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BACKGROUND PAPER No. 2

Human Rights and the Environment: Jurisprudence of Human Rights Bodies

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The following discussion summarizes the decisions, recommendations and comments of global and regional human rights bodies on issues of environmental protection and human rights. In the absence of petition procedures pursuant to environmental treaties, cases concerning the impact of environmental harm on individuals and groups have been brought to international human rights bodies. In addition, these bodies have sometimes addressed the intersection of human rights and environmental protection in General Comments and have posed questions to states about the subject during their consideration of periodic state reports. The discussion below covers the period from 1991 to 2001, with citations to and short comments on earlier cases. The paper does not include the general resolutions of the U.N. Human Rights Commission or Sub-Commission nor the recommendations of Special Rapporteurs appointed by either body.

Global Human Rights Bodies

1. U.N. Human Rights Committee

a. *General Comments.* The U.N. Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics.¹ The Committee has interpreted Article 27² of the Covenant on Civil and Political Rights in a broad manner, observing that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as

¹ See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 6-7 [hereinafter *Compilation*].

² CCPR Article 27 provides that members of minority groups shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. @CCPR, art. 27.

fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. . . . The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole³

b. *Communications*

i. *EHP v. Canada*. In an early case, a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations. The Committee found that the case raised serious issues with regard to the obligation of States parties to protect human life, but declared the case inadmissible due to failure to exhaust local remedies.⁴

ii. In *Bernard Ominayak and the Lubicon Band v. Canada*,⁵ applicants alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands. The Committee characterized the claim as one of minority rights under Article 27 and found that historic inequities and more recent developments, including the oil and gas exploitation, were threatening the way of life and culture of the Band and thus were in violation of Article 27.

iii. *Bordes and Temeharo v. France*. A different case asserting risk of harm from nuclear radiation arose in which the United Nations Human Rights Committee found the case inadmissible on the ground that the claimants did not qualify as victims of a violation. The communication concerned France's nuclear tests among the atolls of Mururoa and Fangataufa in the South Pacific.⁶ The Committee seemed concerned with the remoteness of the harm.⁷ Applicants claimed that the tests represented a threat to their right to life and their right not to be subjected to arbitrary

³ General Comment 23 paras. 7, 9 in *Compilation* at 41.

⁴ *Communication No. 67/1980, EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20. See also *Kitok v. Sweden, Communication No. 197/1985, II Official Records of the Human Rights Committee 1987/88*, U.N. Doc. CCPR/7/Add.1, at 442 (Swedish 1971 Reindeer Husbandry Act held not to violate rights of an individual Sami as a reasonable and objective measure necessary for the continued viability and welfare of the minority as a whole).

⁵ *Communication No. 167/1984, Decisions of the Human Rights Committee*, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

⁶ *Communication No. 645/1995, Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, 30 July 1996.

⁷ The applicants also co-authored a complaint on the same case and submitted it to the European Commission on Human Rights, where it was registered as Case No. 28204/95. The case was declared inadmissible on 4 December 1995.

interference with their privacy and family life. They attempted to place the burden of proof on the government, contending that French authorities had been unable to show that the tests would not endanger the health of the people living in the South Pacific or the environment by further damaging the geological structure of the atolls. The Committee held that the applicants had not substantiated their claim that the tests had violated or threatened violation with the rights invoked. As for their contention that the tests increased the likelihood of catastrophic accident, the Committee notes that this contention is highly controversial even in concerned scientific circles; it is not possible for the Committee to ascertain its validity or correctness.⁸ Thus, as in the prior case, the lack of scientific certainty coupled with the burden of proof on the applicants, limited the claimant's ability to obtain relief through human rights proceedings.

iv. *Ilmari Lansman et al. v. Finland* In a rare case decided on the merits, the Committee found that Article 27 was not violated by the extent of stone-quarrying permitted by Finland in traditional lands of the Sami.⁸ The applicants, forty-eight Sami reindeer breeders challenged the decision of the Central Forestry Board to permit the quarry. The Committee observed that a state may wish to encourage development or economic activity, but found that the scope of its freedom to do so must be tested by reference to the obligations of the state under article 27. The Committee explicitly rejected the European doctrine of margin of appreciation, holding that measures whose impact amount to a denial of the right to culture will not be compatible with the Covenant, although those which simply have a certain limited impact on the way of life of persons belonging to a minority will not necessarily violate the treaty. The Committee also referred to its General Comment on Article 27, according to which measures must be taken to ensure the effective participation of members of minority communities in decisions which affect them.⁹

The Committee concluded that the amount of quarrying that had taken place did not constitute a denial of the applicants' right to culture. It noted that they were consulted and their views taken into account in the government's decision. Moreover, the Committee determined that measures were taken to minimize the impact on reindeer herding activity and on the environment. In regard to future activities, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded then it might constitute a violation of Article 27. According to the Committee, the State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.⁹

v. *Apirana Mahuika et al v. New Zealand*¹⁰. The case posed the problem of balancing indigenous rights to natural resources with governmental efforts to conserve natural resources. The

⁸ Communication No. 511/1992, *Ilmari Lansman et al. v. Finland*, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996).

