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Pallemaerts, M.

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A HUMAN RIGHTS PERSPECTIVE ON CURRENT ENVIRONMENTAL ISSUES AND THEIR MANAGEMENT: EVOLVING INTERNATIONAL LEGAL AND POLITICAL DISCOURSE ON THE HUMAN ENVIRONMENT, THE INDIVIDUAL AND THE STATE

MARC PALLEMAERTS*

In the mind of the average citizen of Europe and North America, the polar bear, now legally recognised as an endangered species under United States law, has become the iconic victim of global warming. However, the plight of this threatened animal species, however dramatic for schoolchildren in affluent societies, should not make one forget that human beings too now face severe threats to their personal security, well-being, health and ultimately life, as a result of environmental degradation at the local, national and global level, including but not limited to the serious consequences of climate change. The United Nations Human Rights Council recently recognised this threat by expressing its concern “that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights”, and requesting the UN High Commissioner for Human Rights to conduct a “detailed analytical study of the relationship between climate change and human rights” for submission to its 10th session.¹ Ironically, the list of areas and countries referred to in the preamble of the resolution as “particularly

* Professor of European Environmental Law, University of Amsterdam; Professor of International and European Environmental Law, Université Libre de Bruxelles; Senior Fellow & Head of the Environmental Governance Research Programme, Institute for European Environmental Policy, London/Brussels. This article is based in part on a lecture delivered by the author at a conference hosted by the Secretary General of the Council of Europe in April 2003. See Marc Pallemerts, “Les droits de la personne et la démocratie face aux questions environnementales internationales”, in: *Nouveaux défis mondiaux pour les droits de la personne et la démocratie*, Résumé du Colloque organisé par le Secrétaire Général du Conseil de l’Europe en association avec le Forum pour l’Europe démocratique, Conseil de l’Europe/Forum pour l’Europe démocratique, Strasbourg, 2003, pp. 100–115.

¹ Human Rights Council Resolution 7/23, 20 March 2008, UN Doc. A/HRC/7/L.11/Add.1, 28 March 2008, p. 9.

vulnerable to the adverse effects of climate change” includes only those categories already specifically mentioned in the United Nations Framework Convention on Climate Change. It omits the Arctic and sub-Arctic areas which are currently undergoing the most rapid climate change according to the latest scientific evidence. The threat to the polar bear’s habitat not only affects that species, but the entire ecosystem on which human populations, too, depend for their livelihood. Concurrently, these very same populations are the most seriously exposed to the health effects of another global environmental problem, which became the subject of concerted international action around the turn of the century; the accumulation of persistent organic pollutants in the environment.

During this first decade of the 21st century, the manifold links between environmental issues and the protection of human rights are becoming increasingly clear. While civil society, the scientific community and indigenous peoples are well aware of such connections and highlight these through their activities and demands, most governments on the other hand are still fairly reluctant to give explicit recognition to such links. This is reflected for example in the cautious wording of the Human Rights Council resolution. Though the language of intergovernmental forums and formal international agreements remains hesitant, the practice of specialised international human rights bodies and courts is increasingly supportive of a rights-based approach to crucial environmental issues. This is apparent from the ever-growing body of relevant case-law and reports in non-contentious review proceedings. This article analyses some of the main developments and trends in international legal and political discourse from the perspective of human rights and seeks to identify the links between specific substantive and procedural rights on the one hand and the protection of the environment and sustainable and equitable use of the planet’s natural resources on the other. It does not aim to be exhaustive, but rather to map out these interlinkages and the legal and policy issues at stake in a still-evolving debate.

A. THE EMERGENCE OF INTERNATIONAL ENVIRONMENTAL LAW AS AN INSTRUMENT OF INTERGOVERNMENTAL COOPERATION

Environmental issues occur at all levels from the local to the global. Historically, awareness of their international dimension has been related to transfrontier pollution problems involving neighbouring states or riparian states of international water bodies. This type of environmental impairment assumes international proportions as ecological boundaries do not correspond to national borders, even though pollution may remain confined to a relatively limited geographical area. Its international nature is so to speak, incidental, since it stems from the location of political and legal boundaries. Other ecological problems are international in nature

owing to the existence of key elements of the biosphere and natural resources situated outside the boundaries of states' territorial jurisdiction. In order to manage such problems within an international legal system based on sovereign national entities that are both the sole subjects and the ultimate sources of international normative activity, treaty-based international legal arrangements have had to be developed. By its very nature, this process has traditionally been very focused on articulating the rights and obligations of states vis-à-vis each other and entrenching the role of national governments as ultimate decision-makers in international environmental regimes.

More recently, advances in scientific knowledge revealed forms of pollution that have an impact far beyond the limits of border regions, international catchment areas and regional seas. These problems are not confined to a limited number of states, but affect the international community as a whole. For, their causes and their effects are widespread and diffuse in nature defying all political and legal borders: depletion of the ozone layer, climate change and the spread and accumulation of certain persistent organic pollutants. Over the last twenty years concerted international action has begun to address such problems, which are truly global in scale. Yet, similar to earlier international normative efforts in the environmental field, global environmental regimes too are primarily based on the establishment of state-centred rules and intergovernmental decision-making processes. International environmental law usually follows a regulatory model in which states assume obligations to regulate the activities of individuals and corporations subject to their jurisdiction through the medium of national law and administrative action. As implementing agents of international environmental regimes, states in turn impose obligations on these individual legal subjects whose activities need to be controlled in the common interest of environmental protection. Individual rights, *a fortiori* fundamental human rights, have therefore rather logically remained peripheral to the "core business" of international environmental law-making. The legal relationships between individuals and states, especially as they concern individual rights as opposed to duties, have long been viewed as falling outside the proper scope of international environmental law.

B. SUBSTANTIVE VERSUS PROCEDURAL ENVIRONMENTAL RIGHTS IN THE INTERNATIONAL DISCOURSE ON ENVIRONMENTAL PROTECTION, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT: TAKING INDIVIDUAL RIGHTS (A LITTLE BIT MORE) SERIOUSLY?

The well-known Principle 1 of the Stockholm Declaration² has inspired many national constitutional provisions adopted since the early 1970s, which recognize the right to environment as a fundamental right under domestic law.³ However, that right has not to date been transposed into a binding rule of international law of universal application.⁴

In 1986, the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED) noted that the right to a healthy environment could not yet be considered “a well-established right under present international law.”⁵ They proposed to fill this gap by including a provision stipulating that “[a]ll human beings have the fundamental right to an environment adequate for their health and well-being”⁶ in a set of universal legal principles on environmental protection and sustainable development, which the group drafted with a view to their eventual incorporation in a global, legally binding instrument. This proposal was endorsed by the World Commission in its final report in which it recommended: the elaboration of a universal declaration within the framework of the United Nations; and subsequently a world convention codifying the general principles of international environmental law. It further recommended the inclusion of a human rights provision as proposed by the Expert Group. Yet such a convention never saw the light of day.

The issue of the relationship between the environment and human rights was again taken up by the United Nations during the preparatory process of the UN Conference on Environment and Development (UNCED). After some preliminary discussions in 1989, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities “affirming the inextricable relationship between human

² Stockholm Declaration on the Human Environment, 5 June 1972, reprinted in *International Legal Materials* (1972), p. 1416.

³ For an overview of such constitutional provisions, see, e.g., the report of the UN Commission on Human Rights, *Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, Annex III.

⁴ For a more detailed discussion of this question, see Marc Pallemmaerts, “The human right to a healthy environment as a substantive right”, in: M. Déjeant-Pons & M. Pallemmaerts (eds.), *Human Rights and the Environment*, Council of Europe Publishing, Strasbourg, 2002, pp. 11–21.

⁵ Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, Graham & Trotman/Martinus Nijhoff, London/Dordrecht/Boston, 1986, p. 40.

⁶ *Ibid.*, p. 38.

rights and the environment” and referring to “new trends in international law relating to the human rights dimension of environmental protection”, decided in August 1990 to initiate a study on the subject and appointed a Special Rapporteur.⁷ This decision was endorsed by the Commission on Human Rights and later by the General Assembly, which adopted an important resolution in December 1990 in which it urged the Commission to continue its study and to report to the UNCED Preparatory Committee.

