The perceptions of indigenous communities, in comparison with the hitherto discussed notions of the right by the mainstream, throws up quite a few interesting dimensions. They relate the right to economic, social and cultural rights in a more intimate fashion. The Indigenous tribal communities typify a life that is perfectly in tune with the natural surroundings in which they live. This is especially so in the case of the forest-dwelling indigenous people. Their basic needs of food, fuel, fodder, building material and medicines are obtained from the sylvan surroundings. Owing to their total dependence on the environment, they have evolved a cultural orientation towards conservation of natural resources and their socio-religious lives have been very intricately intertwined with the eco-system they live in.[67] They are often characterised as "the original affluent societies,[68] as they are blessed with a rich resource-base to support them and their needs kept to the barest minimum. Naturally, right to environment to them would mean the right to "have access to, use, control and management of natural resources" on which their

lives depend. This is supposed to have manifested in the demand for recognition of their right to "self-determination". A number of international instruments have recognized this right of the indigenous community. The right is supposed to encompass their right to "repair, enjoy and enrich their cultural heritage",[69] maintain and develop their identities, languages and religions,"[70] "Maintain, protect and have access to sacred sites",[71] and "participate in the use, management and conservation of resources".[72] The U.N. Draft Declaration on the Rights of Indigenous Peoples guarantees to them "the right to the conservation, restoration and protection of the total environment and productive capacity of their lands, territories and resources."[73]

Different facets of this environmental right of the indigenous people for "self-determination" is getting judicially recognized in recent times. The International Court of Justice, in a number of advisory opinion and decisions, has held the right of the local indigenous communities to be freed from colonial rule and the right to own, control conserve and manage their natural resources by themselves. The South-West Africa Cases (Namibia),[74] Western Sahara,[75] Burkina Faso[76] and East Timor[77] are some of the cases decided by the International Court that uphold the local communities basic right of administering the resources by themselves. National Courts too have started handing down pronouncements upholding this environmental right of the indigenous people. Lovelace v. Canada[78] is the classic case of protection of the right of a tribal woman to live within and use tribal lands even when the tribal law was opposed to it.

Sandra Lovelace, a member of the Maliseet Indian community married a non-tribal and, as under the tribal law, lost her rights over tribal lands. Upon her divorce, she wanted to claim her tribal right again. While the tribal law allowed the male members to marry outside the community and still retain their rights over tribal lands, the female members lost that right upon such a marriage. The matter was argued before the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) on the grounds that the law discriminated against women and it resulted in loss of cultural benefits of living within the community and the loss of identity. The Committee upholded the arguments of Lovelace. Canada, subsequently recognized the right of livelace to live on an Indian reserve and amended the law.

Australian Courts, in the last decade of this millinium, have taken the lead in protecting the environmental right of the indigenous communities to own, control, use and conserve their natural resources. **Mabo v. The State of Queensland**[79] and **Wik Peoples v. State of Queensland,**[80] decided by the Australian High Court, confirm the native title in favour of the Australian aboriginal tribal groups.

Judicial recognition of the tribal rights over environment is still in a nascent stage of development in India. Apart from the case of **Adivasi Kalyankari Sangh v. State of Madhya Pradesh,**[81] in which the right of the tribals over minor forest produce (Tendu Patta leaves) was recognized, case law in this regard is yet t develop. However, the Constitution enables the

State to impose reasonable restrictions on the enjoyment of certain fundamental rights to facilitate tribal development.[82]

Closely related to the indigenous wisdom of control, conservation and sustainable use of resources as attributes of right to environment, is the access to and management of common properly resources. In the traditional resource management systems in India, especially in rural areas and among the tribal settlements, the notion of common property and its management symbolises the harmony in the relationship between human beings and nature. Common property is a resource over which the members of a distinct local community have co-equal use right.[83] Alongside the right, resides the obligation to properly and efficiently manage the resource. Grasslands, village ponds, sacred groves etc., are some of the examples of common property resources. As to common property resources, the right to environment is that right of a community of people "of co-equal use right and a shared responsibility of managing them." Although, much of the legal basis for this right exists in customary law, some of the rules and regulations in relation to urban development - like the Town and Country Planning Acts - provide statutory basis to the right over common property resources in the urban milieu. Lung spaces like Parks and Open-spaces and utilities like vehicle parking spaces in designated areas, compare favourably with the rural common property resources in the sense that they are for common use. While the former have the support of legal regulation, the ones in the rural setting languish and suffer from neglect and encroachments as they lack legal back up.[84]

Amidst the deluge of the legalese of the mainstream notions of the right and the protection accorded to it in the formal environment management systems, lies submerged the perceptions of the marginalised sections of human society, living closest to nature - the rural folk and the indigenous tribal people. This becomes all the more evident as we examine the perceptions of the more influential sections of human society the "conservationists", "nature lovers" and advocates of "globalisation".

"Right of Nature": Right to environment, as articulated through instruments of law and perceived by indigenous communities, invariably project it as an aspect of human rights. Environmentalists object to this anthropocentric approach to the right. The focus on human beings to the exclusion of other living species is unacceptable to them. Even when the enforcement of the right is to protect, conserve and improve the environment, the human rights approach does not find favour with them. Conservation thus achieved they argue, is only a means to serve human ends. This is a myopic vision of the relation between human beings and nature. There is this underlying assumption that man is inherently separate from the rest of nature and that nature is a resource for man's benefit, even though each generation might only be a steward of the resource. Proponents of rights of nature view man as merely a part of nature, not necessarily to be valued more than any other element of the biotic community.[85] This viewpoint redefines responsible human relationships with the rest of nature.[86] Rights of nature, accordingly, is a combination of human right to

environment and human responsibilities for the whole of biophysical world. It is a right of non-human entities that imposes an obligation on human beings to protect, preserve, conserve and improve them. It is an obligation that requires "restoration of previous integrity" of the protected object (like, restocking a river or replanting a tree).[87] It refers to the right of protection of air, soils, waters, essential biological processes, the sustainable productivity of land, preservation of biodiversity, protection against contamination by toxic substances, access to natural resources essential for life and perhaps access to public lands and commons.[88] Although, rights are endowed in plants, animals and the wider ecological processes, conceiving and execution of these rights are to be effected by humans in their favour and at times may even be against himself. This should not pose any legal problem. Law does not require the right-holder to know the right and even the existence of the law. Just as a permanently unconscious person has a claim to legal protection, so does a tree, a wild animal, the river and the like. Of course, human agent is required in every such case to implement the law on behalf of the right holder.[89]

The approach, shifting the focus from human rights to environment to an human obligation to maintain ecological balance and ecological integrity, has a large following and has become very influential in the decision-making processes, all over the world. While the basic premise upon which the view point rests - of making humans more responsible and accountable to the surrounding environment - is very sound and rational, the

extreme form of 'rights of nature advocacy' has become a matter of concern for the protection of the very rights of human beings. The "Animal rights" lovers, the "wildlife" enthusiasts, the proponents of "biotic rights", "the nature" lovers and the like have, in their extreme form, displayed one tendency. The tendency to save the environment at any cost - saving it even from human beings who depend on them to meet their basic needs. This is a dangerous trend. What, perhaps, started as a salutory effort in making human beings realize their responsibilities towards nature and fellow-creatures has, of late, become a kind of a movement - a concerted effort at various levels - to deny, deprive and exclude human beings from access to, use and management of resources. Institutions, organs of State and legal instrumentalities are being influenced towards this end. One illustration would suffice, to drive home the point. With the object of protecting bio-sphere hotspots the Government of India embarked upon an ambitious programme, the "Eco-Development Project".[90] A number of national parks are proposed to be developed to protect, preserve, conserve and 'improve the flora and fauna within the national parks. The Global Environmental Facility, that was created following the conclusion of the Biodiversity Conservation Convention, 1994, and the soft loans from the World Bank, are supporting of the project. Taking umbrage under the provisions of the Wild life (Protection) Act, 1972, the plan has the object of conserving and developing the rich biodiversity in the national parks and Sanctuaries, by displacing the forest-dwelling community. The services of the displaced, who are to be resettled elsewhere, would be utilized in developing the peripheral region to act as a buffer

protecting the life-forms within the nationalparks. The entire approach, both in the plan, policy and the law, is to protect the forests and wild life from people. The conservationist lobby, described above, has been the inspiration for the enacting of the law and implementation of the project. Based on the principle of "insulation and exclusion",[91] the lobby takes a "museum view" of the forests and wild life - an ambience sanitized of the presence of local communities. The rights ethic advanced is the philosophy of "restoration". What is forgotten in such a vigorous campaign is that while an antique or a rare painting is capable of restoration, nature and its denizens and a host of cultural practices forming part of nature are incapable of restoration. They can only be "renewed". An ethics of renewal, the ethic that respects and protects the rights of all those who are an inseparable part of the environment (- that includes local human settlements as well) and makes them responsible managers of that eco-system is what is required for ensuring ecological integrity.[92] This indeed, it is submitted, is the quintessence of right to environment.

The 'right of nature' perception makes one realize that the right to environment is not the exclusive preserve of human kind alone and it has been shared with the rest of the nature as well. It also reminds him that there is an accompanying obligation to fulfil, which alone enables him to enjoy his right to environment.

Sustainable Development Paradigm: A new vista of the understanding of the right to environment becomes visible with

the elucidation of the emerging notion of sustainable development. It not only has created a new human right, but also has made the current generation realize its duties both towards itself and towards the generation to come. It is succinctly put in the Brundtland Commission Report as the right to "equitable use and management of nature's bounty". It implies a concern for "social equity within each generation and between generations."[93] It is a reverbation of Gandhian assertion that "there is enough to meet human needs. But, there is not enough to meet human greed." It is a warning to the way of life adopted in the west - of over consumption. It is a grim reminder to the west that if poverty is an evil, consumerist society and its over consuming way of life is in no way lesser evil. It points to a bleak future, a future without resources, without environment and without life forms on earth, if the current pace of development does not alter drastically.

This interpretation of right to environment can be stated as an attempt in finding the golden mean between the "anthropocentric" and "ecocentric" approaches. Duty to ensure ecological integrity coupled with the right to develop in a "Sustainable eco-friendly" manner is what is contemplated in this analysis of the right. The spirit of such an idea is reflected in the Convention on Conservation of Biodiversity, in which protection and conservation of the diverse varieties of flora and fauna is declared as the "common concern of humankind". It also calls for "sustainable use" of this resource in such a manner as not to lead to its decline in the long run - a use that meets the needs and demands of present and

future generations.[94] The programme of action for the community of nations to operationalise the obligation of conserving biodiversity and promoting sustainable and environmentally sound development is to be found in the Agenda 21 adopted in the Rio summit.[95] The strategies evolved in the document included transfer of environment-friendly technology; poverty alleviation programmes, changing consumption patterns and the like. Necessary legal frame to translate India's international obligations is still at a nascent stage of formulation.

The rainbow of perceptions as to the right to environment highlights the width and sweep of ideas it encompasses. The analysis establishes beyond a shadow of doubt the indivisibility of human rights. It is as much a political and civil right as it is economic, social and cultural right. It reveals that the right is not confined to humans alone but it extends to plants, animals and to the maintenance of "ecological integrity" itself. In such a revelation, the duty and the obligation aspects of human personality are also brought in a sharp focus. Since the right permeates every aspect of human life and is many things more than a human right, the logical expectation is that its manifestation and enforcement should be a foregone conclusion. But, as a matter of fact, it rarely gets recognized let alone enforced. The question then is, what comes in the way of its identification and realization ? The following two sections deal with the obstacles and the existing strategies for overcoming them in making the right to environment an actual, real aspect of human existence.

IV. Obstacles for the Realization of the Right to Environment:

1. Several impediments exist as to deny the fruits of the realization of the right. Perhaps, the foremost among them is the concept itself. The definitional discourse, carried out in the previous chapter, reveals a variety of meanings that makes it very difficult to explain the right in precise terms. Everyone talks about it, at times, bordering on the rhetoric, with very few doing very little to concretise it. That which is not clear, seldom gets enforced. Even when one starts asserting it as a right, a reminder that an obligation accompanies it makes the very same person beat a hasty retreat in demanding the enforcement of the right. When one realizes the temporal element in the right and vigorously attempts to pursue the rights of nature, of plant life and of animals, a few nagging questions confront him: who would perpetually monitor its enforcement ? and how ? begging for an answer. Since, the right is a complex right, a number of rights compete with each other (like, the right to health, the right to livelihood, right of the future generation, and right to ecological integrity etc.) at the same time, demanding enforcement. Preferential enforcement among the rights would then be problematic.

2. Existing laws, Policies and practices in India do not really provide the scope for the protection of the right to environment. The laws are outdated and suffer from a colonial hangover. As, for example, the Land Acquisition Act, 1894 and Indian Forest Act, 1927, enacted during the British regime are still in operation. These two laws were designed to suit the requirements of our former colonial masters. They created a

legal regime that perpetuated the notion of "eminent domain". Land can be acquired, under the garb of promoting "public purpose", without the informed consent of the land holder. Traditional rights of tribal communities over resources do not get recognized either during the process initiating acquisition or at the time of payment of compensation. After the amendment to the Land Acquisition Act in 1984, acquisition of land, through the government, for private purpose is made possible.[96] Consultation and accommodation of affected interests (except by way of monetary compensation) and recognition of different shades of right over land and its resources do not figure in the scheme of things in the law.

The Forest Act, yet another legacy of the British has been of no use in conserving our biodiversity. Two factual statements substantiate this: (i) With the evolution of forest laws in India, the tree cover that constituted forty percent of the total land area by the middle of last century (- around the time legislative enactments began making their appearance), came down to twenty-two percent by the middle of present century, further showing a steep decline to around twelve percent by late eighties.[97] (ii) Assumption of greater control by the State over the forests and its resources has resulted in drastic reduction in the rights of the tribals over them.[98] Inability to protect the ecological integrity and denial and curtailment of the traditional rights (of access to and use of resources) of the people, have been the main features of our resource conservation laws. The implementation of the law aim only the short-term economic gain by over exploitation of the resource-

base - an object that perfectly suited the ends of the British, continues to be vigorously persued in independent India as well.