⁹ Other cases involving Sami reindeer breeders include Communication No. 431/1990, *O.S. et al. v. Finland*, decision of 23 March 1994, and Communication No. 671/1995, *Jouni E. Lansmann et al. v. Finland*, decision of 30 October 1996.

¹⁰ *Communication No. 547/1992, Apirana Mahuika et al v. New Zealand*, CCPR/C/70/D/547/1993, views issued November 16, 2000.

communication, filed by the Maori Legal Service on behalf of eighteen petitioners, claimed violations of the rights of self-determination, right to a remedy, freedom of association, freedom of conscience, non-discrimination, and minority rights. The communication challenged New Zealand's efforts to regulate commercial and non-commercial fishing in light of the dramatic growth of the fishing industry in the past three decades.

The Treaty of Waitangi, legally unenforceable absent specific legislation, guarantees to Maori the full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession. Since the 1980s, the government has sought to determine Maori fishing claims. After extensive negotiations, on September 23, 1992 a Deed of Settlement was executed by representatives of the government and the Maori to regulate all fisheries issues between the parties. In all, 110 signatories signed the Deed.

The authors of the communication represent tribes and sub-tribes that objected to the Settlement. They first brought their claims to the courts of New Zealand, then to the Waitangi Tribunal. All concluded that the settlement was valid except for some aspects that could be rectified in anticipated legislation. Having exhausted local remedies, the petitioners filed their complaint with the Human Rights Committee.

According to the petitioners, the contents of the Settlement were not always adequately disclosed or explained and thus informed decision-making was seriously inhibited. They also argued that the negotiators did not represent individual tribes and sub-tribes. They claimed that the Settlement denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development, in violation of the right of self-determination contained in the Covenant on Civil and Political Rights. They also alleged threats to their way of life and the culture of the tribes in violation of article 27 of the Covenant.

The government accepted that the enjoyment of Maori culture encompasses the right to engage in fishing activities. It acknowledged its obligations to ensure recognition of the right. In its view, the Settlement expressed both the right and the obligation. It noted that minority rights contained in Article 27 are not unlimited but may be subject to reasonable and objective justification, balancing the concerns of the Maori and the need to introduce measures to ensure the sustainability of the fishing resources. The system of fishing quotas that was introduced reflected the need for effective measures to conserve the depleted inshore fishery, carrying out the government's duty to all New Zealanders to conserve and manage the resource for future generations. Its regime was based on the reasonable and objective needs of overall sustainable management.

The Committee considered first whether minority rights under Article 27 of the Covenant had been violated by the Settlement, noting the agreement of both sides that the Maori constitute a minority and that use and control of fisheries is an essential element of their culture. The question was whether the acts of the government amounted to a denial of that culture. The Committee reiterated that a state's freedom to encourage development or allow economic activity must comport with the obligations undertaken in Article 27. The latter requires that a member of a minority shall not be denied his right to enjoy his own culture. . . . However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27. Further, in the case of indigenous peoples, the State may need to take protective measures and measures to ensure the effective participation of members of minority

communities in decisions that affect them. In regard to the latter point, the Committee emphasizes that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.¹⁰ The complicated process of consultation undertaken by the government was held to comply with this requirement, because the government paid special attention to the cultural and religious significance of fishing for the Maori.

In resolving the conflict between various members of the minority group, the Committee indicated that it would consider whether the limitation in issue is in the interests of all members of the minority and whether there is a reasonable and objective justification for its application to those who object. The Committee found it to be a matter of concern that the Settlement and its process contributed to divisions among the Maori, but the Committee concluded that the government had taken the necessary steps to ensure compatibility of the Settlement with Article 27. The Committee thus found no breach of the Covenant guarantees.

2. U.N. Committee on Economic, Social and Cultural Rights.

a. *Periodic Reporting.* In the context of the periodic reporting procedure, states sometimes report on environmental issues as they affect guaranteed rights. In 1986, Tunisia reported to the Commission on Economic, Social and Cultural Rights, in the context of Article 11 on the right to an adequate standard of living, on measures taken to prevent degradation of natural resources, particularly erosion, and about measures to prevent contamination of food.¹¹ Similarly, the Ukraine reported in 1995 on the environmental situation consequent to the explosion at Chernobyl, in regard to the right to life. Committee members sometimes request specific information about environmental harm that threatens human rights. Poland, for example, was asked to provide information in 1989 about measures to combat pollution, especially in upper Silesia.¹²

b. *General Comments.* The Committee referred to environmental issues in its General Comment on the Right to Adequate Food¹³ and its General Comment on the Right to Adequate Housing. In the first, the Committee interpreted the phrase “free from adverse substances” in Article 11 of the Covenant to mean that the state must adopt food safety and other protective measures to prevent contamination through bad environmental hygiene.¹⁴ The Comment on housing states that housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants.¹⁵ On November 8, 2000, the Committee issued General Comment 14 “Substantive Issues Arising in the Implementation of the International Covenant on

¹¹ E/1986/3/Add.9.

¹² E/1989/4/Add.12.

¹³ General Comment 12, E/C.12/1999/5

¹⁴ General Comment 4 of 13 December 1991, United Nations, *Compilation*, HRI/GEN/1/Rev.3, 63, para. 5.