In this same Resolution 45/94, the General Assembly apparently inspired by the language of the WCED proposal also “recognize[d] that all individuals are entitled to live in an environment adequate for their health and well-being.”⁸ This resolution adopted without a vote, seemed to open the prospect of including similar language in the instrument on the “general rights and obligations of States in the field of the environment”⁹ which was due to be adopted by the UNCED two years later.

Notwithstanding the General Assembly resolution and the initiatives of the Commission on Human Rights and its Sub-Commission, whose Special Rapporteur submitted a preliminary report in August 1991, UNCED itself did not explicitly affirm the human right to a healthy environment. No provision of the Rio Declaration explicitly addresses human rights. The Declaration does however contain a few provisions which have some relevance to the issue. As we know, Principle 1 states that human beings are “entitled to a healthy and productive life in harmony with nature.” Compared with Principle 1 of the Stockholm Declaration, the reference in Rio to a vague entitlement to live “in harmony with nature” tends to water down the human rights dimension of environmental protection.

While no progress was made at Rio with respect to the recognition of a substantive human right to a healthy environment,¹⁰ the Rio Declaration does recognize in its Principle 10, the need for public access to environmental information, public participation in environmental decision-making and access to justice, which can be viewed as procedural rights deriving from this substantive right. Principle 10 initiated a global movement towards the further elaboration and affirmation, in both soft law and hard law, of procedural environmental rights – or should we rather say a movement towards *the proceduralisation of environmental rights*, as a substitute for the firm recognition of the substantive human right to a healthy environment?

After Rio, the United Nations human rights bodies continued their work on the relationship between environment and human rights, but without any substantive results so far. In her 1994 final report to the Sub-Commission on Prevention of

⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1990/7, 30 August 1990.

⁸ UN General Assembly Resolution 45/94, 14 December 1990.

⁹ UN General Assembly Resolution 44/228, 22 December 1989, para. 15(d).

¹⁰ See also Dinah Shelton, “What Happened in Rio to Human Rights?”, *Yearbook of International Environmental Law*, Vol. 3 (1992), pp. 75–93.

Discrimination and Protection of Minorities,¹¹ the UN Special Rapporteur expressed the hope that it would “help the United Nations to adopt (...) a set of norms consolidating the right to a satisfactory environment.”¹² Nearly 15 years later, this still seems to be a distant prospect.

Indeed at the World Summit on Sustainable Development (WSSD) in Johannesburg, it proved impossible to move beyond a general clause in the Programme of Implementation affirming that “respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.”¹³ An EU proposal to “acknowledge the importance of the interrelationship between human rights promotion and protection and environmental protection for sustainable development”¹⁴ was watered down into a clause merely “acknowledging the consideration being given to the *possible* relationship between environment and human rights, including the right to development;”¹⁵ In view of earlier normative pronouncements by the UN General Assembly and other UN bodies, this can hardly be viewed as progress.

Nevertheless, the Commission on Human Rights at its first session following the WSSD adopted a new resolution on the subject of “Human rights and the environment as part of sustainable development.” The Commission in this resolution requested the Secretary-General to submit a report on this issue to its next session, while at the same time ‘noting’ the entry into force of the Aarhus Convention and “encourag[ing] all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development *in particular principle 10* in order to contribute, inter alia, to effective access to judicial and administrative proceedings.”¹⁶ The Secretary-General’s report -submitted to the 60th session of the Commission-¹⁷ only resulted in

¹¹ *Human Rights and the Environment*, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9.

¹² *Ibid.*, para. 261.

¹³ Plan of Implementation of the World Summit on Sustainable Development (PoI), UN Doc. A/CONF.199/20 (2002), pp. 7–77 (hereafter referred to as ‘PoI’), para. 5. Cf. *ibid.*, paras. 62(a) and 138.

¹⁴ UN Doc. A/CONF.199/L.1, 26 June 2002, para. 152. Cf. EU Council Conclusions, ‘From Monterrey to Johannesburg: Preparation for the World Summit on Sustainable Development’, 30 May 2002, EU Council Doc. 8958/02 (Presse 147), p. 12, para. 6.5. The EU proposal was inspired by the conclusions of an expert meeting organised jointly by UNEP and the Office of the High Commissioner for Human Rights (OHCHR) at the request of the UN Commission on Human Rights (Decision 2001/111) in January 2002 and suggested that the WSSD “invite further consideration of these issues in the relevant fora, including by continued cooperation between UNEP and UNHCHR.” See *Human Rights and the Environment*, Conclusions of a Joint OHCHR-UNEP Meeting of Experts on Human Rights and the Environment, Geneva (January 2002), UN Doc. HR/PUB/02/2.

¹⁵ PoI, *supra* n. 12, para. 169 (emphasis added).

¹⁶ Resolution 2003/71, 25 April 2003, UN Doc. E/CN.4/2003/135, p. 260, 8th preambular para. & para. 6 (emphasis added).

¹⁷ UN Doc. E/CN.4/2004/87, 6 February 2004.

a procedural decision requesting the UN High Commissioner for Human Rights and the United Nations Environment Programme (UNEP) “to continue to coordinate their efforts in capacity-building activities” and deferring further consideration of “the relationship between the environment and human rights as part of sustainable development” to its next session in 2005.¹⁸

This session – the 61st and penultimate session of the Commission on Human Rights before its replacement by the new UN Human Rights Council resulting from the 2005 UN Summit – adopted another resolution on the subject. This resolution yet again failed to affirm the existence of a substantive right to environment, but stressed several aspects of the links between environmental protection, sustainable development and the promotion and protection of human rights.¹⁹ Its preamble acknowledges both “that environmental damage, including that caused by natural circumstances or disasters, can have potentially negative effects on the enjoyment of human rights and on a healthy life and a healthy environment” and “that protection of the environment and sustainable development can also contribute to human well-being and potentially to the enjoyment of human rights.”²⁰ At the same time, the resolution reiterates the Commission’s support for the implementation of Principle 10 of the Rio Declaration and “[s]tresses the importance for States, when developing their environmental policies, to take into account how environmental degradation may affect all members of society, and in particular women, children, indigenous people or disadvantaged members of society.”²¹ The Secretary-General was requested to prepare a new report “on how respect for human rights can contribute to sustainable development, including its environmental component, and can also contribute positively to poverty eradication”, taking into account the outcomes of the forthcoming Summit meeting.²² But this report, which was to be submitted to the 63rd session of the Commission, was never completed as the Commission concluded its activities at its 62nd session in 2006.

The newly established Human Rights Council has not yet considered the relationship between human rights and the environment in a comprehensive manner. Instead, it has opted to focus its work on a number of specific issues linking the environment with human rights, such as the right to water²³ and the relationship

¹⁸ Commission on Human Rights Decision 2004/119, 21 April 2004, UN Doc. E/CN.4/L.11/Add.7, p. 83.

¹⁹ Commission on Human Rights Resolution 2005/60, 20 April 2005, UN Doc. E/CN.4/2005/135, p. 242, 8th preambular para. & para. 6 (emphasis added).

²⁰ *Ibid.*, 8th & 9th preambular paras.

²¹ *Ibid.*, paras. 5 & 4.

²² *Ibid.*, para. 10.

²³ See Human Rights Council Decision 2/104, 27 November 2006, requesting the OHCHR to conduct a “detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.”

between climate change and human rights.²⁴ It has also allowed the work initiated by the Commission on Human Rights on the “adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights” to continue. These subjects will be further discussed below, as we consider the relationship between specific, well-recognised human rights and environmental protection.

At this stage of our analysis, we can only conclude that while the universal debate on the scope and recognition of a substantive human right to a healthy environment has continued in various United Nations bodies and conferences ever since Stockholm, it still seems far from a successful conclusion.

C. REGIONAL VARIATIONS ON A THEME: INTERNATIONAL RECOGNITION OF ENVIRONMENTAL RIGHTS IN AFRICA, THE AMERICAS AND EUROPE

Developments at the regional level have been somewhat more promising. The most comprehensive effort for the establishment of international legal standards in the field of environmental rights so far is the well-known 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Yet it would be Eurocentric to only mention this pan-European regional agreement, however important it is. It should be mentioned that long before the Aarhus Convention was negotiated, there were already two regional legal instruments for the protection of human rights which contained a reference to the right to environment.