The pollution control laws, also have very little to show, by way of performance and achievements, in ensuring protection of the right to healthy, clean and pollution-free environment. These laws,[99] have ushered in a 'command and control' regime of pollution-control without a proper infra-structure and trained personnel to enforce them. Scope for political appointees occupying highest positions of power in pollution control boards, with least concern for environmental protection, exists. This is amplified in the recent decision of the Karnataka High Court in the case of **C.Jagannatha Pillai and others v. State of Karnataka.**[100] The procedures prescribed for enforcing the laws to control pollution are quite detailed and technical in nature. Instances abound of the enforcement authorities losing cases, (which they should never have) either because of lack of professionalism in their approach or on account of not strictly adhering to the prescribed procedures. **The Delhi Bottling Case**[101] is a classic one, in which an action brought against an industry polluting the river Yamuna failed as the adverse report on analysis of a sample obtained by the authorities was not admissible in evidence. The reason being, the sample was not taken in accordance with the legal requirements. The failure was inspite of the fact that the industry did not challenge the results of the analysis, the integrity of the sampling method or even the method of analysis.[102] The efforts in setting standards for the quality of environment, by prescribing ambient levels of pollution, leaves a lot to be desired. No doubt, the

State and Central Pollution Control Boards have the power of prescribing more stringent standards than those provided by the Central Government. But, owing to the strong centralising tendency in the exercise of authority inherent in the law, the Central Government will have the final say in this regard. It may relax the standards set by the State and Central Boards, bringing to nought all the good efforts made in controlling pollution at lower levels.[103] Control of Vehicular pollution did not figure in the scheme of the working of pollution control authorities till recently. Standards for emission of smoke, vapour etc., from motor vehicles, got inserted into the Environment Protection Rules, 1986 only in the year 1990. Conduct of nation-wide emission tests for both petrol and diesel engine vehicles started from 1989 in India. But, while the emission tests were confined to finding out carbon emission levels, equally harmful emissions of Nitrogen Peroxide and lead went untested. Following the Supreme Court judgement in **M.C.Mehta v. Union of India**[104] requiring motor engines to be mandatorily fitted with catalytic converters to reduce the level of vehicular pollution the manufacture of such engines got a boost. However, there were few takers for the same as the cost of manufacturing was reported to be quite high. Similarly, the assurance of the Central Government to release lead free petrol in all the cities has remained on paper only. Little allocation of funds and no encouragement for research to find appropriate devices to reduce levels of pollution, have lowered the effectiveness of our laws. Popular participation in resource conservation and to control pollution finds very limited space. The citizens' suit provision in the pollution control laws does

not really inspire confidence either in the system of enforcement or in the facilitation of concerned citizen's contribution to control the menace of pollution. True, the scope for citizen's suit exists in these laws.[105] They enable a concerned citizen to activate the pollution control authorities and have access to courts of law to check the menace of pollution by drawing their attention to the problem. But, a closer examination of the provision would reveal the hurdles the citizen will have to overcome before he gets justice. The law only provides access to information to the citizen. This is only as to the information already available with the authorities. The provision does not compel the authorities to undertake fresh investigations upon receipt of complaint from him. It also does not make it mandatory for the authorities to part with any information. They are empowered to withhold information in "public interest" - a term, no where defined in the pollution control laws. Enough scope exists for the authorities to act arbitrarily. The citizens' access to information is further curtailed by the rule under the law that only the officials of the Boards are empowered to obtain information and take samples from polluting enterprises.[106] So, initiation of the Court process by the citizen can, at times, be only on suspicions, conjectures and without any authentic evidence. Scope also exists for the authorities to instruct the polluter not to pollute during the period of sixty days following the complaint. Following which, the Board can proceed to take samples, get it analysed and report to the Court (when the complaint fructifies into legal action) giving a clean chit to the industry. Curtailment of access to information to

the citizen and not compelling the authorities to act forthwith to contain pollution, as it exists in the law, do not protect this aspect of right to environment.[107]

Right of access to, use, conservation and management of ground water has been dented owing to the silence of the law. India follows the common law approach of "land ownership doctrine" and has given statutory recognition for the same under the Easement law.[108] The owner of the land, under the law, has the right to collect and dispose off all the water on land which does not pass in a defined channel. Enough scope exists for the land owner, under the provision, to over-exploit the resource to the disadvantage of the neighbouring land holder. No ground for action exists for the neighbour for the reduction in the water table within his land. Since, the exploitation is not confined to "safe yield", there is scope for draining the resource itself, as is evidenced in indiscriminate digging of wells and drying up of a number of them. With the result, there is inequitable distribution of the resource and its drying up owing to over exploitation in a number of places. The National Water Policy of 1987, declared that the exploitation of ground water resources to be so regulated as not to exceed the recharging possibilities. Equitable access and distribution formed the underlying principle in the policy document. It also ordained avoidance of over-exploitation of ground water in the ecologically sensitive coastal region. Since water is a subject in the State list,[109] the Ministry of Irrigation at the Centre came up with a Model Ground Water (Control and Regulation) Bill, in the year 1970, for the guidance.

The Bill empowered each State Government to establish a Groundwater Authority, to help and advice it in the declaration of "notified areas" (to regulate extraction and use of ground water) and in according permission for landowners to extract ground water continuously. The discretionary power vested in the Authority was a well guided one. This was followed by a Model Irrigation Bill in 1976 by the Ministry of Irrigation at the Centre. It sought to promote proper irrigation methods. This was not followed by any legislation at State level that insured conservation, judicious use and scientific management of the ground water resource. Excepting Gujarat, no State in India made a legislative effort in restricting the overabstraction of water by imposing licensing requirement in the notified areas. For example, Punjab Tube Wells Act, 1954 provides for construction and maintenance of State tube wells and does not regulate the digging of wells by individuals. In the State of Karnataka, the Mysore Irrigation Act, 1965 provides for State Control over the digging of wells in areas where public irrigation works are carried out. But, the law promotes irrigation rather than conservation and equitable distribution of water resource. In fact, in 1987, at the behest of the Department of Mines and Geology, the Legislative Department came up with a draft bill on the subject. This was followed by a revised draft by the same department in mid-nineties. But the same is yet to see the light of the day. No legislative effort exists in evolving a system that ensures equitable distribution of the resource. No policy statement exists as to integrate and regulate the use of surface and ground water resource, in India, with the result, overabstraction and depletion of the water

resource by a few to the detriment and denial of the right to such a use to a large majority of the people, has become the order of the day.[110]

India has a host of legislations concerning Mines and Minerals. They, invariably, deal with the processes of exploration, extraction, storing and transportation of the minerals. Elaborate provisions exist as to workers' safety and use of protective gadgets in carrying on mining activities. But, the laws do not deal with aspects of environmental protection at all. Nor, are these laws amended, after the passage of the Environment Protection Act, as to incorporate relevant regulations to protect environmental integrity.

Legislative initiatives and administrative actions are far from adequate in protecting the victims of the processes of development that results in violation of their human right to environment like the rights of residence, to livelihood and conservation of their cultural identity. Developmental activities of the State, like power and irrigation projects, have led to massive displacement of people and the tribal people suffering the most.[111] Ironically, no national policy document exists regards rehabilitating the displaced ones. Even the couple of Draft policy documents prepared by the Ministry of Environment and Forests and the National Thermal Power Corporation do not address the problem squarely.[112] It is another story that the Drafts sufraced following the agitation against Sardar Sarovar Dam Construction, across the river Narmada, leading to displacement of a large number of people.

It is no mere coincidence that the World Bank withdraw from funding this project citing absence of clear guidelines for resettlement of the displaced ones, around this time. There is no statutory regulation at the national level, to guide the administration in proper rehabilitation of the displaced. Administrative actions in this regard are guided, in most of the States, by the provisions of Land Acquisition Act, 1894. The Act has no provision for either resettling the displaced or for protecting tribal interests. Instances of thousands of tribal families either disappearing or losing their identity exist following their displacement from those areas where dam construction work was carried across the rivers of Kabini, Taraka and other rivers in Karnataka.[113] Legislative initiatives in Maharastra, Madhya Pradesh and Karnataka,[114] are recent instances of some positive thinking in this regard. But, a closer examination of these laws reveals greater emphasis paid to clearing the hurdles for the successful completion of projects rather than taking care of the interests of the project-affected people.

Shortsighted legislative exercises without a proper policy frame have been the greatest of deterrents for the realization of the right to environment in India. Mere preventive, punitive and adhoc measures, as contemplated in the existing laws, have done very little in protecting the right.

3. The realization of the objects of the law is possible if the enforcement authority has the backing of a number of supportive factors. Better infra-structure, like better roads

and rigourous enforcement of pollution standards (with proper facilities for testing of emissions) and improved engine designs, would go a long way in ensuring control of vehicular pollution. Allocation of funds for improvement of conditions of roads is inadequate and it is common knowledge that road-repair work is undertaken, mainly as a temporary measure, in such areas and localities frequented or visited by top dignitaries, in India. Besides neglect of research to improve matters, little encouragement is given for making use of the existing technology. As stated earlier, the direction to fit engines with catalytic converters and supply petrol of good quality are yet to be implemented with any seriousness. A public sector undertaking in Karnataka (Electromobiles), which was developing the technology in introducing battery-operated two wheelers on the roads, was closed-down for want of encouragement. Pollution standards prescribed for four-wheelers was relaxed just to facilitate the development of Maruthi Udyog in India.[115]

4. The response of the industry in the private sector in this regard is also not encouraging. Infra-structure building is deemed a wasteful expenditure and a State function. Economic considerations influence the attitude of the industry towards measures for protection of environment. Superior technology, although beneficial in the long-run, is sacrificed with the excuse that it is economically unviable for short-term gains. Industry is thriving in India, as it is elsewhere, by producing goods that increase consumer wants, rather than satisfy their needs. Little effort is made to ensure the production processes and the finished products are environment-friendly. A number of

illustrative examples can be cited to demonstrate ingenious arguments advanced by the industry justifying their environmentally harmful activities. Use of the protection of fundamental rights device to deny human right to environment is one such method employed. In **P.C.Cherian v. State of Kerala,**[116] two rubber factories defended pollution caused by them by releasing "carbon black" into the atmosphere that inconvenienced the church and the people in the neighbourhood, with the argument that the closure of the factories would deprive the workers there of their means of livelihood. An attempt to make light of the danger to public health as a result of discharge of untreated effluent onto public roads and drains, by a textile industry, on the ground that its right to trade and the workers' right to livelihood took precedence over the right to a clean environment, in **Abhilash Textile v. Rajkot Municipal Corporation.**[117] However, the courts, in both the cases unequivocally held that the right to a clean and healthy environment took precedence over the other rights.[118] But, the Courts of law have not been very consistent in their approach in this regard. In cases like the **Doon Valley Litigation**[119] and the **Shriram Oleum Gas Leas Cases,**[120] discussed earlier, the highest Court did allow the industrial operations to continue on the bases of balancing ecological considerations with those of economic, trade and employment.

With India jumping on to the bandwagon of economic liberalization in the nineties, private sector has now become a major actor in the economic development of India. One of the significant aspects of this development has been to encourage

the private entrepreneur to invest in core sectors of India's economic development (like energy, transport and communication). Studies are undertaken to find ways and means for reducing the rigour of the law so as to facilitate greater scope for private participation.[121] This trend, to evolve a legal regime that is industry-friendly, it is surmised, may lead to an environment-unfriendly atmosphere.

Trans-national Corporations (TNCs) and their activities in recent times, particularly with reference to third world countries, have been the major obstacles for the actualization of the right to clean, healthy, pollution-free and wholesome environment. The tourism industry, one of the major industries in the world, under the garb of promoting "sustainable tourism", has been able to transform landscapes of many a bio-diversity rich habitats into centres of recreation and entertainment to the novue riche, besides denying access to resources to local communities in the area.[122] More sinister is the consequence of the activities of certain TNCs who are engaged in transfer of hazardous substances and technology to third world countries.[123] Absence of safe and foolproof methods of disposal and inadequate risk management point towards long-time local environmental degradation. Massive production of consumer goods that are not bio-degradable and indulging in an aggressive compaign aimed at converting millions of people to a way of life that does not respect, let alone protect, ecological integrity is the principal feature of the operations of TNCs.

5. **Lack of access to information:** Zealous guarding of a right is possible when there is an unambiguous understanding and uncensored information available about matters relating to that right. Availablity of Environmental information is in short supply, especially in developing economies. Veil of secrecy shrouding bureaucratic operations, deny access to information as to several environmental issues. In India, citizen's right to information can be withheld in "public interest". It is an irony that most of public interest litigations, concerning a number of environmental issues, depend heavily upon official sources for disclosure of vital information. When the administration refuses to part with information, for any reason, many an nvironmental action fail at the alter of justice. In what is popularly known as the **Environment Education Case**[124] the highest court in India imposed an obligation on the government, its agencies controlling audio-visual channels of communication and educational institutions to impart environmental education. This was to spread environmental literacy. But very limited obligation exists for the administration to share information with the public as to facts at its command. The official secrets Act, "public interest" and a few other devices come in very handy for the enforcement authorities to find excuses in denying information, even on matters that are of no great significance. Public information and consultation of affected interests at every stage of execution of a project, as is mandatorily required under the English law,[125] does not exist under Indian law. This has enabled the administration to throw the veil of secrecy on every

information of public concern. This acts as the stumbling block for access to justice.

6. Rapid urbanization without proper development of the required infrastructure, is another hurdle for the right to environment, especially for the poorer sections of society. Pressure on space, greater demand for resource consumption and improper planning at the urban centres have, besides draining the limited resources there, put pressure on the resource-base of the country-side as well. Increasing pollution and creation of slums are the direct result of short-sighted planning without making adequate provisions for civic amenities.

7. While overpopulation has been the bane of the developing world, the developed nations suffer from the environmental problems created by overconsumption. Poverty and exhaustion of resources have adversely affected the eco-systems the world over. The cumulative consequence of such a state of affairs is the creation of an ambience that nither respects ecological integrity nor protects anyone's right to environment.