Economic, Social and Cultural Rights (Article 12).”¹⁵ The Comment states in paragraph 4 that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinates of health, such as . . . a healthy environment.” General Comment 14 adds that “[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels” and should be entitled to adequate reparation.¹⁶

3. Committee on the Elimination of Discrimination against Women

CEDAW linked environment to the right to health in its Concluding Observations on the State report of Romania, expressing its “concern about the situation of the environment, including industrial accidents, and their impact on women’s health.”¹⁷

4. Committee on the Rights of the Child

In the context of the State reporting procedure, the Committee has issued observations calling for better compliance with Article 24(2)(c). In its Concluding Observations on the State report submitted by Jordan, the CRC recommended that Jordan “take all appropriate measures, including through international cooperation, to prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children and to strengthen procedures for inspection.”¹⁸ The CRC’s Concluding Observations on South Africa also expressed the Committee’s “concern . . . at the increase in environmental degradation, especially as regards air pollution” and “recommend[ed] that the State party increase its efforts to facilitate the implementation of sustainable development programmes to prevent environmental degradation, especially as regards air pollution.”¹⁹

Regional Systems

¹⁵ U.N. CESCR, General Comment 14, U.N. Doc. E/C.12/2000/4 (2000).

¹⁶ *Id.* Para. 59.

¹⁷ U.N. CEDAW, Concluding Observations on Romania, U.N. Doc. CEDAW/C/2000/II/Add.7 at para. 38 (2000).

¹⁸ U.N. Committee on the Rights of the Child, Concluding Observations on Jordan, U.N. Doc. CRC/C/15/Add.125 at para. 50 (2000).

¹⁹ U.N. Committee on the Rights of the Child, Concluding Observations on South Africa, U.N. Doc. CRC/C/15/Add.122 (200) at para. 30. *See also* Concluding Observations on Kyrgyzstan, U.N. Doc. CRC/C/15/Add. 127 (2000); Concluding Observations on Grenada, U.N. Doc. CRC/15/Add.121 (2000).

On the regional level, human rights commissions and courts in Europe, the Americas and Africa have dealt with alleged violations of human rights linked to environmental harm. In the Inter-American system, claims linked to environmental harm have generally asserted that the right to life is threatened, or that the rights of indigenous groups have been violated. In Europe, there has been a focus on rights to privacy and home life.

1. African Charter on Human and Peoples Rights. The cases submitted to the African system have generally invoked the right to health, protected by Article 16 of the African Charter, rather than the right to environment contained in the same document. In *Communications 25/89, 47/90, 56/91 and 100/93 against Zaire* the Commission held that failure by the Government to provide basic services such as safe drinking water constituted a violation of Article 16.²⁰

2. Organization of American States: American Declaration and Convention

i. *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua.* The case of *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, decided by the Inter-American Court of Human Rights, involves the protection of Nicaraguan forests in lands traditionally owned by the Awas Tingni. The case originated as an action against government-sponsored logging of timber on native lands by Sol del Caribe, S.A. (SOLCARSA), a subsidiary of the Korean company Kumkyung Co. Ltd.. The government granted SOLCARSA a logging concession without consultation with the Awas Tingni community, although the government had agreed to consult them subsequent to granting an earlier logging concession. The Awas Tingni filed a case at the Inter-American Commission, alleging that the government violated their rights to cultural integrity, religion, equal protection and participation in government. The Commission found in 1998 that the government had violated the human rights of the Awas Tingni.

The Commission brought the case before the Court on June 4, 1998, alleging violation by the

²⁰ The finding followed the consolidation of 4 communications asserting torture, killings arbitrary detention, unfair trials, restrictions on the right to association and peaceful assembly, suppression of freedom of the press, denial of the right to education and the right to health. In regard to the latter the Commission said Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16. @ AHG/207(XXXII), Annex VIII at 8.

State of Nicaragua of Articles 1, 2, 21 and 15 of the American Convention, through the State's failure to demarcate and to grant official recognition to the territory of that community. The Commission requested, based on Article 63(1) of the American Convention, that the Court determine compensation for the consequences of the violation of rights violated. The Court, at its 47th Session, considered the preliminary exception filed by the Republic of Nicaragua, based on the alleged failure to exhaust domestic remedies. The Court considered that the State had implicitly renounced the argument of non-exhaustion of domestic remedies because it had failed to cite it before the Commission at the opportune time. In light of the fact that the State's exception was rejected on the grounds of late submission, the Court considered that it was not necessary to pronounce on the question of the effectiveness of the domestic remedies referred to and decided to continue to be seized of the case.