The 1981 African Charter of Human and Peoples’ Rights provides that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”²⁵ It should be noted that this provision does not actually recognize the right to environment as an *individual* human right, but rather as a collective right vested in ‘peoples’. This, however, did not prevent the African Commission on Human and Peoples’ Rights in a famous case against Nigeria concerning the violation of this article in conjunction with other provisions of the African Charter, to interpret it as imposing obligations on states parties in respect of individuals as well as communities. In October 2001, the Commission held:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or *the right to a healthy environment, as it is widely known, (...) imposes clear obligations upon a government. (...) The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right*

²⁴ See Human Rights Council Decision Resolution 7/23, 20 March 2008, *supra* n. 2.

²⁵ African Charter of Human and Peoples’ Rights, Algiers, 26 June 1981, art. 24.

to a general satisfactory environment favourable to development (Article 16(3)) already noted *obligate governments to desist from directly threatening the health and environment of their citizens.*²⁶

The relevant provision of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, for its part, is more straightforward in its formulation. Unlike the African Charter, it does explicitly recognize an individual right, as it stipulates that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.”²⁷ The conceptual link this provision implicitly establishes between the right to a minimal environmental quality and that of access to basic public services appears strikingly relevant in this age of increasing privatization of common property resources and essential public services.

The European regional system for the protection of human rights developed under the auspices of the Council of Europe and based on the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its additional protocols, does not presently include any express provisions recognising environmental rights. However, this has not prevented the development of a significant and still growing case law in which the European Court of Human Rights has firmly established a link between certain serious forms of environmental impairment and the violation of rights explicitly protected by the Convention, of which some important examples are mentioned below.²⁸

The Aarhus Convention, a treaty negotiated within the framework of the United Nations Economic Commission for Europe (ECE) and signed in 1998, was the first instance in which the right to a healthy environment per se was first explicitly recognized in the operative provisions of an international legal instrument at European level. However, it should be noted that when the ECE decided to elaborate a legally binding international instrument on environmental rights after the Rio Conference, it chose to focus exclusively on the implementation of the procedural rights set out in Principle 10 of the Rio Declaration. Accordingly, the mandate of the working group

²⁶ African Commission on Human and Peoples’ Rights, 30th Ordinary Session, Banjul, Gambia, 13–27 October 2001, Decision on Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Doc. ACHPR/COMM/A044/1, para. 52 (emphasis added).

²⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, art. 11. This Protocol entered into force in 1999 and is now binding on 13 states in Central and South America.

²⁸ For a more detailed analysis, see, e.g. Daniel García San José, *Environmental protection and the European Convention on Human Rights*, Human Rights File No. 21, Council of Europe, Strasbourg, 2005; Nukhet Yilmaz Turgut, “The European Court of Human Rights and the Right to the Environment”, *Ankara Law Review*, Vol. 4 (2007), pp. 1–24; Francis Haumont, “Le droit fondamental à la protection de l’environnement dans la Convention de sauvegarde des droits de l’homme et des libertés fondamentales”, *Aménagement-Environnement* (2008), n° spécial, pp. 9–55.

established by the ECE Committee on Environmental Policy in January 1996 to prepare a draft convention on access to environmental information and public participation in environmental decision-making did not contain any reference to the substantive right to a healthy environment.²⁹ Nevertheless, negotiators eventually agreed to include both in the preamble and in the body of the draft convention, provisions referring to this substantive right.

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters³⁰ was signed by 35 member states of the ECE and by the European Community at the “Environment for Europe” ministerial conference in the Danish city of Aarhus on 25 June 1998. It entered into force on 30 October 2001 and now has 41 contracting parties, including the European Community and its Member States (except Ireland) as well as most countries in transition from Eastern Europe, Central Asia and the Caucasus (except Russia and Uzbekistan). Although the Convention was negotiated in a pan-European forum, it was not conceived as an exclusively European instrument, as it is open for accession by any member state of the United Nations “upon approval by the Meeting of the Parties.” Thus far, however, no non-European state has expressed interest in becoming a party to the Aarhus Convention, despite the encouragement given by the Aarhus Parties in 2005.³¹

The preamble to the Aarhus Convention explicitly recalls Principle 1 of the Stockholm Declaration and United Nations General Assembly resolution 45/94 and, paraphrasing language from the Stockholm Declaration’s preamble, “recogniz[es] that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.” It establishes a conceptual link between substantive and procedural environmental rights by stating that “citizens must have access to environmental information, be entitled to participate in decision-making and have access to justice in environmental matters” in order “to be able to assert” their right to live in an environment adequate to their health and well-being, as well as to “observe” their concomitant duty “to protect and improve the environment for the benefit of present and future generations.” Article 1 of the Convention, under the heading “Objective”, then provides:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

²⁹ UN Doc. ECE/CEP/18, 8 February 1996, Annex I.

³⁰ UN Doc. Sales No. E/F/R.98.II.E.27. The Convention text is available online in different languages at <http://www.unece.org/env/pp/treatytext.htm>.

³¹ See Decision II/9, 2nd Meeting of the Parties to the Aarhus Convention, Almaty, Kazakhstan, 25–27 May 2005, UN Doc. ECE/MP.PP/2005/2/Add.13.

The explicit recognition of the right to a healthy environment in the Aarhus Convention adds weight to its operative provisions for the implementation of the procedural rights of access to information, participation in decision-making and access to justice, by articulating the legal and philosophical underpinning of these rights. It indicates that they are not ends in themselves, but are meaningful precisely as means towards the end of protecting the individual's substantive right to live in a healthy environment. It does not however, have immediate legal consequences as the provisions of Article 1 do not *per se* impose on parties any specific obligations beyond those laid down in the other provisions of the Convention.³² In fact, the protection of the right to a healthy environment is presented as an *objective* to which the Aarhus Convention is intended to contribute; not as a substantive obligation distinct from the specific obligations with respect to access to information, participation and access to justice, which the Convention imposes on its contracting parties. It is revealing that the fundamental right to live in a healthy environment at the very moment of its legal recognition finds itself immediately reduced to its procedural dimensions.

Within the scope of this article, I do not intend to dwell on the procedural environmental rights recognised in the Aarhus Convention, nor on such rights increasingly recognised in a number of other regional and even global multilateral environmental agreements and soft law instruments.³³ Yet it cannot be over-stressed to which extent the international legal protection of the procedural environmental rights of individuals and organisations represents an important development in international environmental law. This reveals a departure from its previously near-exclusive focus on articulating the rights and obligations of states *inter se*. The Aarhus Convention is the first multilateral treaty on the environment, the main aim of which is to impose obligations on states in respect of their own citizens. As a result this new

³² This was stressed by the United Kingdom in a declaration made upon signature of the Convention. According to this declaration, "[t]he United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention." While it is self-evident that the specific international obligations imposed on the contracting parties by the operative provisions of the Convention relate only to those procedural rights, this does not necessarily imply that, as the UK suggests, the provisions of the preamble and of art.1 relating to the substantive right can be dismissed as merely expressing an "aspiration". This contradicts the very wording and title of art. 1, which refer to an "objective". In legal terms, an objective is clearly not the same as an aspiration. It can inform and guide the interpretation of the other provisions of the Convention.

³³ For further discussion, see Marc Pallemerts, "The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Engaging the Disenfranchised through the Institutionalization of Procedural Rights?", in: J.F. Green & W.B. Chambers (eds.), *The Politics of Participation in Sustainable Development Governance*, United Nations University Press, Tokyo/New York, 2006, pp. 179–203.

Convention bears close similarities to international legal provisions for the protection of human rights.

It could be argued that the procedural environmental rights guaranteed by the Convention simply give practical form – in the specific context of environmental policy – to the general principles of democracy and the rule of law already enshrined in other international instruments on the protection of human rights. On the other hand, the very emergence of specific rules of international environmental law concerning public participation in decision-making processes reflects broader concerns relating to developments in democracy and citizenship in a changing world.³⁴ The affinity between the Aarhus Convention and international human rights law is also apparent from the Convention's provisions on compliance review, which for the first time in international environmental law, opened up the possibility of a review mechanism accessible not only to states, but also to individuals, through some form of individual recourse procedure, which seems partly inspired by procedures already in force under some UN human rights treaties.