8. Ignoring the role of local self-government in the management of resources has had its adverse impact on the environment. The process of democratic decentralization got a fillip in India with the 73rd and 74th amendments to the Constitution Elections were held and local self-governing bodies were installed to administer villages and districts. The expectation was that these representative institutions would become principal actors in the decision-making processes on

matters of development. But, the fact remains that these bodies are not consulted and their opinions not heard on a number of issues concerning management of their resources. The cogentrix case is a classic illustration of this. When the decision was taken to establish a thermal power project in the ecologically sensitive Dakshina Kannada region in Karnataka State by inviting a foreign company, neither the local body or the people who would be adversely affected were consulted, nor their opinion solicited at any stage. Realizing the adverse ecological impact of the project, when the local panchayats recommended for not going ahead with the proposed developmental activity, the suggestion was cold-shouldered. Clearances from various environmental authorities for the project were obtained by the State, despite local opposition and adverse report by research bodies. The project was cleared, even overlooking the reservations expressed by one of the administrative authorities. The case decided by the Karnataka High Court dismissed all the charges levelled by environmental groups and paved the way for the setting up of 1000mw power plant. In doing so, the court observed, "The concept of environmentalism may have an impact on development policy, but once the policy is spelt out either by the legislature or by authorities constituted under law and these fit into the framework of law, we do not think the Courts can intercede to state what the policy should be and such matters should well neigh be left to experts with the knowledge, information and wisdom to deal with the same." The court, however, cautioned the Ministry to take note of the reports of expert bodies.[126]

Centralizing tendency and the strong unitary feature of the Constitution, despite the trend towards decentralization, have resulted in giving lesser importance than is due to the local bodies and their views. Ignoring the stance of local communities and local bodies (who have intimate knowledge of the environment in which they live) by the decision-makers, any effort in resource conservation and its renewal would suffer greatly. A space has been created under the constitutional scheme for a significant role to be assigned to the local bodies, to assist the State in managing the resources. The Central and the State Governments are yet to appreciate the value of this trend in the evolution of constitutional governance. With the result, local environment suffers from lack of care and peoples' right over them gets ignored.

9. **Traditional Practices and Customs neglected:** At the root of environmental degradation lies the lack of appreciation for and neglect of indigenous methods of conservation and renewal of the resource. Age-old religious and cultural practices of sanctifying plant and animal life with divinity has given way to the practice of viewing them as objects of commercial exploitation. Religious and cultural notions as to living organisms had the salutory effect of conserving a variety of species. Changed life-styles have to a large extent altered these notions. Liberalization and market-orientation approaches have to a large extent contributed to the erosion of the environmental values nurtured since time immemorial. Use-right and community-right notions have been overtaken by the recognition of individual ownership-right notion in the legal

ordering. This has contributed to the decline of common property resources. A resource-base, that ensured maintenance of ecological balance besides providing economic spine to the rural poor, is now hurtling towards extinction.

This is very much related to the developments occurring at the international level regarding intellectual property law. Emerging law concerning Trade Related Intellectual Property Rights (TRIPs) has no place for either respecting or recognizing knowledge systems developed indigenously.[127] A system that believed is sharing in and enjoying the fruits of traditional wisdom communally has given way to a system that believes in appropriation and ownership of benefits of such knowledge exclusively in the hands of only a few. The worst sufferers are the tribal societies that believe in and practice the traditional knowledge systems that helped conserve biodiversity and maintain the ecological integrity.

10. **Environmental Lawyering** that requires development of different skills, strategies and tools to obtain environmental justice has not evolved at the desired pace. There is need to develop alternative lawyering skills alongside the existing formal conflict-resolution mechanisms. Environmental information gathering process being a highly specialized and inter-disciplinary one, is neglected. Strengthening this aspect in the making of law (to create appropriate institutions) and in its enforcement is vital for securing environmental rights. True, reliefs for violations of right to environment, in a limited way, can be obtained by invoking the provisions of

specialized legislations (- pollution control laws, for example). But it is a fact that the tendency of the affected is either to follow the procedures under common law or constitutional litigation than the ones provided by these laws. Inadequacy of processes and procedures in the existing legal regime can be cited as among the reasons for seeking environmental justice.

Lack of political will has been at the root of all these failings and has remained the major obstacle for the realization of the right.

V. Existing Strategies for the realization of the Right:

Abstract nature of the right and its imprecise definition has been taken advantage of in placing a number of hurdles, as discussed, in the path for the realization of the right to protection of the environment. However, certain developments - both at the national and international levels - give some hope for clearing the hurdles. The developments and the strategies emerging therefrom are either ingenious innovations of existing tools of enforcement or novel devices specifically designed to defind this right. One of the gains of the argument that the right to environment as a human right is, the employment of the tools of enforcement as a human right is, the employment of the tools of enforcement of human rights in the protection of environment. The other view that the right concerns protection of flora and fauna and the ecological integrity has also helped in raising the levels of consciousness in the protection of certain aspects of environment. In all these developments one can discern the promotion of the right either as a procedural right or as a substantive one. A brief description of such developments, at this juncture, appears appropriate.

1. International Recognition and Tools of Enforcement:

Between the Stockholm Conference of 1972 and the Rio Summit of 1992, the international community of nations was engaged in efforts to provide the theoretical basis from which legal regulations to protect environment could emerge. The Brundtland Commission in its report entitled "Our Common Future" provided such a base.[128] It adopted a catalogue of "proposed legal principles for the protection of the environment and sustainable

development". The substantive right recognized was the "fundamental human right to an environment adequate for health and well-being.[129] The procedural aspect of the right concerned "right to information, equal access to administrative and judicial bodies and guarantees of due process."[130] The U.N. Conference on Environment and Development of June 1992 (popularly known as the Rio Summit) and its five key documents provided the policy and legal frame and the tools of implementation of a host of rights protecting environment. The **Rio Declaration on Environment and Development**[131] is a set of twenty-seven guiding principles for environmental management. The **Statement on Forests,**[132] although not a legally binding document, is a policy pronouncement exhorting participating States to recognize the rights of the indigenous peoples, to respect their cultural identity and collaborate with them in the development of domestic forest policy.[133] It requires governments to promote and provide opportunities for the participation of interested parties, in the development, implementation and planning of national forest policies.[134] The treaty on climate change,[135] ratified by an overwhelming majority of States in the world imposes a legal obligation on them to phase out green house gases (Carbon Dioxide, Chlorafluro Castons, Methane and Halons) within a time-frame of less than two decades and provide pollution-free atmosphere so that the people of the world would escape the adverse impact of global warming and ozone-depletion. The Convention on Biological Diversity,[136] ratified by over one hundred countries, requires member-states to design laws that ensure conservation of biolgical diversity in the world. Two methods of conservation -

to protect biotic rights - are envisaged in the Convention. Conservation in their natural habitat (in Situ Conservation)[137] and conservation under laboratory conditions (ex Situ Conservation)[138] with the involvement of local communities by the State in planning and execution are the strategies proposed under the Convention. Agenda 21[139] comes up with a detailed workplan for the twentyfirst century to operationalise the policies, principles and the laws emerging out of the Rio Summit. Obligation is now on State parties to recast their laws, fashion institutions and instrumentalities to actualize the commitments made by them.

Mention must be made here of the efforts of the International Union for Conservation of Nature (IUCN/World Conservation Union) in evolving a global environmental legal regime. After elaborate and painstaking combined efforts of leading experts from all regions of the globe under the aegies of IUCN a Draft International Convention on Environment and Development was formulated in March 1995.[140] It is an effort in providing the legal frame to support the integration of various aspects of environment and development and a major step in transforming recommendatory "soft" legal principles into "hard" binding rules of international law. The Covenant has the aim of environmental conservation and sustainable development by establishing integrated rights and obligations.[141] To achieve this end, the parties are obligated to respect every life form,[142] avoid wasteful use of natural resources,[143] conserve natural resources[144] and protect ecological integrity by developing action plans.[145] Elaborate provisions are made to

impose liabilities for violation of provisions.[146] The parties are not to claim sovereign immunity in respect of proceedings instituted under this Covenant.[147] They are obliged to report measures taken by them in implementing their obligations to the Secretary-General of United Nations and the Economic and Social Council to consider the reports and recommend future courses of actions.[148] The parties are to adopt peaceful modes of dispute settlement (like, negotiation, conciliation, arbitration and judicial settlement) on all environmental matters.[149] Institutional mechanism of United Nations would help in administering and enforcing the Covenant.[150] One significant feature of the Draft Covenant is the cataloguing of the right to environment of person. It obligates the parties to endeavour realization of every person's right to an environment and a level of development adequate for his health, well-being and dignity. It confers the right to everyone, without the requirement of proving an interest, to seek, receive and disseminate information on activities or measures adversely affecting the environment and the right to participate in relevant decision-making processes. Right to effective access to judicial and administrative proceedings in enforcing their rights is assured. Fulfilment of the basic need of the people to potable water is one of the obligations of the parties to Covenant. The parties are also required to evolve mechanism facilitating the involvement of indigenous peoples and local communities in environmental decision-making at all levels and to take measures to enable them to pursue sustainable traditional practices.[151] While the Draft Covenant at the outset appears too ambitious an instrument having set an

unrealistic goal to achieve, very cogent arguments are advanced to demonstrate their bases under international law and in the practice of States, in the commentary to the Draft Covenant.[152] All the same, achieving consensus among nations in implementing the provisions of this document is doubtful. Reposing complete trust in the institutions of United Nations in giving effect to and overseeing enforcement of the provisions appears a little unnerving as, these institutions have, in recent times, done little in inspiring confidence as impartial bodies. But, as a strategy, this move deserves to be welcomed since it puts pressure on states to give better account of themselves on this front.

At the regional level, the strategies employed in Europe in enforcing the right appear to be quite effective. The Council of Europe recognized as early as in 1990 protection of environment and natural resources helped securing economic, social and cultural rights. In that year, its Parliamentary Assembly adopted, as its environment policy, that only by protection and conservation of natural habitats survival of human beings and other living creatures could be ensured.[153] In the working of the European Convention for the protection of Human Rights (1950) Environmental Protection has been indirectly achieved by promoting and securing a human right under it. The case of **Arroundelle v. United Kingdom**[154] demonstrates this aspect. In that, the applicant, whose house was situated between an airport runway and a motor way, sufferred because of the noise pollution she experienced all the while. Although, the public authorities did not cause the pollution, they facilitated

such a nuisance by managing and maintaining the airport and the motorway. This was taken note of by the European Commission and made the government enter into a settlement, for its failure in protecting private life and the right to property. The 1988 Decision-Recommendation adopted by the Council of OECD concerned provision of information to the public and public participation in decision-making processes related to the prevention of, and response to accidents involving hazardous substances. A number of legal instruments in Europe[155] refer to the entitlement of every individual to information and consultation on plans, decisions and activities likely to affect both the environment and health and a right to participate in the decision-making processes. The Oslo draft of the ECE Charter on environmental rights and obligations provides for legal protection and compensation for damages and the right to restoration or reinstatement of the environment.[156]

The Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights,[157] refers to two aspects of right to environment: (i) Right to health to everyone as to include the enjoyment of the highest level of physical, mental and social well-being[158] and (ii) Right to live in a healthy environment and to have access to basic public services.[159] It is not possible to petition the Inter-American Commission or Court of Human Rights to enforce these rights. All the same, the rights are protected through periodic reports by States parties on measures adopted in securing them. The Inter-American Commission may make appropriate observations and recommendations regarding their

implementation. It may also include them in its annual report to the General Assembly.

By and large the regional strategies (in the European and American contexts) in the realization of the right to environment appear to follow the path adopted for ESC rights, Governments are encouraged to progressively work towards recognition of a real individual right to a healthy and protected environment as a corollary to the already recognized right to health.[160]

One of the significant developments in recent times has been the increasing concerns shown by multilateral lending institutions, towards protection of human rights and the environment. The World Bank, for instance, in providing economic support for development programmes, has been using its financial clout to make beneficiary countries review and refashion their policies and laws. With its emphasis on development with a "human face", the World Bank has been in a way responsible for the Indian government to come up with draft policy documents on Resettlement and Rehabilitation of project-affected people. The Morse Committee Report,[161] commissioned by the Bank, that reviewed the Sardar Sarovar Project, exposed the inadequacies in the system that did not carryout a proper, scientific cost-benefit analysis before launching a mega project. The Eco-development project of the Bank, aimed at conserving bio-diversity in the National Parks in India (referred to earlier), is currently engaging the attention of all the concerned. The plan is being made use of in

highlighting the flaws in the existing laws on Forest Conservation and Wildlife Protection.[162] The emerging opinion, in many quarters, is that these laws need have to be recast as to accommodate peoples' interests in biodiversity conservation, renewal and sustainable use.

A major problem one has in appreciating the concerns shown by World Bank in protecting the environment and promoting human rights in its developmental activities is, its inability to integrate environmental planning with economic planning and the inaccessibility of these documents to the public.[163] Further, the multilateral lending institutions, including the World Bank, are not autonomous. Developed nations, who have very big financial stakes in these institutions, retain significant leverage over the policies and direct their operations.[164] With the result, economic considerations prevail over protection of environment and human rights in the developmental projects undertaken by them in the developing countries.

On an examination of national strategies in enforcing the right to environment, one can discern two streams of development: while the emphasis is greatly on pollution-control measures besides resource conservation in European countries and the United States, countries like Australia and Canada lay stress on accommodating the rights of local communities over natural resources.

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site a hazardous waste incinerator was turned down by a California Superior Court Judge. This was despite public hearings and preparation of environment impact reports by the authorities.[170] The grounds for such a rejection were that the said report was inadequate and the local residents were not involved in the decision-making process as the entire exercise was not carried out in local language. While Spanish was the language spoken by the overwhelming majority of people, the public enquiry was conducted in English.

In the United Kingdom the law appears to have both preventive and punitive elements in the enforcement of environmental rights. Two principles dominate environmental decision-making there.[171] The 'precautionary principle', requires a cautious progression of an activity until it is proven 'innocent'. Apprehension of significant risks of damage to environment would prompt the government to take precautionary measures to limit the use of potentially dangerous pollutants. The 'polluter pays' principle evolved by the Organization for Economic Co-operation and Development (OECD) in 1972, is adopted in the Environment Act, 1995 in UK. The principle requires the producer of processes threatening or causing environmental damage to bear the costs of necessary environmental measures.

The concept of Best Practicable Environmental Option (BPEO), developed by the Royal Commission on Environmental Pollution, is insisted to be adopted as a measure to control environmental pollution.[172] It is the option that provides the best benefit or least damage to the environment as a whole, at

acceptable cost, in the long term as well as in the short-term.[173] As a strategy, that combines legal and economic thinking, the concept deserves a wider application in planning laws.