On August 31, 2001, the court issued its judgment on the merits and reparations in the case. The Court decided by seven votes to one to declare that the State violated the right to judicial protection (art. 25 of the American Convention) and the right to property (Article 21 of the Convention). It unanimously declared that the State must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. Pending the demarcation of the indigenous lands, the State must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use or enjoyment of those properties located in the Awas Tngni lands. By a vote of 7 to 1, the Court also declared that the State must invest US\$50,000 in public works and services of collective benefit to the Awas Tingni as a form of reparations for non-material injury and US\$30,000 for legal fees and expenses.

ii. *Yanomami v. Brazil*. In the Inter-American system, the Commission established a link between environmental quality and the right to life in response to a petition brought on behalf of the Yanomani Indians of Brazil. The petition alleged that the government violated the American Declaration of the Rights and Duties of Man²¹ by constructing a highway through Yanomani territory and authorizing the exploitation of the territory's resources. These actions led to the influx of non-indigenous who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI).²²

iii. *Country Studies*. Apart from deciding the individual complaints brought to it and

²¹ Pan American Union, Final Act of the Ninth Conference of American States, Res. XXX, at 38 (1948), reprinted in OAS, *Basic Documents Pertaining to Human Rights in the Inter-american System* (1996).

²² Case 7615 (Brazil), INTER-AM.CH.R., 1984-1985 *Annual Report* 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

discussed above, the Inter-American Commission on Human Rights has the authority to study the human rights situation generally or in regard to specific issues with a member state of the OAS. In two recently published studies, the Commission devoted particular attention to environmental rights of indigenous in Ecuador²³ and Brazil²⁴

In regard to *Ecuador*, the Commission noted that it had been examining the human rights situation in the Oriente for several years, in response to claims that oil exploitation activities were contaminating the water, air and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness.²⁵ It found, after an on site visit, that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts of oil exploitation in their drinking and bathing water, in the air, and in the soil. The inhabitants were unanimous in claiming that oil operations, especially the disposal of toxic wastes, jeopardized their lives and health. Many suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, many claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies.

The Commission in its discussion of relevant human rights law emphasized the right to life and physical security. It stated that:

[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.²⁶

In this regard, States Parties may be required to take positive measures to safeguard the fundamental and non-derogable rights to life and physical integrity, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury.

The Commission also directly addressed concerns for economic development, noting that the Convention does not prevent nor discourage it, but rather requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each state may exploit its natural resources, the absence of regulation, inappropriate regulation, or a

²³ Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997)[hereinafter *Report on Ecuador*].

²⁴ Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1 (1997).

²⁵ *Report on Ecuador*, *supra* note 18, v. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report.

²⁶ *Report on Ecuador*, *id.* at 88.

lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.²⁷

The Commission concluded that [c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ...The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.²⁸

This holding can clearly be applied outside the context of indigenous peoples and sets general standards for environmental rights in the Inter-American system. The Commission elaborated on these rights, stating that the right to seek, receive, and impart information and ideas of all kinds is protected by Article 13 of the American Convention. According to the Commission, information that domestic law requires be submitted as part of environmental impact assessment procedures must be readily accessible to potentially affected individuals. Public participation is viewed as linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Finally, the right of access to judicial remedies is called the fundamental guarantor of rights at the national level. The Commission quotes Article 25 of the American Convention that provides everyone the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by th[e] Convention.=

The Commission called on the government to implement legislation enacted to strengthen protection against pollution and to clean up activities by private licensee companies and to take further action to remedy existing contamination and prevent future recurrences. In particular it recommended that the State take measures to improve systems to disseminate information about environmental issues, enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.

The *Report on Brazil* also included a chapter on indigenous rights. Among the problems discussed are those of environmental destruction leading to severe health and cultural consequences. In particular their cultural and physical integrity are said to be under constant threat and attack from invading prospectors and the environmental pollution they create. State protection against the invasions is called irregular and feeble leading to constant danger and environmental deterioration.

²⁷ *Ibid.* at 89.

²⁸ *Ibid.* at 92, 93.

3. Council of Europe: European Convention on Human Rights

In Europe, most of the victims bringing cases to the European Court on Human Rights and the former Commission have invoked either the right to information (art. 10) or the right to privacy and family life (art. 8). Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms provides that «everyone has the right to respect for his private, his home and his correspondence.» The second paragraph of the Article sets forth the permissible grounds for limiting the exercise of the right.²⁹ A related provision, Article 1 of Protocol 1, ensures that «every natural or legal person is entitled to the peaceful enjoyment of his possessions.» The European Commission accepts that pollution or other environmental harm may result in a breach of Article 1 of Protocol 1, but only where such harm results in a substantial reduction in the value of the property and that reduction is not compensated by the state. The Commission has added that the right to peaceful enjoyment of possessions «does not, in principle, guarantee the right to the peaceful enjoyment of possessions in a pleasant environment.»³⁰

Decisions of the former European Commission on Human Rights indicate that environmental harm attributable to state action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Article 8(1). The harm may be excused, however, under Article 8(2) if it results from an authorized activity of economic benefit to the community in general, as long as there is no disproportionate burden on any particular individual; *i.e.* the measures must have a legitimate aim, be lawfully enacted, and be proportional. States enjoy a margin of appreciation in determining the legitimacy of the aim pursued. The Court, in recent decisions, seems to more overtly balance the competing interests of the individual and the community than did the Commission, while it does afford the state a certain margin of appreciation.

It must be recognized that human rights guarantees in the European Convention have been useful primarily when the environmental harm consists of pollution. Issues of resource management and nature conservation or biological diversity are more difficult to bring under the human rights rubric, absent a right to a safe and ecologically-balanced environment. A 1974 opinion of the European Commission on Human Rights indicates the attitude of some human rights bodies and the limits of the human rights approach. In an application challenging the refusal to allow an Icelandic

²⁹ Paragraph 2 provides: «There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.»