Interestingly, these recent developments in international environmental law in Europe have prompted the primary regional forum for human rights, the Council of Europe, to reconsider its own role in addressing the relationship between environmental protection and human rights. The Parliamentary Assembly of the Council of Europe has repeatedly called for new initiatives in this field. The draft European Charter and Convention on the Environment and Sustainable Development, endorsed by the Assembly on 28 September 1990, provides that “[e]very person has the fundamental right to an environment and living conditions conducive to his good health, well-being and full development of the human personality.”³⁵ In 1999, the Parliamentary Assembly specifically recommended “drafting an amendment or an additional protocol to the European Convention on Human Rights concerning the right of individuals to a healthy and viable environment “.³⁶ It should be noted however, that the Committee of Ministers of the Council of Europe did not act on the Assembly's recommendation to initiate intergovernmental negotiations for the elaboration of a legally binding instrument of this nature, “not[ing] that the recognition of the individual and legally enforceable nature of the human right to a healthy and viable environment meets at present certain difficulties, legal and conceptual.”³⁷

Following the Johannesburg summit in 2003, the Parliamentary Assembly again adopted a recommendation on environment and human rights, in which it called on

³⁴ See generally Jonas Ebbeson, “The Notion of Public Participation in International Environmental Law,” *Yearbook of International Environmental Law*, Vol. 8, 1997, pp. 51–97.

³⁵ Recommendation 1130 (1990) on the formulation of a European charter and a European convention on environmental protection and sustainable development, 28 September 1990, para. 1.

³⁶ Recommendation 1431 (1999) on future action to be taken by the Council of Europe in the field of environmental protection, 4 November 1999, para. 11(b).

³⁷ Reply from the Committee of Ministers to Recommendation 1431 (1999) adopted at the 729th meeting of the Ministers' Deputies, 15 November 2000.

governments of member states to “recognise a human right to a healthy, viable and decent environment, including the objective obligation for states to protect the environment, *in national laws*, preferably at constitutional level”, and furthermore specifically recommended that the Committee of Ministers “draw up an additional protocol” to the ECHR “concerning recognition of the individual *procedural* rights, intended to strengthen environmental protection, *as set out in the Aarhus Convention*”.³⁸ It is striking that, in this latest recommendation on the subject, the Parliamentary Assembly, while reiterating its recognition of the substantive right to a healthy environment, seems content to rely primarily on national law for its protection and envisages a further development of the Council of Europe’s regional human rights instruments only for the purpose of guaranteeing procedural environmental rights, deferring to the Aarhus Convention as the primary source of inspiration in this respect. The Committee of Ministers, for its part, was not even prepared to go that far, but instead instructed the organisation’s Committee of Experts for the Development of Human Rights to draft a ‘manual’ on human rights and environment summarising the principles emerging from the case law of the European Court of Human Rights. This task was completed in October 2005, and the manual published the following year.³⁹ The political debate within the Council of Europe is however far from closed, since the new President of the Parliamentary Assembly has recently declared his support for an additional protocol to the ECHR.⁴⁰

This brief overview of regional developments in Europe would be incomplete without a reference to the European Union. While there are no legally binding provisions recognising the right to a healthy environment in European Community law, that right has been acknowledged in a high-level political declaration of the European Council. In their Dublin Declaration on *The Environmental Imperative*, adopted on 7 July 1990, the Heads of State and Government of the Member States of the European Community proclaimed that the objective of Community action for the protection of the environment “must be to guarantee citizens the right to a clean and healthy environment.” This political statement was, however, never translated into a binding provision of primary or secondary Community law. The EU Charter of Fundamental Rights – originally proclaimed in Nice on 7 December 2000, and which would become legally binding upon the entry into force of the Treaty of Lisbon – includes a provision on environmental protection (Article 37) in its Chapter IV,

³⁸ Recommendation 1614 (2003) on environment and human rights, 27 June 2003, paras. 9(b) & 10(a) (emphasis added).

³⁹ *Manual on Human Rights and the Environment – Principles Emerging from the Case-Law of the European Court of Human Rights*, Council of Europe, Strasbourg, 2006. Available at: http://www.coe.int/t/e/human_rights/cddh/1._publications/Environment_manual_final_EN.pdf.

⁴⁰ Lluís Maria de Puig, Président de l’Assemblée parlementaire du Conseil de l’Europe, Discours à l’occasion de la 4e session plénière de l’Assemblée parlementaire euro-méditerranéenne, Athens, 28 March 2008. Available at: http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/President/dePuig/Discours/2008/20080327_EMPA-Athenes.htm.

entitled ‘Solidarity’, but this clause was deliberately phrased as an objective of public policy rather than an individual human right.⁴¹

There is evidence of a growing – though not unanimous – recognition both within national legal systems and internationally of the right to a healthy environment as a fundamental right. Yet as a matter of law, the link between human rights and environmental protection is not dependent on the recognition of such a right. The human rights dimension of environmental issues should not *per se* be equated with the question of the existence or not of a fundamental human right to a healthy environment. Though the recognition of such a right in international law remains controversial, it is not disputed that ecological conditions can have a direct impact on the exercise of certain well-established fundamental rights. In the next section, I will briefly address some of the manifold ways in which degradation of the environment can constitute a breach of certain fundamental human rights, or is liable to jeopardise them in the long term, before concluding this article with a discussion of the often-alleged conflict between the right to a healthy environment and the right to development.

D. ENVIRONMENTAL DIMENSIONS OF THE RIGHT TO LIFE AND PERSONAL SAFETY

As stated in the 1972 Stockholm Declaration, “man is both creature and moulder of his environment”; the latter is essential not only to his well-being, but also “to the enjoyment of his basic human rights, *including the right to life itself*.”⁴² The most serious cases of environmental damage may in fact violate fundamental rights to life and personal safety. In this connection, there is no need to point out the impact of the Bhopal and Chernobyl disasters and other industrial accidents that have caused acute pollution, which has in turn created, and often owing to its chronic effects, continues to create numerous victims. Containing major technological hazards is consequently essential both to protect the environment and to safeguard human rights.

The European Court of Human Rights has ruled “that a violation of the right to life can be envisaged in relation to environmental issues, (...) liable to give rise to a serious risk for life or various aspects of the right to life.”⁴³ It found Turkey had violated the right to life of slum residents living next to a major landfill; they lost their lives when their homes were buried in a landslide caused by an explosion of methane gas

⁴¹ For a critique of the Charter from an environmental perspective, see Henri Smets, “Une Charte des droits fondamentaux sans droit à l’environnement”, in: Conseil européen du droit de l’environnement, *Le droit à l’environnement, un droit fondamental dans l’Union européenne*, Funchal, June 2001, pp. 7–50.

⁴² Stockholm Declaration, *supra* n. 3, 1st preambular para., *in fine* (emphasis added).

⁴³ European Court of Human Rights, judgment of 18 June 2002, *Öneryıldiz v. Turkey*.

that had built up in the tip, as the rubbish decomposed. The Court held that the Turkish authorities had failed to take the necessary measures recommended by technical experts to remove the methane, stabilise the landfill and inform the shanty town's inhabitants of the serious hazards to which they were exposed. More generally, the case of this uncontrolled landfill, where municipal waste from the city of Istanbul was dumped, highlights the serious environmental management problems caused by unplanned urban development and the lack of suitable facilities to treat urban waste. It demonstrates the way in which environmental hazards are transferred to marginal areas and imposed on the most disadvantaged populations, which are least equipped to protect themselves, even to the extent of directly threatening these populations' right to life.

Less obvious in the short term, but probably far more significant in the longer term, is the danger resulting from ongoing climate change. From the outset of the development of a global regime to address climate change, the relationship between protection of the atmosphere and the right to life was duly recognised. Calling for the development of international legal instruments and effective global institutions to address this issue, the heads of state and government meeting at the Hague summit in March 1989 stated that "the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected", emphasising that "the right to live is the right from which all other rights stem."⁴⁴ However, as the process of regime development progressed, the human rights dimension was sidetracked in favour of a purely state-centred approach to climate change mitigation and adaptation policies. The preamble to the United Nations Framework Convention on Climate Change (UNFCCC), signed in 1992, merely acknowledges, in far less eloquent terms than the Hague Declaration, that global warming "may adversely affect" both natural ecosystems and humankind, and that "change in the Earth's climate and its adverse effects are a common concern for humankind."

