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DEFINITION OF AN ENVIRONMENTAL RIGHT IN A HUMAN RIGHTS CONTEXT

Philippe Cullet

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Definition of an Environmental Right in a Human Rights Context

Philippe Cullet*

Abstract

This article examines the theoretical background of a right to environment, its contents and the different ways to achieve implementation of the norm. Environmental protection is first ascertained as a universal concern which warrants consideration within a human rights context. Innovative features of the right such as the emphasis on prevention and on the principle of solidarity deriving from the internationalization of environmental problems are then examined. Further, some implementation mechanisms such as procedural rights developed at the same time in environmental and human rights instruments or the judicial appraisal of environmental protection in the context of enforceable human rights are highlighted.

I Conceptual Aspects of the Link Between Environmental Protection and Human Rights

International environmental law and human rights law have intertwined objectives and ultimately strive to produce better conditions of life on earth. They both seek to tackle universal challenges that must often be solved at the same time at the individual and global level. The necessity to link both fields stems from the different, complementary and partial approaches each has attempted to follow. Environmental law seeks to protect both nature for itself, and for the benefit of humankind on a local and global scale. It has broadly been confined to regulating inter-state relations and, of late, the behaviour of some economic actors. Human rights have centred on fundamental aspirations of human beings with much more developed compliance mechanisms allowing individuals and groups to claim their rights. The inclusion of an environmental dimension in the human rights debate has become necessary in view of the recognition of the pervasive influence of local and global environmental conditions upon the realization of human rights. In legal terms, the new linkages will come to enhance the protection in both fields as the protection of the environment will benefit from the established machinery whereas the human rights system will be enhanced by the inclusion of new interpretative elements until recently ignored.

Different avenues for the integration of environmental concerns in the realization of human rights can be envisaged. Firstly, a reinterpretation of human rights included in international instruments can be attempted. Environmental conservation is hereby included as a further interpretative element widening the scope of the rights. Second, some procedural rights developed separately in human rights and environmental law instruments could be used in conjunction to form a body of very effective technical rights. Finally, a right to environment may be formally added to the catalogue of internationally guaranteed human rights. While each approach can be to some extent pursued separately, they all tend towards the same goal. However, if the inclusion of a new right requires an analysis of the substantive issues at stake, the reinterpretation of recognized rights and

* LL.M., MA. This article is based on a paper delivered at the Conference on Human Rights Approaches to Environmental Protection in the Commonwealth and Beyond, London, May 1993.

procedural rights only intervene at the level of the implementation of the claim and shall be tackled in a later section.

A. Foundation of the Claim

On a factual level, it has already become apparent that preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of, *inter alia*, the rights to health, to food and to life including a decent quality of life.¹ The close link with these rights clearly shows that a right to environment can easily be incorporated into the core of the human rights protection whose ultimate purpose is the blooming of the personality of all human beings in dignity.²

In accordance with international law theory, all human rights represent universal claims necessary to grant every human being a decent life that are part of the core moral codes common to all societies.³ International human rights have been based, since their inception, on this premise that should not be seen as another manifestation of imperialism,⁴ but as the recognition that all human beings aspire to a life in dignity.⁵ The linkage between environmental and human rights concerns has so far been envisaged mostly in terms of the protection or conservation of a clean or healthy environment for the benefit of individuals whose conditions of life are threatened, *e.g.* by noise disturbances or air pollution arising from airports or motorways and industrial pollution. To arrive at a truly universal formulation, a right to environment should also encompass other issues of concern to a majority of the world's population, including access to fresh water and food supplies.

The apparently sharp difference between industry-related pollution seen mainly as a problem of the North and livelihoods issues perceived as a southern issue prompts some to claim that problems are too divergent in North and South countries to be dealt within a single framework. This criticism overlooks the fact that many environmental problems are not country-specific and that industrial pollution is in most cases experienced in a

¹ The special rapporteur on the realization of economic, social and cultural rights has identified environmental degradation as one factor impeding the realization of these rights (UN Doc. E/CN.4/Sub.2/1992/16, *The Realization of Economic, Social and Cultural Rights – Final Report Submitted by Mr. Danilo Türk, Special Rapporteur*, at p. 32).