³⁰ *Rayner v. United Kingdom* (1986), 47 DR 5, 14.

resident to have a dog as a violation of the right of privacy and family life guaranteed by Article 8 of the European Convention on Human Rights, the Commission stated:

The Commission cannot however accept that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings, in so far as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationships within the private sphere. No doubt the dog has had close ties with man since time immemorial. However, given the above considerations this alone is not sufficient to bring the keeping of a dog into the sphere of the private life of the owner.³¹

i. *Noise Pollution Cases*. Most of the early European privacy and home cases involved noise pollution. In *Arrondelle v. United Kingdom*,³² the applicant complained of noise from Gatwick Airport and a nearby motorway. The application was declared admissible and eventually settled with the payment of 7500 pounds. *Baggs v. United Kingdom*, a similar case, was also resolved by friendly settlement.³³ The settlement of the cases left unresolved numerous issues, some of which were addressed in *Powell & Raynor v. United Kingdom* at the Court.³⁴ The Court found that aircraft noise from Heathrow Airport constituted a violation of Article 8, but was justified under Article 8(2) as necessary in a democratic society for the economic well-being of the country. Noise was acceptable under the principle of proportionality, if it did not create an unreasonable burden for the person concerned, a test that could be met by the state if the individual had the possibility of moving elsewhere without substantial difficulties and losses. In contrast, in the *Vearncombe* case, the Commission found that the level and frequency of the noise did not reach the point where a violation of article 8 could be made out and therefore the application was inadmissible.³⁵

ii. *G and E v. Norway*. The European Commission and the Court often accept that the economic well-being of the country will excuse a certain amount of environmental harm, following the *Powell & Raynor* case.³⁶ In *G and E v. Norway*,³⁷ two members of the Sami people alleged a

³¹ *Application 68/25/74*, 5 DR 86.

³² *Arrondelle v. United Kingdom*, (1980)19 DR 186; (1982) 26 DR 5.

³³ *Baggs v. United Kingdom*, (1985) 44 DR 13; (1987) 52 DR 29.

³⁴ *Powell and Rayner v. United Kingdom*, ECHR (1990) Series A, No. 172.

³⁵ *Vearncombe et al. v. United Kingdom and Federal Republic of Germany* (1989), 59 DR 186.

³⁶ See also *S. v. France* (1990), 65 DR 250 (Application inadmissible: nuisance due to nuclear power station built 300 meters from applicant's house constituted a breach of article 8(1), but was justified under article 8(2) because the economic well-being of the country made it necessary in a democratic society and there was no unreasonable burden placed on the applicant because compensation was paid).

violation of article 8 due to a proposed hydroelectric project that would flood part of their traditional reindeer grazing grounds. The Commission accepted that traditional practices could constitute private and family life=within the meaning of Article 8. It questioned, however, whether the amount of land to be flooded was enough to constitute an interference@and found that in any case, the project was justified as necessary for the economic well-being of the country. The application was therefore inadmissible.

iii. *Lopez-Ostra v. Spain*. The major decision of the Court on environmental harm as a breach of the right to private life and the home is *Lopez-Ostra v. Spain*.³⁸ The applicant and her daughter suffered serious health problems from the fumes of a tannery waste treatment plant which operated alongside the apartment building where they lived. The plant opened in July 1988 without a required license and without having followed the procedure for obtaining such a license. The plant malfunctioned when it began operations, releasing gas fumes and contamination, which immediately caused health problems and nuisance to people living in the district. The town council evacuated the local residents and rehoused them free of charge in the town center during the summer. In spite of this, the authorities allowed the plant to resume partial operation. In October the applicant and her family returned to their flat where there were continuing problems. The applicant finally sold her house and moved in 1992.

The decision is significant for several reasons. First, the Court did not require the applicant to exhaust administrative remedies to challenge operation of the plant under the environmental protection laws, but only to complete remedies applicable to enforcement of basic rights. Mrs. Lopez exhausted the latter remedies when the Supreme Court of Spain denied her appeal on a suit for infringement of her fundamental rights and her complaint with the Constitutional Court was dismissed as manifestly ill-founded. Two sisters-in-law of Mrs López Ostra, who lived in the same building as her, followed the procedures concerning environmental law. They brought administrative proceedings alleging that the plant was operating unlawfully. On 18 September 1991 the local court, noting a continuing nuisance and that the plant did not have the licenses required by law, ordered that it should be closed until they were obtained. However, enforcement of this order was stayed following an appeal. The case was still pending in the Supreme Court in 1995 when the European Court issued its judgment. The two sisters-in-law also lodged a complaint, as a result of which a local judge instituted criminal proceedings against the plant for an environmental health offence. The two complainants joined the proceedings as civil parties.

The European Human Rights Court noted 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. It found that the determination of whether this violation had occurred should be tested by striking a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of

³⁷ *Joined Applications 9278/81 and 9415/81* (1984), 35 DR 30.