New scientific research conducted since then, as analysed by the Intergovernmental Panel on Climate Change (IPCC) in its successive assessment reports has confirmed the risks of climate change to human security. In its third report, published in 2001, the IPCC noted a significant increase in the frequency of, and damage caused by, extreme weather events between 1950 and 1990. Insurance companies that are finding it more and more difficult to fulfil their undertakings to indemnify people for the resulting disasters are not the only ones worried about this trend. These numerous floods, storms and other examples of bad weather are also very costly in terms of human life.⁴⁵ The IPCC is predicting an increase in the annual number of flood victims as a result of the rise in sea level.⁴⁶ Inhabitants of small islands and low-lying coastal areas are ever more vulnerable. It is no exaggeration to say that these people's

⁴⁴ The Hague Declaration, 11 March 1989, UN Doc. A/44/340, 22 June 1989.

⁴⁵ Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report*, para. 2.26.

⁴⁶ *Ibid.*, para. 3.24.

right to life and personal safety is being jeopardised by damage to the earth's environment. Governments in the affected countries, most of which are developing countries, cannot afford to pay for protective infrastructure; some of them will be forced to consider evacuating populations whose physical safety can no longer be guaranteed, despite the serious human and socio-economic implications that entails. Notwithstanding the commitment made over fifteen years ago by industrialised nations under Article 4(4) of the UNFCCC, to provide special assistance to the most vulnerable developing countries, such as small island states, to help them in meeting the costs of adaptation to climate change, very little aid for this purpose has actually been provided so far. It is not surprising, therefore, that these countries have taken the initiative to put the issue of the impact of climate change on human rights on the agenda of the UN Human Rights Council.⁴⁷

E. ENVIRONMENTAL DEGRADATION AND CONTAMINATION AS A THREAT TO THE RIGHT TO HEALTH

Apart from extreme cases in which environmental damage can directly endanger people's lives and physical safety, there are numerous examples of international environmental problems that affect the right to health. Global contamination of ecosystems and of the food chain by certain persistent organic pollutants (POPs), which spread a long way from the main areas in which they are produced and used, and tend to accumulate primarily in the Arctic region, has generated a great deal of concern over the last ten years. Since the late 1980s, breast milk in some areas of north-west Canada has been found to contain PCB concentrations constituting a hazard to infant health, even though the production and use of these substances has been banned in North America for decades.⁴⁸ The indigenous populations of the Arctic regions are particularly vulnerable since for survival, they depend on the hunting and fishing of species that tend to bio-accumulate POPs in their tissues. In May 2001, 150 countries, "determined to protect human health and the environment from the harmful impacts of persistent organic pollutants", signed a global POPs convention in Stockholm, setting out measures aimed at eliminating twelve such substances.⁴⁹ The preamble to this Convention acknowledges "that the Arctic

⁴⁷ See Male' Declaration on the Human Dimension of Global Climate Change, adopted in Male', Maldives, 14 November 2007, available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

⁴⁸ Arctic Monitoring and Assessment Programme, *Arctic Pollution Issues: A State of the Arctic Environment Report*, Oslo, 1997, p. 72.

⁴⁹ Stockholm Convention on Persistent Organic Pollutants, Stockholm, 23 May 2001, UN Doc. UNEP/POPS/CONF/4, Appendix II.

ecosystems and indigenous communities are particularly at risk because of the bio-magnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue.”

Toxic products cross national borders as a result not only of physical, chemical and ecological processes, but also of economic processes. For many years, the international community has focused its normative activity on cross-border movements of dangerous waste and international trade in pesticides and other chemical products that are banned or strictly regulated in their countries of origin.⁵⁰ As the *Probo Koala* incident in Abidjan dramatically demonstrated a few years ago dumping, or even recycling, of toxic waste in countries without appropriate treatment facilities can entail serious hazards to their populations’ health. The growing use of dangerous pesticides for agriculture in developing countries, which often results from an expansion in unsustainable methods of agricultural production spurred by globalisation, has adverse effects on the environment and causes millions of cases of poisoning among small farmers and agricultural labourers in these countries, who do not have the necessary information, equipment and social rights to protect themselves effectively from the hazards associated with using these toxic products, and whose health also suffers from the chronic, insidious impact of ongoing exposure to such substances in both their workplaces and their homes. Multilateral conventions were concluded in 1989 and 1998 respectively to control cross-border movements of dangerous waste⁵¹ and international trade in banned and severely restricted products⁵², but these measures have been far from fully effective in dealing with the problems.

In response to concerns expressed by developing countries, the United Nations Commission on Human Rights, “affirming that illegal movements and unloading of toxic and poisonous products and waste are a serious threat to human rights to life and health, particularly in developing countries which do not have the necessary treatment techniques,” decided in 1995 to appoint a Special Rapporteur. The Rapporteur’s term of office which was subsequently extended twice was to “research and study the impact of the illicit unloading of toxic and poisonous products and waste in African countries and other developing countries on the enjoyment of human rights, particularly everyone’s right to life and health” and to draw up recommendations and proposals for appropriate measures.⁵³ The work of the special rapporteur is currently being continued under the auspices of the Human Rights Council.

⁵⁰ On this issue, see generally Marc Pallemmaerts, *Toxics and Transnational Law: International and European Regulation of Toxic Substances as Legal Symbolism*, Hart Publishing, Oxford/Portland, Oregon, 2003, 767 pp.

⁵¹ Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, Basel, 22 March 1989.

⁵² Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 10 September 1998.

⁵³ Commission on Human Rights Resolution 1995/81, 8 March 1995.

In industrialised countries, atmospheric pollution and noise caused by transportation are now regarded as a major public health issue, especially in urban areas. According to the WHO's European Regional Office, the number of adult deaths linked to chronic exposure to atmospheric pollution caused by traffic in European cities is estimated at about 80 000 per year, and the risks of respiratory symptoms are about 50% higher among children living near very busy roads than those living in areas with little traffic. The level of indirect mortality from motor vehicle exhaust fumes is similar to the number of victims of road accidents. Moreover, transport, and particularly road traffic, is the main cause of human exposure to background noise in Europe; the WHO estimates that the proportion of the European population exposed to high noise levels harmful to health rose from 15% in 1980 to 26% in 1990.

In view of this situation, the Ministers and representatives of European member states of the WHO responsible for transport, environment and health adopted a "Charter on Transport, Environment and Health" in London on 16 June 1999, in which they expressed their concern "that current means of transport, which are dominated by motorized road transport, have substantial adverse impacts on health."⁵⁴ The environmental and health problems caused by transport are unquestionably international in nature, since the spectacular growth in the total volume of transport (which more than doubled in the European Union between 1970 and 1997, according to the European Environment Agency)⁵⁵ – particularly international transportation of goods by road, whose market share has increased considerably in relation to other, less polluting forms of transport – is related to the economic integration policies and policies to liberalise the transport sector pursued by the EU. Moreover, emissions from the transport sector make a significant contribution to various forms of cross-border atmospheric pollution.

Not everyone is exposed to environmental health hazards to the same extent. Some are more vulnerable than others. In a joint study published to coincide with the Johannesburg World Summit on Sustainable Development, the WHO, UNICEF and UNEP drew the international community's attention to the particular vulnerability of children. According to this report, two-thirds of global damage to human health caused by environmental factors, expressed in lost years of life expectancy, is suffered by children aged zero to 14.⁵⁶ Pollution from lead, for instance, affects children's health in particular: epidemiological studies have shown that chronic exposure to even weak doses of lead can impair the development of children's intellectual capacities.⁵⁷ Moreover, European children chronically exposed to intense noise, such

⁵⁴ WHO Doc. EUR/ICP/EHCO 02 02 05/9 Rev.4.

⁵⁵ European Environment Agency, *Environmental Signals 2000*, Environmental Assessment Report No 6, Copenhagen, 2000.