No single statutory basis exists in U.K. for citizen's right to environmental information. However, the requirement to maintain records of activities in public registers under various environment-related laws, give scope for public access to information. Request for information may be refused on the grounds of maintaining commercial confidentiality, unreasonableness and in national interest. The British penchant for secrecy would, however, make it very difficult for one to access relevant information. Refusal of requests for information are made under one technicality or the other and no appeal mechanism is evolved to deal with a refusal.[174]

The accent, in recent times, appears to be more on voluntary self-regulation. The regulators argue that such a 'clean' approach to industrial operations makes a lot of economic sense. Two such measures have been gaining increasing acceptance in th working of industries there: The Environment Management System Standard (referred to as BS 7750), introduced in 1992, facilitates the businessman to create a structure for measuring, managing and improving environmental performance. Environment-friendly policy formulation, training of the personal, public information and audits of performance, form important limbs of this exercise. Secondly, the Eco-management and Audit Scheme (EMAS), is a voluntary market initiative to

encourage continual improved environmental performance by businesses, with particular reference to production processes. Besides the components similar to the first one, the procedures here include submission to external verification and registration by the Department of Environment. EMAS launched on 10 April 1995, has had the beneficial effect on the participating businesses with the promotion of corporate reputation, enhanced customer relations and improved profitability. The idea, appears to impress the corporate world that a positive approach to environmental issues and pressures, really pays.[175]

The Canadian approach has a lot to do with access to and management of natural resources. As discussed earlier, in the **Lovelace Case,**[176] the Canadian law recognized and enforced the right of a Canadian tribal woman (who married outside the tribe and divorced) to exercise her traditional rights over tribal lands. To facilitate this, the Canadian legislature went even to the extent of modifying tribal laws. There are proposals that seek changes in the social and legal structures to facilitate environmental protection through greater participation of indigenous communities in the conservation efforts. Limiting state sovereignty over local resources; conferment of powers of enforcement in protecting the environment to indigenous peoples and their participation in environmental decision-making processes at all levels, are some of the proposals actively being considered in the Canadian context.[177]

The Australian law, especially the activist judiciary, through the strategy of protecting native titles over resources, has richly contributed to the jurisprudence of right to environment. In the **Mabo Case**[178] the Australian High Court, under the guise of restating the common law, recognized the rights of Australian Aborigines and Torres Strait Islanders to their traditional lands. It held, through a majority, that the common law of Australia recognized a form of native title which reflected the traditional entitlement of the indigenous inhabitants to their lands, provided that the title had not already been extinguished and the traditional connection with the land still maintained. In the recently decided **wiks' Case**[179] the Court held that the grant of pastoral leases under a statute did not extinguish native title over land resources. The right conferred under a statute ought to be worked in harmony with a pre-existing traditional rights over the same property. In the event of an irreconcilable conflict, the statutory right prevails over traditional aboriginal right. These pronouncements of the Australian High Court have evoked two opposing views in juristic circles.[180] While, on the one hand, they are viewed as new inventions contrary to the existing law,[181] the other view strongly contends that they are not more than restatement and continuation of the common law traditions.[182] The decisions are of seminal significance, as the rights of the traditional communities over resources get accommodated in the mainstream legal discourse on right to environment, through judicial intervention.

3. Position in India:

Strategies employed for enforcement of environmental rights in India rquire a detailed analysis. Vindication of the right has, to a large extent, been achieved through judicial process. This is very significant, as one learns from the experiences elsewhere. The legal system may guarantee a constitutional right to environment and statutes may accord the citizens a right to participate in environmental protection, but when no tools for their enforcement exist, then they are as good as non-existent. This is the experience in Hungary, Brazil and Ecuador. Indian experience contrasts very significantly from these. In India, environmental rights were seized from below, by activist lawyers prompting the judiciary to find and construct environmental rights from out of the existing legal material.[183]

Unlike in many of the legal systems, the right to environment - either individual or collective - is not clearly articulated in the substantive law in India. The Constitution, speaks in "duty" language, by requiring the state (under Article 48A) and the individual (under Article 51A(g)) to protect the environment, ecology and the forests. Specific legislations relating to pollution-control, and protection of forests and wildlife, also do not refer to any such right. But the Courts of law in India have been trail-blazers, in the sense that they have handed down land-mark decisions aimed at protection of environment and maintenance of ecological integrity without any reference to violation of human rights. Orders for the

preservation of Calcutta's wetlands[184] and for building of sewers in Ahmedabad,[185] are some of the examples of Courts of law rendering environmental justice without requiring proof of violation of human rights. In a way, these decisions project the non-human dimension of right to environment. In the **Chilka Lake Case,**[186] tangential reference to fundamental right to enjoyment of pollution-free environment is more of a strategy employed by the Court to drive home the point of adverse impact of extensive and intensive prawn farming on the environment. Such an exercise to earn "Prawn dollars" at the expense of clean and wholesome environment was declared as bad in law by the Court. The **Environmental Education Case,**[187] has broken a barrier to access to justice like the requirement of violation of a fundamental right to invoke the writ jurisdiction. The directions of the highest court in the case, to the Central and State Governments and the University Grant Commission, to impart environment literacy through audio-visual mediums and by introducing courses on environmental education have, in the last five years, focussed the attention of the people to a number of environmental issues and in the dissemination of knowledge on different aspects of environment.

The credit for the right acquiring some spine should go to courts of law in India. Through a series of pronouncements, as discussed in the Chapter on the content of the right, the courts have made it a part of some of the fundamental rights (especially, the right to life and fundamental freedoms). The salutory effect of such an effort has been to insulate this right, like any other fundamental right, from any legislative or

administrative actions leading to its violation. Constitutional remedies, in the form of writs,[188] which are themselves a fundamental right, are made available for any violation of this right.

Relaxation of procedures to gain access to Courts and obtain environmental justice is another innovative approach adopted by the Courts in India in recent times. The phenoenal rise in public interst litigations (PIL) on various environmental issues has, virtually thrown open the gates of access to justice. The higher judiciary has facilitated this by relaxing a number of procedures.[189] Allowing representative or public interest actions by third parties; conversion of ordinary letters and telegrams into writ petitions (- by exercising their epistolery jurisdiction);[190] issuance of directions to administration, monitoring enforcement and retention of jurisdiction long after passing orders and making orders for equitable remedies even where there was no clear proof of existence of corresponding rights, are some of the initiatives of the higher judiciary, in making public interest litigation a potent weapon for the protection and promotion of fundamental rights. The same strategy has also been applied in protections of right to environment as well.[191] Removal of a number of hurdles like, the ~~absence of~~ requirement that aggrieved alone can sue and low cost of litigation has made public interest litigation a very important tool in the hands of an environmental activist. The Courts have even gone to the extent of issuing directions to administration as to the method and manner in which displaced persons are to be rehabilitated;[192]

Constitution of an expert Committee to examine the adverse impact of mining operations in the Doon Valley[193] and the procedure that are required to be followed by the government in either altering the boundaries of a sanctuary[194] or dereserving a reserved forest.[195] At times, the Supreme Court has even issued directions to State Governments and district administration to ensure the lives of environmental activists are not endangered in their struggle for protection of flora and fauna.[196] The tool is also being used by the Court to put in proper perspective the national policy of liberalization. In the **Ganesh Wood Products Case,**[197] the government approving the establishment of an indutry with in the forest area was opposed on the ground that it would lead to indiscriminate felling of trees and affect the environment. The High Court required the government to take into consideration forest conservation while clearing proposals for siting industries within the forest area. It further held, "the policy of liberalization should be understood in the light of national forest policy of the government, as well as the various enactments." In another case **(Indian Council for Enviro-Legal Action v. Union of India),**[198] the farmers had not been adequately compensated for the losses suffered by them on account of the pollution of the sub-soil and water as a result of discharge of effluents from the neighbouring private industries. The Supreme Court required the State Government to ensure recovery of copensation amount and payment made to the aggrieved. The District Judge was asked to obtain a report ascertaining the number of farmers to be compensated and the quantum of compensation payable to them.

The government was also asked to place a progress report, in this regard, before the apex court.

The litigants, mostly public spirited citizens, often times find it very difficult to obtain authentic information and get involved in constitutional litigation based on conjectures, apprehensions and suspicions. Difficulty of getting to the root of facts stem from the operation of a number of factors: official secrecy, bureaucratic indifference, commercial confidentiality and so on. To overcome this difficulty and to ascertain facts so as to render justice, a number of techniques have been employed by the Courts. The judicial innovations, in public interest litigations, include - requiring public officials to furnish details and submit comprehensive affidavits; receiving expert testimony in cases of complex nature and appointing fact-finding bodies. Monitoring committees are also appointed to ensure continuous supervision of compliance of judicial pronouncements by public authorities and private bodies. In **L.K.Koolwal v. State of Rajasthan,**[199] for instance, the Rajasthan High Court appointed a Commissioner to report on the insanitary conditions in different parts of Jaipur City to help it to decide on acute sanitation problem there. In **Shriram Gas Leakage Case,**[200] the Nilay Choudhary Committee was requested to advise on the consequences of recommencement of operations of a hazardous chemical plants and suggest measures to reduce environmental damage likely to be caused by it. In the **Limestone Quarrying Case,**[201] an expert Committee was not only appointed to assess the environmental impact of quarrying activities in the Doon Valley but was also

enlisted to supervise the enforcement of Court orders in relation to afforestation measures and rehabilitation of mine owners.

Realizing the special character of environmental litigation, the Supreme Court and several High Courts have reserved one day in the week to deal with such cases by constituting the "Environment Bench" in the higher judiciary.

Attraction of public interest litigation as a strategy for the enforcement of human right to environment should, however, not divert one's attention from some of the limitations of the tool in securing environmental justice. These may be summarized as below:

i. Recourse to public interest litigation and seeking remedy by invoking the writ jurisdiction of the higher judiciary is a natural consequence of human rights approach to environmental protection. This leads to procedural difficulties. Human Rights remedies are fashioned essentially for use against state and its agencies. Employment of these remedies to hold private entities liable have been on rarest of rare occasions, rather than as a rule. For every **Asbestos industry judgment,**[202] that brought private enterprise within the purview of the writ jurisdiction under Article 32, there are scores of decisions of **M/s.Jothi and Com.**[203] variety that would exclude them from being held liable for violation of fundamental rights.

ii. The enticement of public interest litigation has, in recent times, made activist lawyers take to it ~~is~~ in total ignorance to and neglect of other legal avenues for securing justice. Basically, the judicial process involving writ remedy does not encourage elaborate adducing of evidence to ascertain facts. Private law concepts (as obtaining under tort law), have step-by-step approach, involving detailed deliberation leading to dispensation of justice. Well, the procedures are a little cumbersome and time-consuming ones. But, in ones' enthusiasm in saving time and in short-circuiting procedural requirements, if higher judiciary is directly approached through this means, unintended tragic consequences cannot be ruled out. Since, there is no scope for an appeal and a review of the decision of the Court ruled out, the outcome of public interest litigation has a ring of finality to it. Remedies obtained under private law, ~~under~~ ~~statutes~~ and through the procedures prescribed ~~under the~~ Code of Civil Procedure stand at a distinct ~~advantage, as~~ they are appealable and subject to scrutiny by ~~the~~ ~~higher~~ judiciary.

iii. Judicial ~~orders~~, obtained through this strategy, apply only retrospectively to rights already violated. Yes, prerogative writs may abate violations in progress. But, they are available only upon existence of evidence of violation having already taken place. So, limited scope exists for issuance of orders to prevent fresh violations.[204]

iv. Environmental justice, through PIL, is dependent on the temperment of the judge, his concern for environmental

protection and judicious exercise of his wide discretionary power. As a result, a lot of uncertainty prevails as to the possible judicial approaches to environmental problems and the likely outcome of the endeavour.

v. At times, PIL, has led to the judiciary stepping into the shoes of administration. This attitude of stepping into an administrative vacuum and law-making, has made the other two wings of the government - the legislature and executive - being viewed in poor light. Juristic opinion has cautioned this as a dangerous and undesirable trend.[205] This has also led to a lot of tension among them, in working the system.

A significant legislative development has occurred this year, concerning this. The Parliament passed the National Environment Appellate Authority Bill, 1997, recently. After getting the required presidential assent the law is expected to easen the burden of higher judiciary and help in effective and expeditious disposal of appeals. The Bill entitles a person or an association of persons likely to be directly affected by the grant of environmental clearance or any person who owns or has control over a project for which an application has been submitted for environmental clearance, to approach the quasi-judicial body.[206] The Authority comprises of either a retired Judge of the Supreme Court or the retired Chief Justice of a High Court (as the Chairperson), a Secretary to the government (as the Vice-Chairperson) and three other members having professional knowledge or practical expertise in areas

pertaining to conservation, environmental management, law or planning and development.[207] Despite reservations expressed at various quarters[208] about the efficacy of this strategy of reducing docket exploision in the Courts of law, the approach is bound to make the justice delivery system more focussed towards finding solutions to environmental issues, in a more professional way.

In the constitutional scheme, the seventy-third and seventy-fourth amendments have ushered in the democratic decentralization of the decision-making process to village, Taluk and District Panchayats level on a number of environmental issues. Although, there has been general reluctance on the part of the State Governments to transfer power to local self-governing bodies, the expectation, in the long run, is that the latter would have a major say in policy-makings and policy-implementation at the grass-root level.

The poor and the marginalized sections of society are the worst victims of any developmental activity adversely affecting the environment. Incapacity to pay the fee of the legal practitioner and the court fee invariably comes in the way of securing environmental justice through the formal justice delivery system. This hurdle of the availability of "justice at an unaffordable price" for the weaker sections of the society, was overcome through the 42nd Amendment to the Constitution in 1976.[209] Described as the "Constitutional Cornucopia of judicare",[210] it is a constitutional directive to the State to make available legal aid to the poor, needy and indigent. This is to

ensure their access to justice not to be ridden with economic and other disabilities. As a follow up, the government of India enbacted the Legal Services Authorities Act in 1987[211] to constitute the necessary institutional machinery required to provide free and competent legal services to the weaker sections of the society. The authorities constituted both at the Central and State levels channelise the process of legal service delivery. One of the provisions concern setting up of legal service clinics in Universities and colleges to render legal aid to the impoverished and the needy and to spread legal literacy among the masses.[212] This could be perceived as an opportunity provided under law for Universities and law colleges in India to work out appropriate tools, techniques and strategies, in association with the organized Bar, Bench and activist groups, for securing environmental justice besides spreading environmental education.