³⁸ *Lopez-Ostra v. Spain*, ECHR (1994), Series A, No. 303C.

her right to respect for her home and her private and family life. In doing this, the Court applied its margin of appreciation=doctrine, allowing the state a certain=discretion in determining the appropriate balance, but finding in this case that the margin of appreciation had been exceeded. It awarded Mrs. Lopez 4,000,000 pesetas, plus costs and attorneys fees.

iv. In *Anna Maria Guerra and 39 others against Italy*³⁹ the applicants complained of pollution resulting from operation of the chemical factory 'ENICHEM Agricoltura,' situated near the town of Manfredonia; the risk of major accidents at the plant; and the absence of regulation by the public authorities. Invoking Article 10 of the European Convention on Human Rights, the applicants asserted in particular the government's failure to inform the public of the risks and the measures to be taken in case of a major accident, prescribed by the domestic law transposing the EC 'Seveso' directive.⁴⁰ The former European Commission on Human Rights⁴¹ admitted the complaint insofar as it alleged a violation of the right to information. It did not accept the claim of pollution damage. Most of the facts were uncontested. The Commission found that the government had classified the factory as a "high risk" facility in applying the criteria established by the EC directive and Italian law and that there had been accidents at the factory, including an explosion that sent more than 150 persons to the hospital. A technical commission named by the city of Manfredonia found that according to the factory's own study the treatment of emissions was inadequate and the environmental impact study incomplete. During the operations of the chemical factory, the government instigated several inquiries. In addition, the residents of Manfredonia instituted civil actions. The Commission nonetheless found that the law was inadequately enforced, giving the company almost complete impunity to pollute. In addition to its failure to hold the company responsible for polluting, the government took no action between the adoption of the "Seveso" law and the cessation of chemical production by the factory in 1994 to inform the population of the situation or to make operational a contingency plan.

The decision centered on the interpretation of state duties under Article 10. The applicants insisted that they sought information from the government that was not otherwise available to them. The government in turn claimed that the law protected industrial secrets, prohibiting authorities from divulging such information in their possession. The essential question before the Commission was whether the right to information for the directly concerned public imposed on the government a

³⁹ Case 14967/89, *Guerra and Others v. Italy*, 1998-1 ECHR, Judgment of 19 February 1998.

⁴⁰ EEC Directive on the Major Accident Hazards of Certain Industrial Activities, 82/501/EEC, 1982 O.J. 230, amended by 87/216/EEC, 19 March 1987. The Seveso=law required disclosure of the production process; the substances present and their quantities; possible risks for employees, workers, the population and the environment; security measures, and rules to follow in case of accident. Other laws supplemented the right to environmental information.

⁴¹ The European Commission on Human Rights ceased to function with the entry into force of Protocol 11 to the European Convention which created a permanent European Court of Human Rights. Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted May 11, 1994, entered into force Nov. 1, 1998, E.T.S. 155, *reprinted in* 33 I.L.M. 960 (1994). The new Court was inaugurated on Nov. 1, 1998.

positive duty to inform.

By a large majority, the Commission concluded that Article 10 imposes on states the positive duty to collect, collate, and disseminate information which would otherwise not be directly accessible to the public or brought to the public's attention. In arriving at its conclusion, the Commission relied upon "the present state of European law" (*l'état actuel du droit européen*) which it said confirmed that public information represents one of the essential instruments for protecting the well-being and health of the populace in situations of environmental danger. The Commission referred specifically to the Chernobyl resolution, adopted by the Parliamentary Assembly of the Council of Europe, which it said recognized, at least in Europe, a fundamental right to information concerning activities that are dangerous for the environment or human well-being.

The case was referred to a Grand Chamber of the European Court of Human Rights, which issued its judgment February 19, 1998. The Court reversed the Commission on its expanded reading of Article 10, but unanimously found a violation of Article 8, the right to family, home and private life. The Court reaffirmed its earlier case law holding that Article 10 generally only prohibits a government from interfering with a person's freedom to receive information that others are willing to impart. According to the Court, that freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.⁴² Eight of the 20 judges suggested in separate opinions that positive obligations to collect and disseminate information might exist in some circumstances.

In regard to Article 8, the Court reaffirmed that it can impose positive obligations on states to ensure respect for private or family life. Citing the *Lopez Ostra* case, the Court reiterated 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.⁴³ Noting that the individuals waited throughout the operation of fertilizer production at the company for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory, the Court found a violation of Article 8.

The Court appears to have strained to avoid overturning its prior case law interpreting Article 10. The basis of the complaint was the government's failure to provide environmental information, not pollution like that found in the *Lopez-Ostra* case. The Court also declined to consider whether the right to life guaranteed by Article 2 had been violated, considering it unnecessary in light of its decision on Article 8, despite the fact that deaths from cancer had occurred in the factory and this would have a clear bearing on damages. In regard to the latter, the Court found that applicants had not proved pecuniary damages but were entitled to ITL 10,000,000 each for non-pecuniary damage. The applicants also sought a clean-up order, which the Court declined to give on the ground that it lacks the power to issue orders.

v. Several recent cases in the European human rights system mark renewed efforts to address issues of nature protection through human rights. All of the cases were brought against France and concerned a French law imposing an obligation on certain owners of small areas of land to belong to the local hunting association and to permit hunting on their property. The applicants oppose hunting and complained that the French law violated their right to peaceful enjoyment of their possessions,

⁴² *Guerra and Others v. Italy*, 1998-I ECHR, Judgment of 19 February 1998, para. 53.