⁵⁶ UNEP/Unicef/WHO, *Children in the New Millennium: Environmental Impact on Health*, Nairobi/New York/Geneva, 2002, p. 19.

⁵⁷ *Ibid.*, p. 58.

as those living near airports, have been found to be impaired in terms of their learning to read, and ability to concentrate and solve problems.⁵⁸ These forms of environmental damage consequently jeopardise not only the children's right to enjoy the highest attainable state of physical and mental health, but also, indirectly, the full exercise of their right to education. The provisions of the Convention on the Rights of the Child concerning protection of the right to health require the States Parties, in fulfilling their obligations in respect of prevention, to take into consideration "the dangers and risks of environmental pollution."⁵⁹

F. THE RIGHT TO WATER AND FOOD: BASIC HUMAN NEEDS WHICH ARE DIRECTLY DEPENDENT ON DECLINING ECOSYSTEMS

Article 11 of the International Covenant on Economic, Social and Cultural Rights establishes everyone's right "to an adequate standard of living for himself and his family (...) and to the continuous improvement of living conditions." This right includes the right to food and housing and was interpreted by the Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the Covenant's implementation, as the legal basis of every human being's right to water in quantities, and of a quality, sufficient for his or her personal and domestic needs.⁶⁰ According to the Committee, the right to water also stems from other fundamental rights such as the rights to health, life and human dignity.

The depletion and degradation of water resources are undoubtedly in the forefront of ecological problems that have a direct impact on human rights. As the Director-General of UNESCO, Koïchiro Matsuura, said in connection with that organisation's publication of the first *World Water Development Report*, "the water crisis (...) lies at the heart of our survival and that of our planet Earth". According to the report, the amount of water available per individual dropped by a third between 1970 and 1990, and in the next 20 years the amount of water available per person in the world is expected, on average, to drop by a further third. In the most optimistic scenarios, at least 2 billion people in 48 countries will face water shortages by about 2050.⁶¹

The water crisis is not simply a question of the quantity of reserves available: the quality of surface waters and groundwater is increasingly affected by pollution from industrial, agricultural and domestic sources. While water pollution affects both industrialised and developing countries, its adverse effects on human health are often

⁵⁸ WHO Doc. EUR/ICP/EHCO 02 02 05/9 Rev.4.

⁵⁹ Convention on the Rights of the Child, art. 24, para. 2(c).

⁶⁰ UN Doc. E/C.12/2002/11, 26 November 2002.

⁶¹ *Water for People, Water for Life*, United Nations World Water Development Report, Unesco, Paris, 2003, pp. 12-13.

more acute in the latter. The *World Water Development Report* also states that poor populations are the most seriously affected: 50% of the population in developing countries is exposed to polluted water sources.⁶² In Asia, the rivers contain three times more bacteria from human waste than the world average, and 20 times more lead than rivers in industrialised countries.⁶³

In its General Comment on the right to water,⁶⁴ the Committee on Economic, Social and Cultural Rights clarifies the various obligations on States Parties to the International Covenant on Economic, Social and Cultural Rights to secure respect for this right. They must implement the necessary strategies and measures to ensure the availability, accessibility and quality of water for both present and future generations. Many riparian countries of international rivers and countries sharing aquifers that extend beyond their national borders depend on water resources over which they do not have sole control. Therefore, international co-operation based on the equitable use of water resources is essential in order to guarantee the right to water. Numerous international legal instruments have been adopted to promote such co-operation and appropriate machinery set in motion for the integrated management of international basins.

In Europe, the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes was supplemented in 1999 by a Protocol on Water and Health, which outlines a set of measures aimed at improving water management and preventing and combating water-borne diseases. This Protocol emphasises the need for sustainable water management in order to protect human health and well-being; it implicitly recognises that this is a human rights issue, referring to the essential nature of water resources “in quantities, and of a quality, sufficient to meet basic human needs.”⁶⁵ One of the principles set out in the Protocol is that of “equitable access to water, adequate in terms both of quantity and of quality”, which “should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”⁶⁶

Another human right established in Article 11 of the International Covenant on Economic, Social and Cultural Rights that may be jeopardised by environmental problems is the right to food. Food production is largely dependent on the condition of the environment. Soil deterioration has a serious impact on food production and living conditions for rural populations in many regions of the world. As stated in the preamble to the United Nations Convention to Combat Desertification in Those

⁶² *Ibid.*, p. 11.

⁶³ *Ibid.*

⁶⁴ UN Doc. E/C.12/2002/11, 20 January 2003.

⁶⁵ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, London, 18 June 1999, UN Doc. MP.WAT/AC.1/1999/1, 1st preambular para.

⁶⁶ *Ibid.*, art. 5 (1).

Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, “desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition [and] lack of food security”. While desertification stems primarily from local causes linked to “complex interactions among physical, biological, political, social, cultural and economic factors”, some of these factors may be exacerbated by the international economic context. The preamble to the Convention also notes “the impact of trade and relevant aspects of international economic relations on the ability of affected countries to combat desertification adequately.”

In the long term, climate change may have serious implications for agricultural production. According to the IPCC, global warming may result in a significant reduction in the yield of cereal crops in most tropical and sub-tropical regions.⁶⁷ In general, the impact of environmental damage on food security is felt most directly by populations that depend on their immediate natural environment to meet their needs for food, without access to national and international markets; these include many indigenous peoples. On the other hand, some policy measures taken by governments to curb emissions of greenhouse gases, like the promotion of biofuels, may also have negative incidental effects on food security, as the demand for biofuel feedstocks has an impact on agricultural land-use patterns and the production and market price of certain food crops.

G. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE AS A PROXY FOR THE RIGHT TO A HEALTHY ENVIRONMENT

Within the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms, environmental issues have generally been analysed in terms of the right to respect for private and family life, guaranteed by Article 8 of the Convention. In a number of judgments, the European Court of Human Rights has found that some serious forms of environmental damage affecting people in their places of residence can constitute violations of their right to respect for their private and family life. Under Article 8 of the Convention, the Parties have an obligation to take the necessary environmental protection measures to prevent any interference in the exercise of this right.

Many cases considered by the Commission and the European Court of Human Rights concern noise pollution suffered by people living near airports. In 1980, the Commission declared complaints from local residents under Article 8 of the Convention admissible. It accepted that, in principle, significant noise pollution could

⁶⁷ Intergovernmental Panel on Climate Change, *Climate Change 2001: Synthesis Report*, para. 3.21.

affect a person's physical well-being to the extent that it impairs his or her private life. However, it also accepted that interference in the exercise of the right to private life could be justified by the general economic interest served by the operation of an airport, and that there was no violation of Article 8 of the Convention provided that the principle of proportionality had been respected in weighing different interests.

In the most controversial case concerning Heathrow Airport, however, the Court concluded that Article 8 had been violated, finding that the United Kingdom had permitted an increase in the noise pollution produced by night flights without giving serious consideration to the impact of this increased pollution on local residents' sleep, and without seeking the least detrimental solution in terms of human rights. In this case, the Court first held that the country's economic interest had not been properly weighed against the rights of the applicants, who were victims of the pollution.⁶⁸ However, this judgment was overturned on appeal by the Grand Chamber of the Court, whose majority, after scrutinising the national decision-making process leading to the decision to allow increased night flights, ultimately found that the defendant state had not exceeded its 'wide margin of appreciation' in balancing the applicants' rights against the economic interests at stake.⁶⁹

In another, older case, concerning pollution from a tannery, the Court had found Spain guilty of violating Article 8 of the Convention owing to a lack of measures to prevent environmental conditions adversely affecting the quality of life of a person living near the plant in question, recognising that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."⁷⁰ In a more recent judgment, following a complaint made by people living near a chemical production plant constituting a major accident hazard in Italy, the Court ruled that even merely depriving a person of "essential information" concerning the nature and extent of an industrial accident hazard in his or her immediate environment, to which he or she and his or her family are exposed, could constitute a violation of that person's right to respect for his or her private and family life.⁷¹ Since these precedent-setting cases, there has been a rather steady stream of case-law of the European Court of Human Rights in which Article 8 of Convention was held to have been infringed by individuals' exposure to serious environmental degradation at their place of residence.

⁶⁸ European Court of Human Rights, judgment of 2 October 2001, *Hatton et al. v. United Kingdom*.