The Right to Information Bill, drawn up by the Press Council of India under the Chairmanship of former Supreme Court Judge P.B.Sawant,[213] is another development that promises realization of an important aspect of the right to environment (- the right to environmental information -), if and when it blossoms into a legislation. The Bill declares that every citizen shall have the right to information from public authority.[214] Any information, which is not denied by a public authority to a State legislature or Parliament shall not be denied to a citizen.[215] And, the right is the right of access to information that includes inspection, taking notes and extracts and obtaining certified copies of documents or records

of any public authority.[216] The authority to whom the application is made is required to pass on the desired information within thirty days time.[217] The 'public authority' in question is defined in broadest possible terms as to include government, parliament, legislatures, local authorities, a company, a trust, a firm, a society or any other organization whose activities affect public interest. Penalties are imposed for failure or refusing to give information or for giving false information.[218] The authority involved in justice-delivery is excluded from the purview of "public authority". The intended piece of legislation might ultimately provide the tool that helps to substantiate the assertions of a public-spirited citizen in a citizens' suit under pollution-control laws.

A recent effort of the Indian Law Institute in "Integrating Major Central Acts on Environment[219] merits attention. The draft legislation makes one to look up in anticipation to a codifying and consolidating law-making that addresses several problems unresolved by the existing set of pollution-control laws. But what one comes across is an effort that finds no place for citizens' suit; that promotes greater centralization of powers in deciding on setting of effluent standards,[220] absence of clear-cut provisions for carrying out proper emission tests; total lack of an effort in evolving a scheme for underground water management; unsatisfactory set of provisions that do not detail the extent of obligation of the one responsible for the release of hazardous substances and the extent of precaution to be taken in such cases.[221] The legislative effort also fails in its ability to meet the

requirements of ensuring popular participation to facilitate spread of environmental literacy.

The policy pronouncements, legislative efforts, administrative measures and more importantly contributions of the social movements and research groups concerning Bio-diversity consservation, in the last one decade, raise expectations of better protection of the human right of access to and sustainable use of resources. The National Forest Policy Resolution of 1988[222] set the blue-print for future management of forest and its resources. The principles enunciated in the policy document included: Conservation and protection of resources for the benefit of posterity; meeting basic needs of people, especially fulewood, fodder and small timber for the rural and tribal people; maintaining the intrinsic relationship between forests and its inhabitants by protecting the customary rights of the latter; emphasis on enhancing forest through a process of expansion and better management of biosphere reserves and active involvement of people in programmes of protection, conservation and management of forests. Following the policy pronouncement, the Government of India launched the Joint Forest Management Programme (JFM) in 1990.[223] The twin concerns essentially were, to contain the phenomena of deforestation and reduce the pressure on forest resources. The latter, resulting from the continuing dependence of neighbouring village communities on forests to meet their bio-mass requirements. The JFM plrogramme, was thus conceived as a strategy that would help expand the forest cover as to include wastelands as well as meet the basic needs of local communities. The benefit sharing of

such a management effort by the villagers was deemed to be an incentive, in return for their involvement in and contribution towards forest expansion efforts of the government. Successful efforts in West-Bengal was cited as the inspiration for putting it into steam in over a dozen states in India. The programme has drawn flak for a number of reasons;[224] The entire planning (of where to site ? What to grow ? and how to manage ? etc.) is done by the forest department and the village communities are to implement the plan. This is possible only if the latter are in agreement to go along with the given programme of action. The programme is off, if the villagers do not subscribe to the set plan ! The plan is to be implemented in degraded areas and in waste-lands. No scope exists for extending it to the reserve forest area. Further, the villagers are entitled for only a fourth of the benefits resulting from their labour. The forest department along with the government could decide on the mode, method and purpose of utilization of the rest of the produce. The model of participatory management of resources as contemplated under this scheme turns out, in effect, to be yet another governmental effort that fails to carry people along with it in conceiving and implementing a programme in a democratic way. Many a time, it is found that the JFM is floated only because a foreign funding agency has extended financial aid for the same. Thus, in Karnataka JFM is confined to the Western Ghat region, as the Overseas Development Agency, that is funding the programme, wants it to be confined only to that region. Mention must, however be made of the praiseworthy of efforts of the Karnataka Forest Department in association with a few concerned NGOs for having prepared a booklet

containing the guidelines for the Constitution and working of the managing bodies of JFM programme.[225] It is hoped that the effort would reduce bureaucratic high-handedness and arbitrariness.

Closely related to this effort of participatory management of forest resources is the step taken by the Ministry of Environment and Forest to appoint Van Mukhiyas.[226] This decision of the Ministry is prompted by the need to bridge the gap of effective communication of NGOs and the Forest Department with the village communities. It envisages nomination of a Van Mukhiya in consultation with the village panchayat. The person so appointed should have been a member of village protection or development committee and will hold that position for a period of two years, "subject to good performance". His attributes are - the ability to mnotivate people in conservation efforts and experience in forest works. He is the lead functionary in interactions with forest and district authorities. He would be involved in all quarterly consultative meetings at block and panchayat levels along side Gram Pradhans, forest officers, NGOs and Block Development Officers. He has to assist the forest department and associate in all JFM programmes. He is to recommend names of beneficiaries and their shares. He is entitled upto ten per cent of proceeds of harvest and a free pass by rail or road within the district. The procedures adopted in the creation of the position of Van Mukhiya and the status accorded to him in the scheme of things would help the government in successful bureaucratization of local representative bodies. Instead of representing their people,

they would succeed ending up as one more mouth-piece of governmental policies and programmes.

Remarkable legislative efforts within and outside the government are witnessed in relation to biodiversity conservation in the eighties and nineties. Changes are effected in the wildlife law as to emphasise conservation of certain plant varieties along with several animal species,[227] to encourage scientific studies and researches in the forest area for better protection of wild life[228] and to facilitate both **insitu** anmd **exsitu** conservation of biodiversity.[229] But, the law and its working is still a long way away from making local communities partners in wildlife conservation efforts of the state. Tapping of indigenous wisdom and accommodating the interests of the forest dwelling community continues to be not addressed in the law at all.[230]

The 1994 effort of the Ministry of Environment and Forests, producing a draft forest bill (entitled "Conservation of Forests and Natural Ecosystems Act"),[231] ostensibly with the object of restoration, conservation and management of forests and natural ecosystems, triggered unprecedented reactions leading even to the making of alternate bills on the subject by social action groups and the scientific community. The developments deserve some attention for the different models of resource management aimed either at protecting forests for or from people. The official Draft Bill concentrates all the powers of deciding on the use of forest and for non-forest purpose in the Centre to the exlusion of states and local self-government. It invests

the forest officials with enormous discretionary powers in deciding on forest offences. As the bill has very little to do with administrative accountability, scope for arbitrary exercise of power by the authorities cannot be ruled out. Although, elaborate provisions are made in relation to village forests, proprietary rights and ultimate control in their management continue to be vested in the state.[232] What promises to be an effort in encouraging joint forest management, turns out to be subservient assignment undertaken by the village community. Instead of rounding off the rough edges existing in the JFM programme, the Bill effectively kills a nascent effort in the process of democratization of forest management. Enough scope exists for companies and firms to raise plantations and to help them escape from the operation of land ceiling laws.[233] While providing for levy of tax on timber and other forest produce used for commercial purpose and that the revenue so obtained to be utilized for the welfare of forest-dwellers, no details come forth as to how that would be accomplished.[234] As an alternative, "people's Bill on Nature, Health and Education" proposed by P.R.Sheshagiri Rao and Madhav Gadgil[235] comes up with excellent principles for management of the eco-system in an integrated manner. It proposes two basic regimes of management: a supply regime, that satisfies the natural resources demands of the people and the larger economy and a safety regime, that conserves biodiversity. It visualizes people as the managers of resources. It desires that the benefits of management to reach all sectors of village community. To achieve this end, a management structure is proposed, whose functions and powers tend to come in conflict with a number of constitutionally

created institutions. Very little role is assigned to the forest department in the conceiving and execution of the resource management plans. People-centred conservation effort as conceived in the people's Bill requires a series of amendments in the Constitution and a thorough shake-up in the existing administrative structure. The impractical character of the Bill prompted a social scientist to remark that it reads more like a "manifesto" than a legal document.[236] All the same, the significant contribution of the Bill is to have provoked a debate on the usefulness of the existing structures and policies in the conservation efforts, and in exposing the weaknesses in the system of management. The emphasis of the authors on greater local control over resources to meet their basic needs ought to constitute the underlying principle of any conservation effort.

One major development in strengthening the tribal peoples' struggles on issues of natural resources, mega projects, displacement and self-governance is the passage of the panchayats (Extension to the Scheduled Areas) Act of 1996 that obtained the presidential assent on December 24, 1996.[237] The Act, in a way, exerts pressure on states to enact laws as to make the panchayats safeguard and preserve the traditions and customs of the tribal people, their cultural identity, community resources and customary modes of dispute resolution. A responsibility is imposed on the states to ensure that the panchayats, at appropriate levels, exercise their power to prevent alienation of land and take appropriate action to restore any unlawfully alienated land of a scheduled tribe. The

Act, gives legal sanctity to community rights over land and its resources.

The Public Liability Insurance Act, 1991 is yet another positive legislative effort, that seeks to protect the interests of the victim of a hazardous industrial activity. Under the Act, the victim is entitled to be compensated by the industry. The quantum of compensation payable is linked to the size and capital assets of the industry. The Act is still in the early stages of implementation.

A recent notification of the Ministry of Environment and Forests makes public hearing mandatory for all activities covered under the Impact Assessment Notification of 1994.[238] Signs of strengthening the procedural aspect of the right to environment are visible through this measure of the Union Government.

VI. SUGGESTIONS AND CONCLUSIONS:

The endeavour in this position paper has been, to evaluate the current state of Indian and global environment within "rights" discourse. As one begins to establish and appreciate the inextricable interconnectedness between human rights and protection of the environment, realization dawns that the latter is much more than a mere human right. Its Canvass is so vast that it encompasses many an unchartered mysteries of nature, hidden from human perception, in its different hues and colours. Human existence, let alone human rights, is only a stroke from the brush on that huge canvas. But, visualization of protection

of environment as an aspect of human rights and a pursuit in its concretization in terms of entitlements, interests and rights has, it is also realized, the advantage of going a long way in the realization of social, economic and cultural rights.

No doubt, environmental concerns include and transcend human rights concerns. But, there is an increasing tendency to push through the agenda of protection and conservation of the environment and the resources in it to the exclusion of meeting human needs, especially of the disadvantaged sections. Expressions like "common concern of humanity", "sustainable development", "sustainable trade", "sustainable tourism", "Eco-tourism" and "inter-generational equity", used in a number of international instruments and in the working of international institutions, are being interpreted as to deny human access to resources and their sustainable use. The reigning **mantras** of economic liberalisation and globalization of economies as the magic wand of "development", as practiced, appear to promote this idea. Under the circumstances projecting the right to environment as a human right and employment of the tools and strategies of the latter to meet the basic needs and entitlements of the people is perfectly a legitimate exercise.

Saving nature **for and with** human beings should be the environmental ethic that needs to be practiced. Legal institutions, policies and perceptions ought to be focussed in achieving this goal. Viewed thus, the right to environment includes the human right of access to, use and management of resources in a healthy and pollution-free ambience. Underlying

the right, exists an onerous responsibility of judicious, and sustainable use of resources and an obligation towards fellow-creatures, to live in harmony and share the bounty of nature in a just and equitable manner. To achieve this, in the Indian context, the following guiding principles, of ecological management may be worth considering:

(1) **Resource Conservation:** Over consumption, wasteful use, inefficient and unscientific management of resources have been responsible for the existing resource-crunch in India. To stem this rot a number of initiatives need have to be taken at various levels of the working of the State. Ground water management may be taken as an example. While the silence of law in this regard is deafening, very little administrative effort is made in suggesting legislative and other measures for the working of a management regime that conserves and facilitates sustainable use of the resource. Divorcing land rights from right over underground ground water and treating the latter as a national asset to be administered at regional and local levels may be a suggestion worth considering that may help conserve and equitably distribute the water resource in our country. Similarly, effecting changes in the forest and wild life laws as to create a regime that makes the local communities partners in the management may lead to better conservation of natural resources.

2) **Popular Participation and respect for Indigenous Wisdom:** This requires several legislative and administrative measures that include: respect for and utilization of traditional wisdom

and knowledge systems; access to information; involvement in the decision-making processes; partnership in management and wherever possible to facilitate management of resources exclusively by local communities themselves. The JFM programme, for instance, ought to provide for a more real and meaningful partnership between the people and the state administration. Extension of the programme even to reserve forest area is worthy of consideration. Necessary changes need have to be made in the existing law to facilitate this. The Central Government notification of mandatory public hearing before sanctioning of any developmental activity, issued recently, expands the scope for keeping people informed of the nature and impact of the proposed activity. If the notification also provides for accommodating popular sentiments and interests, it can turnout to be truly a democratic process of ensuring popular participation in the decision-making process.

The Right to Information Bill, a contribution of the press, requires to be seriously considered by the Parliament. A statutory enactment to give effect to it would lessen the level of arbitrariness in environmental decision-making efforts of the State. The National Forest Policy Resolution of 1988 that had popular participation as one of its very important limbs needs to be read into the bio-diversity law in the making in India. Nepal, drawing inspiration from Indian Forest Policy resolution, has enacted its forest law. Encouragement to popular participation, both in letter and spirit in managing even protected areas, has been one of the success stories in

Nepal.[239] No reason exists for India in not implementing its own policy resolution.

The Constitution affords sufficient protection to tribal access to resources,[240] protection and conservation of their culture and life styles[241] and even creates space for their community management of resources.[242] Statutory changes and administrative measures are required to bring this into effect.

3. **Strengthening local self-government:** Very little has been accomplished in transferring power to panchayat raj institutions, since the 73rd and 74th amendments to the Constitution. The process of decentralization aimed at empowerment of local self-government and making democratic governance a truly representative one cannot be completed unless governance is taken to the grass-roots. Since local issues are best addressed and solutions found at the local level, the constitutional command for devolution of power requires to be respected by the State Governments by equipping the local administration and representative government with better facilities to fulfil their constitutional obligations. This also helps the local communities to have a greater and effective say in the management of resources. Following the passage of the panchayats (Extension to the Scheduled Areas) Act of 1996, the ball is now in the courts of State Governments to take steps to ensure the rights of the local community over land and its resources are protected.