² Kromarek, P., 'Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme; sa mise en oeuvre nationale, européenne et internationale', *Introductory report, European Conference on the Environment and Human Rights, Strasbourg 19-20 January 1979, Institute for European Environmental Policy, London (mimeographed/restricted circulation)*, at p. 13, quoting Cassin.

³ Hoeffe, O., 'Les droits de l'homme comme principes de l'humanité politique', in: Papini, R. (Direction de l'ouvrage), *Droits des peuples, droits de l'homme – Paix et justice sociale internationale, Le Centurion (Collection droits de l'homme et solidarité)*, Paris 1984, at p. 95.

⁴ Even though the Universal Declaration of Human Rights and the two UN Human Rights Covenants were drafted by the former colonial countries within a structure of international law mainly geared towards their needs, most societies have defined rights and duties on the basis of similar notions of justice and dignity (see Marks, S.P., 'Emerging Human Rights: a New Generation for the 1980's?', *33/2 Rutgers L. Rev.*, 1981, pp. 435-452, at p. 437). However, whereas principles may be universal, local implementation must be reserved so as to allow for divergences among human societies based on historical, geographical or social specificities. Besides, the absence of formal hierarchy between universal principles does not preclude prioritization in practice in so far as the specific needs of each society are different.

⁵ This has been repeatedly stated, *e.g.*, in the Preamble to the Universal Declaration of Human Rights (UN Doc. ST/HR/1/Rev.4 (Vol.I, Part 1)).

similar fashion throughout the world even if southern countries may be less preoccupied with industrial pollution than with other more pressing issues.

Also, problems can often not be confined within a single country and may have to be solved on a regional or global scale. If it is true that interdependence is first experienced at the national level and that resources available in finite quantities such as fresh water should be fairly distributed within a given country, such examples as the South-east Anatolia Project (GAP) show that downstream countries' water supply risks being heavily disrupted by a project which is to divert substantially the flow of several rivers.⁶ This type of regional issue can not be seen as specific to a group of countries but is however linked to one specific path of development, *i.e.* industrial development. Given that some problems like the greenhouse effect threaten the entire planet, a comprehensive approach will have to be adopted so as to take into account this new international interdependence. It should not be overlooked that, in the end, the local and global sides of environmental protection are complementary and that the success of local conservationist schemes can in some circumstances be impaired by human-induced global climate change.⁷

B. Nature of the Claim

It is by now clear that environmental protection is intrinsically related to a number of other human rights and comes out as both a precondition and an outcome of the enjoyment of many rights.⁸ A right to environment should nevertheless not be classified as a synthesis right,⁹ because it embodies specific characteristics that can be distinguished from other rights, and does not constitute a 'shell-right' aimed at enhancing the realization of the other ones.¹⁰ In fact, the widespread criticism of this right stems mainly from the incapacity we have to mould it into one of the old categories of human rights. However, we cannot and should not attempt to categorize this new right as, either a civil and political right, or an economic, social and cultural right, or a solidarity right because it transcends the distinctions and embodies elements found in each of the three

⁶ For a recent assessment of the situation, see 'Demirel Raises Stakes in Tense Regional Game', *Financial Times*, 10 November 1994, p. 6.

⁷ The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests stresses in its fourth paragraph that '[t]he vital role of all types of forests in maintaining the ecological processes and balance at the *local, national and global levels* (...) should be recognized' (emphasis added, UN Doc. A/CONF.151/26 (Vol. 3), Report of the UNCED, Rio de Janeiro, 3-14 June 1992, Annex III).

⁸ See, *e.g.* Symonides, J., 'The Human Right to a Clean, Balanced and Protected Environment', 20/1 *Int'l J. of Legal Information* 1992, pp. 24-40, at p. 29 and UN General Assembly Resolution 45/94, Preamble § 3, 14 December 1990, Need to Ensure a Healthy Environment for the Well-Being of Individuals (UN Doc. A/45/49, at p. 178).