⁴³ *Ibid.* para. 60.

their right to freedom of association, and the right to freedom of conscience. They also maintained that the obligations are discriminatory. They relied on Article 1 of Protocol No. 1 and Articles 9 and 11 of the Convention, separately and in conjunction with Article 14 of the Convention.

The Commission issued its report on the first of the cases, *Marie-Jeanne Chassagnou, Rene Petit and Simone Lasgrezas v. France*, on October 30, 1997.⁴⁴ It found a violation of all the rights except freedom of conscience, which it decided it need not address because of the other findings. The report was submitted to the Committee of Ministers. The second two cases, *Leon Dumont and others v. France* and *Josephine Montion v. France*, involve identical issues and were submitted by the Commission to the Court in March 1998. In a judgment of April 29, 1999, the European Court of Human Rights agreed with the Commission that the applicants' rights to freedom of association and peaceful enjoyment of property had been violated, as well as the requirement of non-discrimination.⁴⁵ Like the Commission, the Court declined to address the issue of freedom of conscience, although a separate opinion argued that the case should have included consideration of environmental or ecological beliefs within the scope of Convention Article 9. In fact, the issue seems to have influenced the Court to some extent. In other cases, as described below, the Court has applied the doctrine of *margin of appreciation* to afford considerable deference to governmental decisions when property rights, in particular, have been limited for environmental purposes in the public interest. In this case, in contrast, the Court was unwilling to accept French arguments that the public interest and the environment were being protected through measures designed to manage and conserve the stocks of wild fauna hunted by humans. There was some evidence in the case that the French *Loi Verdeille* was actually implementing policies that were more environmentally sound than those advocated by the landowners, but the Court declined to defer to the government, perhaps because of the nature of the claim and the sensitivity of the hunting issue.

vi. In other cases, the Court has rejected claims that rights have been violated when the government has acted for environmental reasons. In most of these cases, the Court has found that environmental protection is a legitimate aim and that the restrictions are reasonable. Thus, in *Mateos e Silva, Ltd. and Others v. Portugal*,⁴⁶ the Portuguese government sought to create a nature reserve out of land on the Algarve coast, including parcels owned by the applicants. The Court found that the applicant's rights had been violated because their case against the decision had been pending in local courts for more than thirteen years. On the right to property, the Court accepted that measures pursued through town and country planning for the purposes of protecting the environment serve a legitimate public purpose justifying restrictions on property rights, but found that in this case the restriction was not *necessary* because the government had never implemented the proposed plan for the nature reserve. In contrast to this case, the decision in *Pine Valley Developments Ltd. and Others v. Ireland*⁴⁷ upheld the government's interference with property rights

⁴⁴ *Marie-Jeanne Chassagnou, Rene Petit and Simone Lasgrezas v. France*, [Http://www.dhcommhr.coe.fr/fr/25088R31.F.html](http://www.dhcommhr.coe.fr/fr/25088R31.F.html).

⁴⁵ *Chassagnou and Others v. France*, ECHR, Judgment of 29 April 1999.

⁴⁶ *Mateos y Silva Ltd. and Others v. Portugal*, 1996-IV ECHR, Judgment of 16 September 1996.

⁴⁷ *Pine Valley Development v. Ireland*, ECHR Ser. A No. 222 (1991). The Court did find a

in order to protect the environment. The Court found that there was an interference with the right to peaceful enjoyment of possessions when permission was denied to build an industrial warehouse and office development in a zoned green belt, but the interference was for a legitimate government aim -- protection of the environment -- and the actions were proportionate to the ends.⁴⁸

vii. In another recent case, the European Court held that the state may not extend defamation laws to restrict dissemination of environmental information of public interest. In the case of *Bladet Tromsø and Stensaas v. Norway*,⁴⁹ a Grand Chamber of the European Court held 13-4 that Norway had violated the rights of a newspaper and its editor by fining them both for defamation after they published extracts of a report by a governmental seal hunting inspector.⁵⁰ The report claimed among other things that seals had been flayed alive and that there were other violations of seal hunting regulations. The names of the crew were deleted from the publication but they successfully sued for defamation. The European Court held that the judgment was an unjustified interference with Article 10 of the Convention. The Court found that the reporting should have been considered in the wider context of the newspaper's coverage of the controversial seal hunting issue, a matter of public interest. Its reporting conveyed an overall picture of balanced reporting. The Court also was influenced by the fact that the report was an official one that the Ministry of Fisheries had not questioned or disavowed. In the view of the Court the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise its public-watchdog role could be undermined.

viii. In the European system, Article 6,⁵¹ which provides judicial guarantees of a fair trial, has been construed as including a right to a tribunal for the determination of rights and duties.⁵²

violation of Article 14 taken in conjunction with the right to peaceful enjoyment of possessions.