4. Infra-structure building and Administrative Reforms: Effective enforcement of right to environment depends to a large extent on the existence of proper infra-structure and an administrative authority that discharges its functions in a professional manner. Without doubt, success in controlling vehicular pollution can be assured with better road conditions, use of petrol free from impurities and properly designed engines. Similarly, the administration ought to have the desired competence to discharge their duties of enforcing the laws. Constant updating of knowledge and regular training to the personnel can deliver the goods of a healthy and clean environment. Encouragement and sufficient incentives for the development of R and D needs to be extended to failitate better, scientific and efficient management of resources by the personnel. Administrative procedures need have to be clearly laid down and exercise of discretionary power should be in a guided manner, as to overcome the pitfalls of arbitrariness and bias.

5. Environmental Advocacy: Availability of a number of avenues for seeking redressal and sufficient scope for agitating deprivation of the environmental right before forums that are knowledgeable about environmental issues, can only ensure environmental justice. Constitution of an environmental tribunal and a fact finding body to assist it to ascertain the truth, help in the better protection of the right. The formal justice delivery system existing at present, as served by common law, criminal law, civil procedure and the tool of public interest litigation has its own limitations (as detailed

earlier), in enforcing the right to environment. Hence, the need for a separate body, comparable to the National Human Rights Commission, to deal with environmental issues. A body that combines with it functions of a fact-finding entity; receives and processes expert evidences and findings and equipped with sufficient infra-structure and personnel to adjudicate and enforce its decisions, is the need of the hour. The National Environment Tribunal Act, 1995[243] had a narrow ambit and did not really meet this requirement. The National Environment Appellate Authority Bill, 1997 (cited in Chapter V), appears to be a step in the right direction. More teeth is required to be added to the existing provision under the pollution control laws as to make citizens' suit a real pressure on the administration to enforce the law on polluting industries. This would provide a better avenue of environmental advocacy for the public spirited citizens.

6. **Better town and city-planning**: One of the major causes for environmental degradation is the improper planning and unrestrained growth of our cities and towns. This has resulted in depriving the people of basic amenities like drinking water, proper transportation-system, and other essential services like electricity and health services. The cascading effect of such a phenomena has been increasing pressure on the resources at the country-side. The city of Bangalore is a classic case of a city on the verge of decay. A city, whose demands for water was met by excellently maintained tank-water system, is suffering from acute shortage of water because of conversion of most of the tanks into industrial and residential plots. Expansion of slums (euphemistically referred to as "unintended settlements" by

planners and policy makers) has become the order of the day. Better planning and scrupulous enforcement of town and country-planning laws by the administration is required.

7. **Corporate Environmental Ethic:** Indian industries, by and large, have, hitherto been insensitive to environmental concerns. Economic considerations and profit motive have dominated the corporate concerns. Albeit using public utilities (like rail and road), little contribution has been made by them to properly maintain them. Application of "polluter pays" principle, although effective in controlling the level of pollution to some extent, alone is not sufficient to make them more responsible. Preventive and proactive measures are necessary to reduce the pace of degradation of the environment, caused by them. The industry must realize that it would make perfect business sense for it to adopt environment-friendly technology and contribute to a healthy and clean environment. This can earn them the good-will of the people and greater demand for their products.

8. **Reduction in political interference:** A definitive role played by the elected representativs in the appointments to Pollution-Control Boards and in the dilution of the set standards for effluent discharge has contributed to lax enforcement of the regulations, corruption in the system of administration and flagrant violation of the law with impurity by the polluters. It requires strong political will to resist the temptation to interfere in the day-to-day functions of the administration in the honest discharge of their duties. Accountability of the peoples' representative, not just in the electoral turnstiles, but on a continuous basis for all their

commissions and omissions is required. Ultimate sovereignty of the people would be put to test in securing their right to environment against the backdrop of unscrupulous dealings of the political masters. Right to Information Bill, proposed by the press council, has provisions for making the elected representatives accountable. Will our parliamentarians show enough political spine and will-power to enact the same ?

Spread of popular environmental literacy (- research institutions and Universities have a major role in imparting such an education) and creating better access to environmental justice through the development of alternate dispute resolution mechanisms (- law schools and the organized legal professions have to contribute their mite in developing this strategy) are a few of the suggestions that need to be viewed seriously by all the concerned if the right to environment is to be actualized.

The largest democracy in the world is preparing to celebrate the golden jubilee of its independence. There cannot be a greater tribute to those who earned it for the people of India than ushering an era of a truly representative and democratic management regime to ensure resource conservation and their sustainable use. The discourse on right to environment provides such an opportunity and a challenge for the people of this great nation.

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1. See, Resolutions 32/130 (1977); 39/145 (1984); 41/117 (1986).

2. Richard Falk, Human Rights and State Sovereignty, (1981) p.167.

3. Human Rights Watch and Natural Resources Defence Council, Defending the Earth: Abuses of Human Rights and the Environment, (1992), where case studies of governmental actions abusing human rights have led to environmental problems are documented. In his first presidential election campaign Bill Clinton remarked, "It is no accident that in those countries where the environment has been most devastated human suffering is the most sovere, where there is freedom of expression and economic pursuit, there is also determination to use natural resources more wisely.", quoted in Michael J. Kane, "Promoting Political rights to protect the Environment", **The Yale Journal of International Law**, Vol.18, No.1, Winter 1993, 389 at 390.

4. See, Preamble of Draft Principles on Human Rights and Environment, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Final Report of the Special Rapporteur. UN.Doc.E/CN.4/Sub.2/1994/9 (6 July 1994), 74.

5. Interview with Marie Pragova, Deputy Mayor of Prague, in New York, N.Y. (Sept. 1, 1991), Kerry Kennedy Cuomo, "Keynote Address - Human Rights and the Environment: Common Ground", The Yale Journal of International Law, Vol.18, No.1, Winter 1993, 227, at 228.

6. ibid., p.230.

7. Similar problems are beginning to be experienced over the east coast of India, where aquafarms exist.

8. Supra, n.5, p.231.

9. See, Ramachandra Guha, The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya, (Berkeley, 1989).

10. See, Sadananda Kanavalli, Quest for Justice, SPS (Dharwad, 1993).

11. Michael R. Anderson, "Human Rights Approaches to Environmental Protection: An Overview" in Human Rights Approaches to Environmental Protection, Ed. Alan E. Boyle and Michael R. Anderson, Clarendon Press, Oxford, (1996), p.3.

12. See, "Joint Declaration of Principles" between the two countries signed at Nauru on August 10, 1993, reported in Australian International Law News, (1993), p.189.

13. Cited in Kerry Kennedy Cuomo, Supra, n.4, p.230.

14. ibid.

15. For a detailed analysis see, Holmes Rolston, III, "Rights and Responsibilities on the Home Planet", The Yale Journal of International Law, Vol.18, No.1, Winter 1993, p.251.

16. Alexandre Kiss, "Concept and Possible Implications of the Right to Environment", in Human Rights in the Twenty-first Century: A Global Challenge, Ed., Kathleen E. Mahoney and Paul Mahoney, Martinus Nijhoff Publishers, Dordrecht (1993), 551 at 552-553.

17. ibid.

18. AIR 1982 All. 285.

19. M.C. Mehta v. Union of India, 1987 1 SCC 395 and AIR 1987 SC 1086.

20.

21.

22. M.C.Mehta v. Union of India, (Mehta I-Tanneries) AIR 1988 SC 1037.

23. Consumer Education and Research Centre v. Union of India, AIR 1995 SC 922.

24. Article 30.

25. Article 48A.

26. Article 51A(g).

27. See, A.A. Cancado Trindade, "Environmental Protection and the Absence of Restrictions on Human Rights", in Human Rights in the Twenty-first Century: A Global Challenge, Supra, n.16, p.561, at 562.

28. Preamble to the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.

29. Preamble to 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction.

30. The Preamble to 1977 Convention on the Prohibition of Military or Any other Hostile use of Environmental Modification techniques.

31. The Preambles to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1974 Convention for the Prevention of Marine Pollution from

Land based sources; the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts.

32. For instance, Preamble and Article 2 of the 1985 Vienna Convention for the Protection of the Ozone Layer and the Preamble of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.

33. The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

34. U.N. General Assembly Resolution 43/53 of December 1988, recognized the climate as the Common Concern of Mankind, Supra, n.27, at p.568.

35. The 1994 Biodiversity Conservation Convention.

36. The World Charter of Nature.

37. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the 1961 European Social Charter.

38. See, Maguelonne Dejeant-pons, "The Right to Environment in Regional Human Rights Systems", in Human Rights in the Twenty-first Century: A Global Challenge, **Supra**, n.16, 595 at 600.

39. Ibid., at p.601, Articles 10 and 11 of the Additional Protocol adopted in San Salvador on 17 November, 1988.

40. Article 45, para 1.

41. Article 123.

42. For a detailed reference to right to environment under national Constitutions across the world See, Edith Brown Weiss, In Fairness to Future Generations, 297-327 (1989).

43. See, Michael R. Anderson, Supra, n.10 at 10.

44. Constitution of Portugal.

45. Constitution of Equador.

46. For a more elaborate discussion See, Upendra Shenoy and M.K. Ramesh, "Ecological Crisis", paper presented in

47. See, V.K.Gupta, Kautilyan Jurisprudence, (1987), 155-156, cited in Rosencranz et.al., **Environmental Law and Policy in India**, (1991) at 28-29.

48. See, Upendra Baxi, "Quest for Environmental Justice", X Alig. L.J. (1990) p.(ix).

49. AIR 1985 SC 652, 656.

50. AIR 1987 AP 171, 181.

51. For similar decisions see, Bangalore Medical Trust v. B.S.Muddappa, AIR 1991 SC 1902; **V.Lakshmipathy v. State of Karnataka**, AIR 1992 Kant. 57; **Pratibha Cooperative Housing Society Ltd. v. State of Maharastra**, (1991)3 SCC 341.

52. (1987)2 SCC 295.

53. AIR 1992 Bombay 471.

54. AIR 1991 SC 420, 424.

55. AIR 1990 SC 1480, 717.

56. 1990(1) KLT 580.

57. Supra, n.19.

58. 1991, Forest Law Times, 10.

59. Municipal Council, Ratlam v. Vardhichand, AIR 1980 SC 1622.

60. AIR 1988 Raj. 2, 4.

61. M.C. Mehta v. Union of India, (Mehta I-Tanneries), Supra n.22 and **M.C.Mehta v. Union of India**, (Mehta II-Municipalities) AIR 1988 SC 1115.

62. Art.19(1)(a).

63. Rosencranz et.al., Environmental Law and Policy in India, **Supra**, n.47 at p.140.

64. Bombay High Court A.S. Writ Petition No.2733 of 1986, October 7, 1986, unreported, reproduced in Rosencranz et.al., Environmental Law and Policy in India, ibid., at p.144; In Rosencranz, the Supreme Court order recognizing such a right is reproduced in a different case between the very same parties: **Bombay Environmental Action Group v. Pune Cantonment Board**, S.C., SLP (Civil) No.11291 of 1986, October, 13, 1986, at p.149.

65. ibid., at p.148.

66. Section 49(2) of Water (Prevention and Control of Pollution) Act, 1974 and Section 43(2) of Air (Prevention and Control of Pollution) Act, 1981.

67. See, ILO Convention No.107 of 1957; Colchester Marcus, "The Global Threat to Tribal Peoples: Strategies for Survival", in Global Development and Environment Crisis - Has Humankind a Future, Collection of articles published by Sahabat Alam, Malaysia (1988) 1443.

68. This is according to the principle that there are two ways of being affluent: one is by acquiring and consuming more - the practice of the mainstream - and the other is by requiring less - a lifestyle followed to the hilt by the indigenous communities.

69. U.N.Human Rights Commission, Sub-commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Implementation of United Nations Resolutions, at 11-13, U.N.Doc.E/CN.4/Sub.2/405/Rev.1, U.N. Sales No.E.79.XIV.5 (1980) (Hector Gras Espiell, Special Rapporteur).

70. Preamble to ILO Convention 169,: Convention concerning Indigenous and Tribal peoples in Independent Countries. India is not a party to the Convention.

71. Ibid., Article 13 calls for respecting spiritual value of indigenous peoples' relationship with their land; Discrimination Against Indigenous Populations, U.N. ESCOR, Human Rights Commission, Sub-commission on Prevention of Discrimination and Protection of Minorities, 40th Session, Provisional Agenda Item 12, at 31 U.N.Doc.E/CN.4/Sub.2/1988/25. (Working paper by Erica-Irene A.Daes) cited in Michelle Leighton Schwartz, "International Legal Protection for Victims of Environmental Abuse", **Yale Journal of International Law**, Vol.18, No.1, 1993, 355 at 365.

72. Ibid., Article 15.

73. Article 28, U.N. Doc.E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994.

74. Advisory Opinion in South-West Africa (Namibia) Cases, See, ICJ Reports, 1971.

75. See, ICJ Reports 1975.

76. See, ICJ Reports, 1986.

77. See, ICJ Reports 1995.

78. Communication No.R.6/24/1977, Human Rights Committee, Views of the Committee, July 30, 1981; U.N. Doc.A/96/40, Supp. No.40, Reprinted in 2 Hum. Rts. L.J. 158 (1981).

79. (1992)66 ALJR 408.

80. (1996)141 ALR 129. The author is grateful to his Lordship Justice Michael Kirby to have made available the full text of the decision.

81.

82. Article 19(2).

83. See, N.S.Jodha, "Common Property Resources and Rural Poor in Dry Regions of India," EPW, Vol. XXI, No.27, July 5, 1986, 1169.

84. For jurisprudential basis of the right of over common property resources, see, Chhatrapati Singh, Common Property, Common Poverty; Also see, Whether Common Lands?

Samaja Parivartana Samudaya, Dharwad, 1988, for documents relating to certain developmental activities that have led to the decline of common property resources.

85. John E. Alder, "Legal Values and Environmental Values: Towards a Regulatory Framework", in Nature Conservation and Countryside Law, Ed., Christopher P. Rodgers, University of Wales Press, Cardiff (1996), 9 at p.14.

86. See, James A. Nash, Loving Nature: Ecological Integrity and Christian Responsibility, cited in James A. Nash, "The Case for Biotic Rights", The Yale Journal of International Law (1993), Vol.18, No.1, 235.