⁹ A synthesis right is a right embodying a number of elements that may also be found in other rights and whose recognition is often seen as a precondition of the enjoyment of all other human rights. Alleged synthesis rights (like the right to development) have often been rejected because of their tentacular and imprecise nature.

¹⁰ *Contra* Downs, J.A., 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right', 3 *Duke J. Comp. & Int'l L.* 1993, pp. 351-385, who asserts that a right to environment is being proposed to facilitate the exercise and enjoyment of the other human rights (pp. 358-362).

categories.¹¹ The right to environment requires States to refrain from activities harmful to the environment, and to adopt and enforce policies promoting conservation and improvement of the quality of the environment.¹² Secondly, it appears on several counts that the right is not purely an individual right: one may single out the rights of future generations whose interests must be taken into account but whose individual members cannot be identified,¹³ or focus on more precise claims relating in particular to displaced indigenous peoples facing the total loss of their cultural, social and physical environment.

The right to environment thus reminds us of the inanity of a tight separation between positive and negative rights, individual and collective rights or political and economic problems, distinctions that were promoted primarily as political or ideological weapons during the Cold War rather than grounded in the nature of the rights themselves.

The vanishing categorization of human rights leads us to reject any hierarchy in theory insofar as all the rights we include as human rights are fundamental rights, of which none can be held to be intrinsically superior given their pervasive interdependence.¹⁴ The globalization of challenges tends indeed to show clearly that all biological as well as economic processes are interrelated and must be dealt within a single framework.¹⁵ However, the implementation of all human rights cannot be achieved at once given the limited availability of resources. Each State will have to promote some areas in priority according to the special needs of the country but this should never be done at the expense of other rights, only in parallel.¹⁶

C. Formulation of the Right

At this juncture, the focus must be put on the terminology used to define a right to environment in legal instruments. Most of the instruments embodying this right have either qualified the word environment,¹⁷ or focused the attention on some particular

¹¹ Pathak, R.S., 'The Human Rights System as a Conceptual Framework for Environmental Law', in: Brown Weiss, E. (ed.), *Environmental Change and International Law – New Challenges and Dimensions*, UN University Press, Tokyo 1992, pp. 205-243.

¹² Besides, states must ensure that people are protected against environmental risk generated either by governmental or private agencies. See Nickel, J.W., 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification', 18/1 *Yale J. of Int'l L.* 1993, pp. 282-295, at p. 286.

¹³ Shutkin, W.A., 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment', 31/3 *Virginia J. of Int'l L.* 1991, pp. 479-511, at p. 504.

¹⁴ See, e.g. Article 5 of the Vienna Declaration and Programme of Action of 25 June 1993 (UN Doc. A/CONF.157/24 (Part I), Report of the World Conference on Human Rights).

¹⁵ It is fairly significant that recommendations included in the final report of the Special Rapporteur on human rights and the environment stress in effect that all UN bodies dealing with human rights issues should now strive to include environmental issues in their framework of analysis. The report thus acknowledges that the different bodies instituted under different treaties in the name of separate categories of rights now have to deal with a common set of issues and eventually will have to adopt a common response to common threats (see UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994, Human Rights and the Environment – Final report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur, pp. 62-63).

¹⁶ Most scholars and governments now accept that the trade-off between either civil and political rights and economic and social rights (classical argument that economic development was to be achieved first before caring for economic and social rights) on the reverse argument (former World Bank claim that the implementation of political rights was not linked to the successful realization of economic and social rights) was not conducive to the promotion of either set of rights in the long term.