⁴⁸ See also *Buckley v. The United Kingdom*, 1996-IV ECHR, Judgment of 25 September 1996, where a gypsy woman was fined for having a caravan on her land under a law which required gypsy caravans be located in specially designated areas to protect the natural beauty of the environment. A claim that this infringed Article 8 was rejected because the law was held to pursue a legitimate state interest and was not disproportionate.

⁴⁹ *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999.

⁵⁰ The government had decided, on the basis of Norwegian law, not to publish the report because it contained allegations of statutory offenses.

⁵¹ Article 6, para. 1 states: An the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

⁵² *Golder v. United Kingdom*, ECHR (1975), Series A, No. 18; *Klass v. Germany*, ECHR (1978), Series A, No. 28.

Applicability of Article 6 depends upon the existence of a dispute concerning a right recognized in the law of the state concerned, including those created by licenses, authorizations and permits that affect the use of property or commercial activities.⁵³ In *Oerlemans v. Netherlands*⁵⁴ Article 6 was deemed to apply to a case where a Dutch citizen could not challenge a ministerial order designating his land as a protected site.

ix. In *Zander v. Sweden*,⁵⁵ Article 6 of the European Convention provided the basis for a complaint that the applicants had been denied a remedy for threatened environmental harm. The applicants owned property next to a waste treatment and storage area. Local well water showed contamination by cyanide from the dump site. The municipality prohibited use of the water and furnished temporary water supplies. Subsequently, the permissible level of cyanide was raised and the city supply was halted. When the company maintaining the dump site sought a renewed and expanded permit, the applicants argued that the threat to their water supply would be sufficiently high that the company should be obliged to provide free drinking water if pollution occurred. The board granted the permit, but denied the applicants' request. They sought but could not obtain judicial review of the decision. The European Court held that Article 6 applied and was violated. The applicability of Article 6 was based on the Court's finding that the applicants could arguably maintain that they were entitled under Swedish law to protection against the water in their well being polluted as a result of VAFAB's activities on the dump.⁵⁶ According to the Court,

In regard to 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.⁵⁷

x. Some environmental threats have been deemed too remote to give rise to a claim within the purview of Article 6 (1). In *Balmer-Schafroth and Others v. Switzerland*,⁵⁸ applicants argued that they were entitled to a hearing over the government's decision to renew an operating permit for a nuclear power plant. The European Court found that the applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, because they failed to show that the operation of the power station exposed them

⁵³ *Bentham v. Netherlands*, ECHR (1985), Series A, No. 97.

⁵⁴ *Oerlemans v. Netherlands*, ECHR (1991), Series A, No. 219.

⁵⁵ *Zander v. Sweden*, ECHR (1993), Series A, No. 279B.

⁵⁶ *Ibid.*, para. 24.

⁵⁷ *Ibid.* Para 45 (Commission opinion).

⁵⁸ *Balmer-Schafroth v. Switzerland*, 1997-IV ECHR, Judgment of 26 Aug. 1997.

personally to a danger that was serious, specific, and, above all, imminent. The applicants failed to establish the dangers and the remedies with a degree of probability that made the outcome of the proceedings directly decisive for the right they invoked. Seven judges dissented, objecting that the Court had failed to specify why the connection that the applicants were trying to make was too tenuous. In their view, Article 6 should have applied to allow the applicants to establish before a tribunal the degree of danger they were facing rather than requiring them to prove at the outset the existence of a risk and its consequences. A likelihood of risk and damage should be sufficient, invoking the precautionary principle:

The majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio Agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage. United Nations Resolution No. 840 of 3 November 1985 on the abuse of power was adopted as part of the same concern. Where the protection of persons in the context of the environment and installations posing a threat to human safety is concerned, all States must adhere to those principles.

ix. The right to a remedy extends to compensation for pollution. In the European case *Zimmerman and Steiner v. Switzerland*⁵⁹, the Court found Article 6 applicable to a complaint about the length of proceedings for compensation for injury caused by noise and air pollution from a nearby airport. Article 6 does not, however, encompass a right to judicial review of legislative enactments. In *Braunerheilm v. Sweden*,⁶⁰ the Commission denied a claim that Article 6 was violated when the applicant could not challenge in court a new law that granted fishing licenses to the general public in waters where the applicant previously had exclusive rights.

Summary: Nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights. In nearly every instance, the complaints brought have not been based upon a specific right to a safe and environmentally-sound environment, but rather upon rights to life, property, health, information, family and home life. Underlying the complaints, however, are instances of pollution, deforestation, water pollution, and other types of environmental harm. It may be asked whether or not a recognized and explicit right to a safe and environmentally-sound environment would add to the existing protections and further the international values represented by environmental law and human rights.

⁵⁹ *Zimmerman and Steiner v. Switzerland*, ECHR (1983), Series A, No. 66.

⁶⁰ *Braunerheilm v. Sweden*, App. No. 11764/85 (Mar. 9, 1989). See Maguelonne Dejeant-Pons, *Le Droit de l'homme a l'environnement, droit fondamental au niveau europeen dans le cadre du Conseil de l'Europe, et la Convention europeenne de sauvegarde des droit de l'homme et des libertes fondamentales*, 4 *Revue Jur. de L'environnement* (1994).