87. Supra, n.85 at p.16.

88. Holmes Rolston, III, "Rights and Responsibilities on the Home Planet". The Yale Journal of International Law (1993), Vol.18: 251 at 260; James A. Nash comes up with "A Bill of Biotic Rights" that concentrates on protection of life forms other than human beings, Supra, n.84 at 245.

89. John E. Alder, Supra, n.85 at 16.

90. See, World Bank assisted Eco-development project, India, Documents, March 22, 1996.

91. See, Nalin R. Jena, "National Parks and Sanctuaries v. People's Rights - Some Issues of Concern" in Sustainable Development: Ecological and Socio-cultural Dimensions, 277-278.

92. Shiv Viswanathan, "From Dudhwa, with love", Seminar 426, February 1995, 15 at 18.

93. Agenda 21 was adopted by the United Nations Conference on Environment and Development on 14 June 1992, Document A/Conf.151/26, Vols. I-III.

94. Preamble and Article 2 of Convention on Conservation of Biodiversity, 1992.

95. Agenda 21 was adopted by the United Nations Conference on Environment and Development on 14 June 1992, Document A/Conf.151/26, Vols. I-III.

96. See, Walter Fernandes and Samyadip Chatterji, "A Critique of the Draft National Policy for Rehabilitation of Persons Displaced as a Consequence of Acquisition of Land", Vikalp Vol.III/6, Nov.-Dec. 1994, 17 at 19.

97. See, Walter Fernandes, Philip Viegas and Geetha Menon; Forests, Environment and Tribal Economy, Indian Social Institute, New Delhi (1988) 2-3. This is further substantiated by the Satellite images obtained in 1985.

Adhyadesh, 1985 and The Karnataka Resettlement of Project-Displaced Persons Act, 1987.

115. See, Armin Rosencranz, et.al., Supra, n.47 at 213.

116. 1981, Kerala Law Times, 113.

117. AIR 1988 Guj. 57.

118. In M.C.Mehta v. Union of INdia (Mehta I-Tanneries), Supra n.22, concurring with the opinion of Venkataramiah J., for closure of a number of tanneries for polluting the river Ganga, Kuldip Singh J., remarked "we are conscious that closure of the tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people."

119. Supra, n.49.

120. Supra, n.22.

121. One such initiative is the Project LARGE (Legal Adjustments and Reforms to a Globalizing Economy) undertaken by research institutions at the behest of the central ministry of finance. The idea is to ensure an industry-friendly legal frame.

122. See, Desmond Fernandes,

123. See, Gunther Handl, "Environmental Protection and Development in Third World Countries: Common Destiny-common responsibility", International Law and Politics Vol.20 (1980), 603.

124. **M.C. Mehta v. Union of India,** (1988)1 SCC 471 and AIR 1992 SC 382.

125.

126. See, "HC clears decks for Cogentrix Plant", **Deccan Herald, 30.8.1997, p.1.**

127.

128. World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987), 86, Appendix I.

129. Ibid., Ministerial Declaration, Paragraph 16 , and Action Programme, paragraph 5e.

130. Ibid., principle 6.

131. UNCED, The Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1997).

98. See, letter of Dr.B.D.Sharma, Commissioner for Scheduled Castes and Tribes, to the President of India, DO.No.1/Gen./90-RU-III, dt.28.5.1990.

99.Principally, the Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention & Control of Pollution) Act, 1981, hereinafter referred to as EPA, Water Act and Air Act, respectively.

100. Wrt.Ptn.No.3982/1995, Karnataka H.C. 17.3.1997.

101. AIR 1986 Del. 152.

102. Armin Rosencranz et.al., Supra, n.47 at 157.

103. Sections 3(iii) & (iv), 4, 5 & 6(2)(a)&(b) of EPA read with Rule 3 of Environment (Protection) Rules 1986 and Sections 15(a) & (b), 17(1)(g) and 18 of Water Act and Sections 6, 16(2) and (4) and 17(1)(g), 18, 19 & 21 of Air Act.

104. 1997(4) SCALE (SP) 3-12.

105. Section 19 of EPA; Section 49 of Water Act and Section 43 of Air Act.

106. Sections 20&21 of Water Act and Sections 23 to 26 of Air Act.

107. See, M.K. Ramesh, Pollution Control Law, Policy and Practice (Mimograph) for a critique of Pollution Control Laws in India.

108. Illustration (8) to Section 7 of Indian Easements Act, 1882.

109. Entry 17, List II, 7th Schedule.

110. For a lucid analysis on the subject, see, P.Iswara Bhat, "Over exploitation of Ground Water and Silence of the Law: An analysis of the Indian problem with same suggestions." Seminar paper; Also see, S.N. Jain, "Legal Aspects of Groundwater Management", JILI (1984) 181.

111. See, Walter Fernandes and Samyadip Chatterji, "A Critique of the Draft National Policy", Lokayan Bulletin, (March-Apr. 1995) 29 at 31.

112. Ibid.

113. Illustrative examples as to people suffering mutiple displacement and other consequences of embarking on developmental projects can be found in Smitu Kothari, "Whose Nation is it ? The Displaced as Victims of Development", Lokayan Bulletin, (March-Apr. 1995) 1.

114. The Maharastra Project Affected Persons Rehabilitation Act, 1986; The Madhya Pradesh Displaced Persons (Resettlement)

132. UNCED, Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests, U.N. Doc.A/CONF.151/6/Rev.1 (1992).

133. Ibid., Articles 5(a) and 12(d).

134. Ibid., Article 2(d).

135. United Nationsl Framework Convention on Climate Change, May 9, 1992, 31 ILM 849.

136. Convention on the Conservation of Biological Diversity, June 5, 1992, 31 ILM, 818, India ratified the convention in 1994.

137. Ibid., Article 8(a).

138. Ibid., Article 9(a).

139. UNCED, June 3-14, 1992, 31 ILM 814.

140. The Document is unique in the sense that while the first part of the document is the Draft Covenant itself made of 72 Articles, the second part is a commentary that explains that the legal deviations for each of the provisions of the Draft Covenant. Commission on Environmental Law of IUCN in cooperation with International Council of Environmental Law, March 1995. An earlier draft of the same was reproduced as UN Doc.A/CONF/151/PC/WG.III/4.

141. Article 1.

142. Article 2.

143. Article 11(3).

144. Art. 20(1).

145. Article 35.

146. Ch.IX Responsibility and Liability, Articles 47 to 52.

147. Article 54.

148. Article 60.

149. Article 62(1).

150. Article 62(2).

151. Article 12.

152. Pages 25 to 176 of the Draft Document.

153. Recommendation 1131 (1990) on Environment Policy in Europe, adopted by the Parliamentary Assembly of the Council of Europe.

154. (No.7889/77), 26 Eur. Commn. H.R.D.R., 5-12.

155. European Charter on Environment and Health, adopted on 8 December 1989 in Frankfurt-am-main by the Ministers of Environment and of Health of the Member States of the European Region of the World Health Organization, and by the Commission of the European Communities.

156. See, Maguelanne Dejeant-Pons, "The Right to Environment in Regional Human Rights Systems", in Human Rights in the Twenty-first Century: A Global Challenge, Ed., Kathleen E. Mahoney and Paul Mahoney, Martinus Nijnoff Publishers (1992), 595 at 610-611.

157. Adopted in San Salvador on 17 November, 1988.

158. Article 10.

159. Article 11.

160. See, The Final Declaration of the Pan-European Parliamentary Conference on the Protection of East-West Environment, adopted in Vienna on 26 October 1990.

161.

162. See, Anita Cheria, Why Nagarahole Burns ? See, also, M.K.Ramesh, "Palliatives for the park-affected people", Paper presented in the Seminar on "Impoverishment Risks of Involuntary Resettlement", organized by Social Development Unit of the World Bank, New Delhi, 12-14 Mar. 1996.

163. Bruce Rich, "The Emperor's New Clothes: The World Bank and Environmental Refor", 5 World Policy Journal (1990) 305.

164. Michael J. Kane, "Promoting Political Rights to Protect the Environment", 18 Yale Journal of International Law (1993), 389, 409.

165. See, Samara F. Swanston, "Legal Strategies for Achieving Environmental Equity", 18 Yale Journal of International Law (1993) 337, 338-339.

166. The Clean Air Act, 1988; the Clean Water Act, 1988; the Toxic Substances Control Act, 1988; the Resource Conservation and Recovery Act, 1988 and the Safe Drinking Water Act, 1988.

167. Sierra Club v. Simkins Industries Inc., 847 F.2d 1109 (4th Cir. 1988).

168. See, Robert D. Bullard, "Race and Environmental Justice in the United States", 18 Yale Journal of Internal Law, (1993), 319.

169. Ibid., at 329.

170. El Pueblo Para el Aire Y Agua Limpio (People for Clean Air and Water) v. County of Kings, Civ.No. 366045 (Cal. Super. Ct. Sacramento Cty. Jan. 1992).

171. See, David Hughes, Environmental, Butterworth, London, erd Ed. (1996), 20.23.

172. Section 7(2), Environmental Protection Act.

173. Royal Commission on Environmental Pollution, 12th Report, (Cm 310).

174. Supra, n.171, 23.

175. Ibid., 28-30.

176. Supra, n.78.

177. Mary Simon, "The Integration and Interdependence of Culture and the Environment" in **Human Right in the Twenty-First Century: A Global Challenge**,521, Supra, n.15.

178. There are two decisions both concerning the same parties: Mabo v. State of Queensland (1988)166 CL 186 and Mabo v. State of Queensland, (1992)175 CLR 1. The reference here is to the (1992) decision.

179. **Wik Peoples v. State of Queensland**, 141 ALR 129. Two cases were combined and decided by the Australian High Court: **Wik Peoples v. State of Queensland and others** (138 of 1996), **Thayarre People v. State of Queensland and others**, (139 of 1996), 11-13 June, 23 December 1996.

180. Although, the Expression of opinions concern mainly the decisions in the Mabo, the same may also be extended to the Wik Case as well.

181. Justice Meagher of the New South Wales Court of Appeal, quoted in B. Hocking, "Aboriginal Law Does Now Run in Australia" (1993)15 Syd. L. Rev. 196.

182. See, Raymond Brazil, "The High Court of Australia Recognizes Native Title - The Mabo Decision: Restating Common Law" (1993) Australian International Law News, at 2.

183. Michael R. Anderson, Human Rights Approaches to Environmental Protection: An Overview, in Human Rights Approaches to Environmental Protection, ed., Alan E. Boyle and Michael R. Anderson, Clarendon, Press, Oxford, (1996), 1 at 20.

184. People United for a Better Living in Calcutta v. State of West Bengal, AIR 1993 Cal. 215.

185. Janki Nathubahai Chhara v. Sardarnagar Municipality, AIR 1986 Guj. 49.

186. **Kholamuhana Primary Fisherman Cooperative Society v. State of Orissa**, AIR 1994 Ori. 191.

187. Supra, n.124.

188. Articles 32 & 226. While the Supreme Court can be directly approached by invoking Article 32, the High Court can be accessed under Art.226, without the need to traverse through the processes of the lower courts. While Article 32 is confined to redressing violation of fundamental rights only, Art.226 can be invoked to seek remedies for violence to other legal rights as well.

189. For a survey of case law highlighting judicial innovations see, Upendra Baxi, "Taking Suffering Seriously", in Sudarshan, Rajeev Dhawan and Khurshid (eds.), **Judges and Judicial Power**, (Bombay, 1985).

190. Rural Litigation Entitlement Kendra v. State of U.P. AIR 1987 SC 2187. This position was reiterated by the Supreme Court in the Shriram Gas Leakage Case, Supra, n.19 at 1090.

191. See, Bharat Desai, Enforcement of the Right to Environment Protection through Public Interest Litigation in India", 33 JILI (1993), 27.

192. Banvasi Sevashram v. State of Uttar Pradesh, AIR 1992 SC 920.

193. Supra, n.190.

194. CERS v. Union of India, AIR 1995 Gau. 133.

195. Union of India v. Kamath Holiday Resorts, AIR 1996 SC 1040.

196. Tarun Bharat Singh, Alwar v. Union of India, 1993 Supp.(1) SCC 4.

197. State of Himachal Pradesh v. Ganesh Wood Products (1995)6 SCC 363.

198. Indian Council for Enviro-legal Action v. Union of India, 1995(6) SCALE 578.

199. AIR 1988 Raj. 2.

200. Supra, n.19 at 969.

201. Supra, n.190.

202. Consumer Education and Research Centre v. Union of India, AIR 1995 SC 922.

203. M/s. Jothi and Com. v. Tamil Nadu Pollution Control Board, AIR 1994 Mad. 50.

204. See, Upendra Baxi, Talking Suffering Seriously: Social Action Litigation in the Supreme Court of India. In Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, Justice Pathak had cautioned against dangers of excessive judicial activism in PIL.

205. Clause 11 of the Environment Authority Bill, 1997.

206. See, Darryl D'Monte, "Environmental Issues and the Courts", Deccan Herald, 30.8.1996, p.8.

207. See, Soma Basu, "Environment Authority Bill Ill-drafted", The Hindu, 20.3.1997.

208. Art. 39A.

209. See, Justice V.R.Krishna Iyer, Legal Services Authorities Act - A Critique, Society for Community Organization Trust, Madurai (1988), at 4.

210. This was amended in 1994.

211. Sections 4(k), section 8 and 11.

212. The Bill has been circulated in Mediascape 1997, the magazine of the National Media Centre. Also see, Krishan Mahajan, "Accountability of Judges finds no mention in Bill", Indian Express, 14.5.1997, p.20.

213. Section 3.

214. Proviso to section 4.

215. Section 2.

216. Where the information concerns life and liberty, the obligation to inform passing has to be within forty eight hours.

217. Sections 8, 9, and 10. Fines range from Rs.50 to Rs.15000.

218. This is a project undertaken for the government of India by P.M.Bakshi and his team. The Draft Legislation attempted by the team has not yet been taken into consideration by the Central Government.

219. 3.15 and 3.16

220. Chapter 4.

221. Presented in Parliament in December 1988 by the Minister for Forests, Ecology and Environment. For the texts of the Minister's speech and the new policy, see, All about Draft Forest Bill and Forest Lands, Eds. S.R.Hiremath, Sadanand Kanawalli and Sharad Kulkarni, Samaj Parivartan Samudaya, Dharwad, 3rd ed. (1995), 143-156.