¹⁷ On the assumption that 'environment' is neutral and needs qualification even though it should be obvious that no one is claiming a right to a degraded environment.

elements. In most instances, the right recognized is a right to a healthy or clean environment or an environment conducive to well-being and higher standards of living, all of which centre on the quality of life of the better-off throughout the world.¹⁸ Some bolder formulations speak of a right to a decent environment encompassing social and cultural aspects that take, *e.g.* into account the suitability of a given environment to an individual or a people according to its social and cultural needs and thus acknowledge the interdependence of all elements of the human environment.¹⁹ Finally, a number of instruments recognize the link between the protection of the environment and development. This was first envisaged in a binding instrument in the African Charter.²⁰

Two different trends can be identified in the history of these provisions. First, at the UN level, the references to a right to environment have become over the last 20 years less and less clear even though a great number of instruments do acknowledge the relationship between human rights and environmental protection.²¹ Second, conservation of the environment has become over the years intrinsically enmeshed with development. If people may have been able to speak of environmental protection for itself at the 1972 Stockholm Conference on the Human Environment, everything tends to be put today under the heading of sustainable development that supposedly reflects the integration of developmental and environmental concerns.²² The concept of sustainable development, however welcome it may be in allowing all countries, official and private agencies to speak the same language and share the same rhetoric, is not well defined and clearly ambiguous in its orientation. In most of the recent documents, what is meant by development is not the comprehensive process involving social, economic and cultural elements that was outlined in the Declaration on the right to development, but mainly economic growth.²³ Moreover, in the discussion on sustainable development, economic development tends to take precedence over environmental protection.²⁴ Thus, in the Rio Declaration, what is at stake is the relationship between economic growth and environmental protection rather than development, human rights and the environment. The problem is then that economic growth is seen as the first element in the relationship between development and environment and that the human rights dimension

¹⁸ *E.g.* Article 11, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – ‘Protocol of San Salvador’ (reprinted in: 28 *ILM* 1989, p. 156), and the draft UN Economic Commission for Europe Charter on Environmental Rights and Obligations, adopted 29-31 October 1990, Principle 1 (UN Doc. ENVWA/R.38, Annex 1).

¹⁹ Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration), Principle 1 (UN Doc. A/Conf.48/14/Rev.1).

²⁰ African Charter on Human and Peoples’ Rights, Article 24 (reprinted in: 21 *ILM* 1982, p. 58).

²¹ Principle 1 of the Stockholm Declaration thus appears retroactively one of the most boldest formulations (above note 19).

²² *E.g.* Principle 4 of the Rio Declaration on Environment and Development (UN Doc. A/CONF.151/26 (Vol. 1), Report of the UNCED, Rio de Janeiro, 3-14 June 1992, Annex I).

²³ UN General Assembly Resolution 41/128, 4 December 1986, Declaration on the Right to Development (UN Doc. ST/HR/1/Rev.4 (Vol.I/Part.2)).

²⁴ *E.g.* Principle 3 of the Rio Declaration (above note 22) and Article 11 of the Vienna Declaration (above note 14). The doctrine and some operational agencies of the UN system have come to analyze development over time as a comprehensive process whose realization is dependent upon the realization of human rights and environmental protection, and that is not to be primarily based upon economic growth. However, even within the UNDP that seems most advanced in this regard, sustainable human development is regarded as ‘development that not only generates economic growth’ but other benefits as well (UN Doc. DP/1994/39, § 12). Sustainable development thus seems to be first associated with growth before taking into account the human or environmental dimension.

is left aside,²⁵ although human rights should constitute an essential means and end of development.²⁶

Another issue of concern in the determination of a human right to environment is that some of the provisions seem to move away from some of the most fundamental elements of the human rights theory. One may thus wonder whether Principle 3 of the Rio Declaration grants a right to development to States or to individuals,²⁷ and Article 3(4) of the Climate Change Convention clearly grants States a right to sustainable development.²⁸ These developments, whatever their merits, are not welcome in the framework of a human rights' analysis as rights of States can by definition not be included in the framework of rights of individuals and groups against the State.