⁶⁹ European Court of Human Rights (Grand Chamber), judgment of 9 July 2003, *Hatton et al. v. United Kingdom*.

⁷⁰ European Court of Human Rights, judgment of 9 December 1994, *Lopez Ostra v. Spain*, para. 51.

⁷¹ European Court of Human Rights, judgment of 19 February 1998, *Guerra et al. v. Italy*, para. 60.

H. THE AMBIVALENT RELATIONSHIP BETWEEN THE RIGHT TO PROPERTY AND THE PROTECTION OF ENVIRONMENTAL RESOURCES

The relationship between environmental protection and the right to property may be seen in both positive and negative terms. In some cases, protection of the right to property will be compatible with protection of the environment; in others, conflicts may arise between these two values. It all depends on the owner's approach to the exercise of his or her rights and the purposes for which they are exercised. In actual fact, the traditional concept of property rights, where the owner has complete control over the objects in question, may be seen as a justification either for the destructive use of environmental resources under private ownership or for their protection and sustainable use. Land-owners who consider their property rights violated by government measures restricting the free use of their property in the interests of environmental protection or land-use planning generally rely on the right to respect for property established by the first additional Protocol to the ECHR, before the European Court for Human Rights. On the whole, the Court has accepted that such measures may be justified under the provisions of the Protocol allowing states to control the use of property in accordance with the general interest. In some cases, however, specific circumstances relating to the enforcement of a regulatory measure have been so onerous to the owner that the Court has found that the right to property has been violated.⁷²

Another rather unusual case concerning the right to property and environmental protection clearly illustrates the ambiguous relationship between the right to property and environmental protection interests. The Court ruled that a French law requiring certain landowners to transfer the right to hunt on their land to hunting associations, so that members of such associations could practise their sport – even though these owners were opposed to hunting for ethical and ecological reasons and wished to prohibit it on their land- constituted a violation of every person's right to respect for his or her property, as guaranteed by Article 1 of the first Protocol to the Convention.⁷³ In this case, a fundamental human right was successfully relied upon to prevent a particular use of nature.

While this case concerned a somewhat symbolic issue, ecological, economic and cultural conflicts over rights to natural resources and the recognition and protection of the right to property are far more significant when they involve indigenous peoples. Over the last twenty years, various global and regional bodies for the protection of human rights have, in both contentious and non-contentious proceedings, considered

⁷² European Court of Human Rights, judgment of 16 September 1996, *Matos e Silva Lda et al. v. Portugal*.

⁷³ European Court of Human Rights, judgment of 29 April 1999, *Chassagnou et al. v. France*.

complaints from indigenous communities whose environment is being damaged by extractive economic activities (mainly mining, oil extraction and forestry) conducted on their land without their consent but with the permission and sometimes even the active participation of government authorities. These communities find it difficult to secure respect for their traditional rights in many legal systems based on an individualistic approach to property rights, which have trouble grasping and acknowledging the customary rules of collective ownership and common use of natural resources that are typical of indigenous peoples.

In a significant judgment, the Inter-American Court of Human Rights ruled in favour of a 'progressive interpretation' of the right to property guaranteed by Article 21 of the American Convention on Human Rights so as to include the rights of members of indigenous communities exercised in the context of collective ownership arrangements. It ruled that the specific concept of ownership recognised by these communities was just as worthy of legal protection as the more traditional concept of individual ownership, emphasising the particularly significant links between indigenous peoples and the land. In this judgment, the Inter-American Court found Nicaragua guilty of violating the right to property by granting a Korean company a forestry concession on land occupied by the indigenous community of Awás Tingni on the country's Atlantic coast and failing to take the necessary steps to mark out and protect its territory. The Court explained its decision by stating that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival." These communities' relationship to the land is "not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."⁷⁴

This case clearly illustrates the ambivalence of the right to property as it relates to the protection and use of natural resources. Admittedly, according to the traditional list of so-called first- and second-generation human rights, the discussion of the links between human rights and environment does not entirely do justice to the complex, integrated nature of the relationships between human beings and their environment. Yet, the ongoing discussion is more than able to demonstrate the multiple relationships between efforts to address environmental problems and efforts to secure respect for human rights. At the same time however, conflicting interests and divergent interpretations of fundamental rights have also stood in the way of a general recognition of the right to a healthy environment as a basic human right.

⁷⁴ Inter-American Court of Human Rights, judgment of 31 August 2000, *Case of the Mayagna (Sumo) Community of Awás Tingni v. Nicaragua*, para. 149.

I. THE RIGHT TO THE ENVIRONMENT VS. THE RIGHT TO DEVELOPMENT: A FALSE DICHOTOMY

Universal recognition of the individual environmental rights of present and future generations and of the substantive right to a healthy environment as such often generates resistance from those who fear that this would be detrimental to the present generations' right to development. It is also a cause for concern that such recognition would serve as a pretext for new forms of conditionality and other constraints hindering the economic development of poor nations. This presumed opposition between the right to the environment and the right to development explains the virtual absence of any reference to human rights in the texts formulated by the major United Nations conferences on sustainable development in Rio and Johannesburg.

Principle 1 of the 1992 Rio Declaration on Environment and Development states that "human beings are at the centre of concerns for sustainable development," and that "they are entitled to a healthy and productive life in harmony with nature." The main purpose of this provision is to articulate an anthropocentric approach to environmental protection and sustainable development rather than to affirm individual environmental rights. Compared with Principle 1 of the 1972 Stockholm Declaration on the Human Environment, which recognised man's "fundamental right to [...] adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", the Rio Declaration's reference to a vague right to live "in harmony with nature" waters down considerably the human rights dimension of environmental protection. The emphasis placed on a "productive life" reflects developing countries' apprehensions that environmental protection might be prioritised at the expense of economic development.

It is clearly for this very reason that the Rio Declaration expressly recognises the right to development, even though this is not explicitly worded as an *individual* human right. Principle 3 of the Declaration states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Since it does not specify *who* is the subject of the right to development it affirms, this provision could also be interpreted as referring to a collective right or a right of States rather than to an individual right. The drafting history of the Declaration shows that the main concern of developing countries' was to assert the right to development as an inalienable right of States and peoples rather than an individual human right.⁷⁵

The 2002 World Summit on Sustainable Development in Johannesburg also glossed over the links between sustainable development, environmental protection and human rights. The Johannesburg Plan of Implementation refers to such links only in very general terms, in an introductory provision stating that:

⁷⁵ See, *inter alia*, UN Doc. A/CONF.151/PC/WG.III/L.20/Rev. 1, 19 March 1992, p. 3, Principle 3.

Peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.⁷⁶

In her address to the Summit, the then UN High Commissioner for Human Rights, Mary Robinson, regretted the lack of consideration given to the promotion and protection of human rights in the policy debate on sustainable development. A European Union proposal to include a provision in the Johannesburg Plan of Implementation, acknowledging “the importance of the interrelationship between human rights promotion and protection and environmental protection for sustainable development” and inviting “further consideration of these issues in the relevant fora”⁷⁷ failed to make it into the final version of that text. The Summit merely “acknowledge[d] the consideration being given to the possible relationship between environment and human rights,”⁷⁸ even though as we have seen, the existence of this link has been accepted for a long time by numerous specialised human rights bodies, within both the United Nations and various regional organisations.

The false opposition between the right to development and the right to the environment that underpins debates within the UN fora, stems from an analysis of global environmental issues grounded in intergovernmentalism and the economic and political power relationships between States. As early as the 1972 Stockholm Conference, Third World countries were wary of international co-operation in the environmental field, which they feared might lead to restrictions on their economic and social development and limit their freedom to exploit their natural resources according to national priorities. North-South tensions in international co-operation aimed at addressing the world’s ecological problems became even sharper in the 1990s: a result of trade disputes over unilateral environmental protection measures taken by some industrialised countries and a growing awareness of the wide-ranging economic implications of international environmental policies.

Multilateral negotiations on a global scale to combat climate change have brought into sharp focus the great disparity between developed and developing countries in terms of their respective levels of historical and current responsibility for the causes of this global environmental problem. Acceptance of the principle of ‘common but differentiated responsibilities’ was a prerequisite for reaching any North-South compact on the issue. As the preamble to the United Nations Framework Convention on Climate Change notes “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, [...] per capita emissions in developing countries are still relatively low and [...] the share of global emissions originating in developing countries will grow to meet their social and development

⁷⁶ World Summit on Sustainable Development, PoI, *supra* n. 13, para. 5.