222. Notification of Ministry of Environment, Forests and Wildlife, No.6-21/89-p.p., dated June 1, 1990. For the full text of the Notification see, **All About Draft Forest Bill and Forest Lands**, Ibid., 143-156.

223. See, M.K.Ramesh, "Joint Forest Planning and Management (JFPM): Law, Practice and Proposals", paper presented in the Workshop on JFPM and Related Issues, organized jointly by Institute of Social and Economic Change, Bangalore and Samaja Parivarthana Samudaya, Dharwad (April 11-12, 1995).

224. **Joint Forest Planning and Management in Karnataka: Formation of Village Forest Committees: Some Guidelines**, prepared by Karnataka Forest Department; Regional Centre, National Afforestation and Eco-Development Board, Bangalore and Federation of Voluntary Organizations for Rural Development in Karnataka (1996 Feb.).

225. Government of India, Ministry of Environment and Forests, No.8-29/96-FP dated 7.12.1995. Through the Notification, the Forest Sceretaries of all States and Union territories were issued with Guidelines for involving village communities for protection and conservation of forests and plantation by appointing Van Mukhiya.

226. Chapter IIIA (consisting of Sections 17A-17H) was inserted to protect specified varieties of plants by Act 44 of 1991 to come into effect from 2.10.1991.

227. Section 12(b) and (bb) inserted by Act 23 of 1982 with effect from 21.5.1982.

228. **Chapter IVA (Sections 38A to 38J) creating Central Zoo Authority and Recognition of Zoos to administer exsitu conservation and section 12(c) and (d), to facilitate the scientific process in that regard inserted by Act 44 of 1991 to come into effect from 2.10.1991.**

229. See, M.K.Ramesh, "Wildlife Protection Act, 1972: An Agenda for Reform", paper presented in the Workshop to consider the Legal Issues in the Drafting of an Alternate Management Plan for the proposed Rajaji National Park, under the auspices of Rural Litigation and Entitlement Kendra, Dehradun (March 23-25, 1996).

230. For a full text of the Draft Bill and NGOs proposal of an Alternate Bill, See, Amended Draft Forest Bill 1995, Voluntary Organizations, (3rd Ed. Oct. 1995), published by Samaj Parivarthan Samudaya, Dharwad, Centre for Tribal Conscientization, Pune et.al., C-1 to C-224.

231. Section 34A.

232. Section 38D.

233. A rich body of critical literature on the official draft is available. See, Sharad Kulkarni, "Proposed Forest Act: An Assessment", EPW, July 23, 1994, 1909; Ramachandra Guha,

"Forestry Debate and Draft Forest Act: Who Wins, Who Loses ?", EPW, August 20, 1994, 2192; Ashish Kothari, "Forests for Whom ? On the proposed Conservation Act", Frontline, August 12, 1994; Walter Fernandes and Ashiwini Chhatre, Critiques of the Forest Bill 1994, Legal Resources and Social Action.

234. EPW, October 7, 1995, 2501, The Bill is published by Centre for Ecological Sciences, Indian Institute of Sciences, Bangalore, (February, 1995).

235. Sharachhandra Lele, "Environmental Governance", Seminar, 438, February 1996, 17.

236. See, Mukul, "Tribal Areas: Transition to Self-Governance", EPW, May 3, 1997.

237. See, "Public Hearing Must for Project Assessment", The Hindu, 16.4.97, p.17.

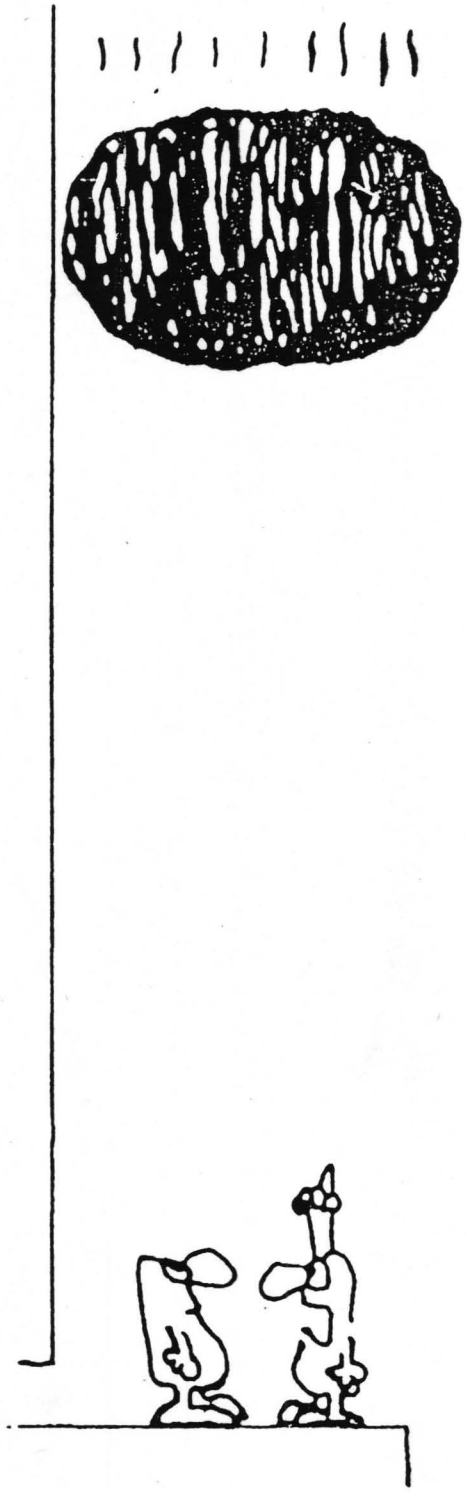
238. See, Anand Mohan Bhattarai, **Participatory Forest Management in the Mountains: Policy, Law and Institutions,** LL.M. dissertation Thesis submitted to National Law School of India University (1997).

239. Article 19(5) imposes restrictions on fundamental freedoms of the rest of the citizenry, if they come in conflict with the interests of the scheduled tribes.

240. Article 29.

241. Fifth and Sixth Schedules.

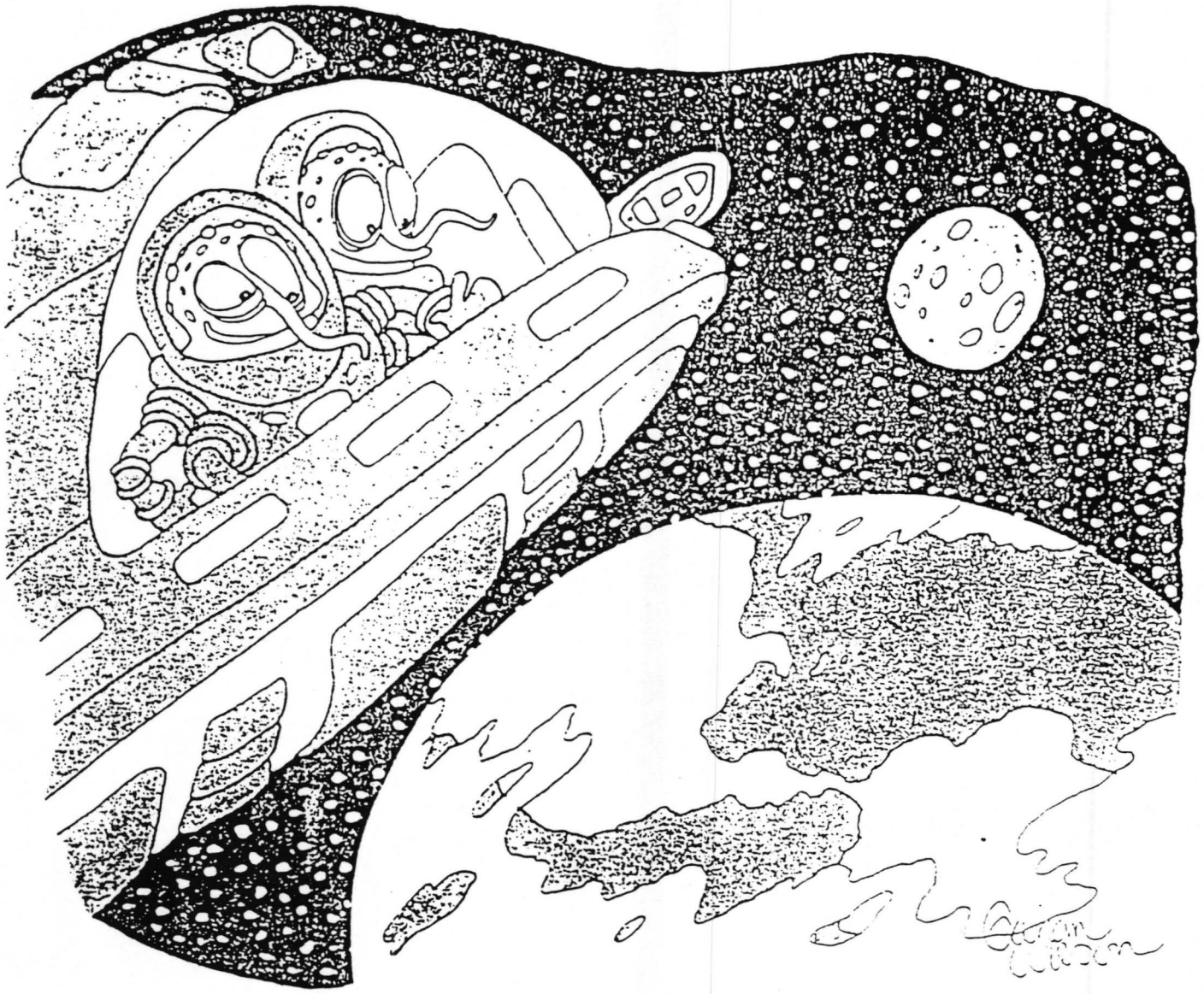
242. Ministry of Law, Justice and Company Affairs, No.27 of 1995, dated 19th June, 1995. It received the assent of the President of India on 17th June 1995.



GUY BADEAUX
Courtesy Le Droit (Ottawa)

"Your problem is in the gene which makes antibodies, but since the Biophase Corp. now has a patent on that gene, I can't do anything for you."

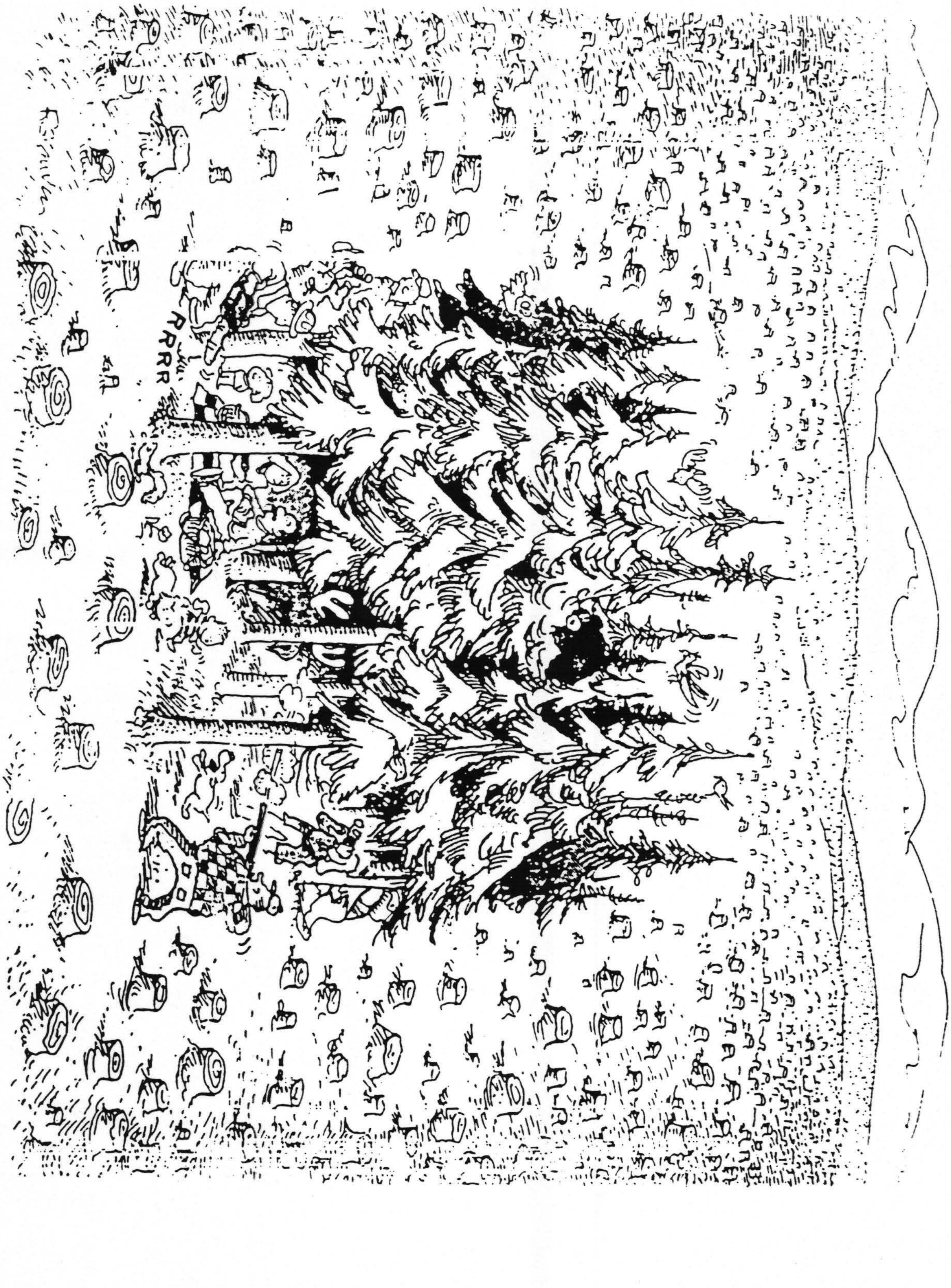
Dickinson



"Another decade or so, and it'll be warm enough for us."


No, the taste doesn't do anything for me - but apparently, they're a fantastic aphrodisiac...
Kate Farnsworth


No
I don't know my father
Why do you ask?


RRRR


HERE COMES THE ENDANGERING SPECIES!
DOUG BRUMMER