⁷⁷ Conclusions of the Council of the European Union, 2429th session, 30 May 2002, para. 6.5.

⁷⁸ PoI, *supra* n. 13, para. 152.

needs.” Several provisions of the Convention stress that the participation of developing countries in the Parties’ joint efforts to “protect the climate system for the benefit of present and future generations”, shall be “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”⁷⁹ National and international measures to address climate change shall be consistent with these principles, and shall not be taken at the expense of the right to development. On the contrary, they must be “co-ordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty.”⁸⁰ Common efforts to fight global warming require a redistribution of the limited absorption capacity of the earth’s atmosphere, given that, as stated in the preamble to the Framework Convention, “developing countries need access to the resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow.”⁸¹

It is clear that any long-term solution to the major challenge of global warming must address the concerns for international equity reflected in these provisions. While demands for a more equitable global distribution of ‘environmental space’ are unassailable from an ethical standpoint, issues of equity in international environmental policy are too often considered solely in terms of States’ macroeconomic interests. This reductionist approach which underpins political and legal discourse overlooks the human dimension. A different approach based on human rights and an understanding of the right to development as an individual right rather than a sovereign right of States, sheds a different light on the debate. Analysis shows that the right to the environment and the right to development are not necessarily conflicting, as many governments still tend to assume.

In the Declaration on the Right to Development, adopted by the United Nations General Assembly in December 1986,⁸² the right to development is seen as both an individual and a collective right. The Declaration defines this right as “an inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” Its preamble states “that equality of opportunity for development is *a prerogative both of nations and of individuals* who make up nations”. According to the Declaration, “the human person is the central subject of the development process and [...] development policy should therefore make the human being the main participant

⁷⁹ United Nations Framework Convention on Climate Change, art. 3(1).

⁸⁰ *Ibid.*, 21st preambular para.

⁸¹ *Ibid.*, 22nd preambular para.

⁸² United Nations General Assembly Resolution 41/128 of 4 December 1986.

and beneficiary of development.” National and international development policies must therefore aim at “the constant improvement of the well-being of the entire population and of all individuals” and the elimination of “obstacles to development,” foremost of which is the denial of civil, political, economic, social and cultural rights. In particular, such policies must ensure “equality of opportunity for all in their access to basic resources.”

Given our global environmental predicament, it is clear that it will be impossible to secure the right to development set out in the United Nations Declaration unless efforts are made to safeguard the environmental conditions enabling human development. This requires ensuring sustainable and equitable access to the natural resources that are essential to human survival and well-being. The depletion or disappearance of these resources may impair the full exercise of a number of fundamental human rights, the achievement of which is the very purpose of development.⁸³ In terms of individual rights, there is no opposition between the right to development and the right to a healthy environment, but rather a clear interdependence and complementarity.

In the UNFCCC, the issue of equitable distribution of the biosphere’s capacity to absorb greenhouse gases is considered exclusively from the perspective of States. Using the terminology of the Declaration on the Right to Development, one could say the Parties to the Convention are concerned about ensuring “equality of opportunity for development” as a “prerogative of nations,” i.e. safeguarding the development opportunities of poor countries that consume little energy as opposed to those of rich countries whose industrialisation has already seriously damaged the common ecological heritage and ensuring that the necessary restrictions on greenhouse gas emissions do not become an “obstacle to development.”

Looking at international environmental issues and human development in terms of human rights forces us to focus on “equality of opportunity for development” as the right of each individual, and to consider the necessary social and environmental conditions for “equality of opportunity for all in their access to basic resources,” to quote the Declaration on the Right to Development once again. The common ecological heritage is unquestionably one of these ‘basic resources’ that are essential to human well-being. Unsustainable production and consumption patterns based on the excessive appropriation and consumption of natural resources are a real issue. Especially, when they use the environment in ways that disregard the biosphere’s carrying capacity and the needs of humanity as a whole. Thus, they undermine “equality of opportunity for all in their access to basic resources” and, therefore, the prospects of securing civil, political, economic, social and cultural rights for all. This

⁸³ Office of the High Commissioner for Human Rights, Human Rights, *Poverty Reduction and Sustainable Development: Health, Food and Water - A Background Paper*, United Nations, Geneva, 2002.

is implicitly acknowledged in the Johannesburg Declaration, which notes that “air, water and marine pollution continue to rob millions of a decent life.”⁸⁴

The “unsustainable patterns of production and consumption,” addressed by Principle 8 of the Rio Declaration which requires states to “reduce and eliminate” in order to “achieve sustainable development and a higher quality of life for all people,” are not confined to industrialised countries. Moreover, not all the inhabitants of such countries have access to them, unlike some elites in developing countries. National and international environmental protection policies cannot overlook inequalities in access to resources, both between and within countries.

The existence of unsustainable modes of production and consumption, the spread of which is currently being encouraged by economic globalisation, raises issues of individual and collective responsibility. As the Declaration on the Right to Development states, “all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community.”⁸⁵ The exercise of the right to development and of individual civil and economic rights cannot justify production and consumption patterns that destroy the environmental commons, thereby jeopardising other people’s rights. Consequently, environmental protection must also be seen as every human being’s duty to the community, as Principle 1 of the Stockholm Declaration pointed out as far back as 1972. The intergenerational aspect of this duty – which goes hand in hand with the right to development – was emphasised in Principle 3 of the Rio Declaration. At a time of growing global concern about scarcity and depletion of vital natural resource and of unchecked destruction of life-supporting ecosystems as a result of the relentless pressure from unsustainable patterns of production and consumption, the “indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development” – to quote once again the terms of the Johannesburg Declaration⁸⁶ – more than ever calls into question the legitimacy of political discourse which denies the fundamental nature of environmental human rights and the importance of environmental protection by depicting them as antagonistic to the right to development.

⁸⁴ Johannesburg Declaration on Sustainable Development, UN Doc. A/CONF.199/20, p. 3, para. 13 *in fine*.

⁸⁵ Declaration on the Right to Development, art. 2, para. 2.

⁸⁶ Johannesburg Declaration, *supra* n. 80, para. 3 *in fine*.

J. CONCLUDING REMARKS

In an earlier contribution to this journal,⁸⁷ Dinah Shelton has identified three main approaches to the relationship between human rights and environmental protection, only one of which is the recognition of the right to a healthy environment as an independent, substantive human right. The other two either regard environmental quality as a necessary condition for ensuring the enjoyment of other, more firmly established first- and second-generation human rights, or emphasize procedural rights of individuals and groups as an indispensable instrument of effective environmental protection policies. While the latter, instrumental approach has gained universal acceptance since the Rio Declaration, which initiated a now dominant trend towards what I have referred to above as the proceduralisation of environmental rights, the other approaches continue to be pursued in international legal and political discourse and are – as the above analysis of this discourse demonstrates – also supported by developments in national and international law and the jurisprudence of various human rights bodies.

However, as is equally apparent from this analysis, many states still remain reluctant to grant international legal recognition and protection to a substantive human right to a safe and healthy environment as such, and tend to view procedural environmental rights as a less threatening substitute. But although such procedural rights are contributing to enhancing the effectiveness and legitimacy of environmental policies and are empowering individuals and groups, in what the Stockholm Declaration, in a long-forgotten provision, once termed “the just struggle of the peoples of all countries against pollution”⁸⁸ they should not be regarded as a panacea nor become an end in themselves. Ultimately, what matters is the achievement of substantial improvements in the quality and sustainability of the environment on which human life and security, progress and well-being depend. From this perspective, the universal recognition in international law of the substantive human right to a safe and healthy environment should remain a firm goal on the agenda of both environmentalists and human rights defenders.

⁸⁷ Dinah Shelton, “Human Rights, Health and Environmental Protection: Linkages in Law and Practice”, 1 *Human Rights & International Legal Discourse* (2007), pp. 9–59.

⁸⁸ Stockholm Declaration, *supra* n. 3, Principle 6, *in fine*.