There is however no denial that the emergence of global atmospheric challenges call for a reassessment of the current structure of international law. If rights of States cannot be accepted in a human rights' context, new mechanisms need notwithstanding be devised. The classical case of citizens complaining that their State has not fulfilled its international obligations is not sufficient when problems can be caused in one part of the world and their effects felt mostly elsewhere or much later on. Environmental instruments have started to incorporate this dimension in some limited instances. Thus, in the UN Economic Commission for Europe (UNECE) Impact Assessment Convention, any potentially affected individual has a right to participate in the assessment of certain new activities, be s/he a resident of the origin country or not, whereas a individual right to information on existing industrial risks arising from any Member State in a given area is granted in the Convention on Industrial Accidents.²⁹

In spite of the discrepancy in the various formulations and the diverse legal status of the instruments at stake, all of these taken together reveal the existence of a basic aspiration around the world to a global environment conducive to life on earth and a local environment free from unacceptable degradation. The fact that the content of the right recognized does differ significantly, particularly between instruments in the environment-development field or human rights is no bar to international law recognizing environmental protection and conservation as one of its fundamental tenets.

The formulation of the right as a plain 'right to environment' is no more imprecise than a right to a healthy or clean environment as these qualifying adjectives are themselves vague and subject to divergent interpretations. However, the major drawback of the healthy, clean or decent environment formulations is that they have been promulgated mainly by northerners focusing on a particular set of problems closer to them. Thus, if all formulations are broad enough to cover all situations, the history of these proposals make them less suitable to uncontroversial interpretation. A 'right to environment' thus has the advantage of

²⁵ Agenda 21 (UN Doc. A/CONF.151/26) which outlines in detail the policies to adopt for the realization of a sustainable development hardly mentions the term human rights even though they form a necessary part of the strategy proposed (see Shelton, D., 'What Happened in Rio to Human Rights?', 3 *Yb Int'l Env. L.* 1992, pp. 75-93).

²⁶ See Paul, J.C.N., 'International Development Agencies, Human Rights and Humane Development Projects' (Symposium: International Development Agencies (IDAs), Human Rights and Environmental Considerations), 17/1 *Den. J. Int'l L. & Pol'y* 1988, pp. 67-120, at p. 69.

²⁷ See Pallemarts, M., 'International Environmental Law From Stockholm to Rio: Back to the Future?', in: Sands, P. (ed.), *Greening International Law*, Earthscan, London 1993, pp. 9-10.

²⁸ Article 3(4) of the Framework Convention on Climate Change (reprinted in: 31 *ILM* 1992, pp. 849-873).

²⁹ Article 2(6) of the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context and Article 9(1) of the 1992 UNECE Convention on the Transboundary Effects of Industrial Effects (both reprinted in: *UN Sales No. E.93.II.E.35, Environmental Conventions Elaborated under the Auspices of the UNECE*, Geneva 1994).

representing a less biased formulation while recognizing that the contents of the right are likely to evolve very rapidly as new environmental problems emerge.

It remains to be noted that in the future, further developments may be expected in the UN arena as a set of draft principles on human rights and the environment will be put on the agenda of the Commission on Human Rights as of 1995 and may eventually come to be considered in the General Assembly.³⁰ In its current form the draft is quite comprehensive in that it includes a proposed fully-fledged right, goes on to assert some of the linkages that can be made between environmental protection and human rights already included in one of the covenants and adds a section on procedures that will be necessary to make the right a reality.

II Contents of a Right to Environment

The recognition of a substantive right is still fraught with controversy in some quarters as it brings a number of new and challenging elements to the human rights theory. Firstly, it should take into account the need to preserve the very existence of life on earth necessary for humankind's survival, and as a second step, ensure that the conditions of life provided to humans are conducive to a decent quality of life. These two aspects require the preservation of both local ecosystems and livelihoods, and the global equilibria of the ecosphere.

At this juncture, one should recall that the holders of a right to environment can neither claim a given state of the environment, nor a perfect environment (this has never existed since humans appeared on earth), nor a local environment similar to other places in the world as the unequal distribution of resources does not allow for the existence of equal environmental conditions everywhere. Thus, as stated before, the principle must be universal and the application decentralized and responsive to local concerns as in most cases, individuals only feel threatened or concerned when a problem is directly putting them at risk.

A. The Principle of Solidarity

To begin with, the contents of the right can be looked at through the principle of solidarity that pervades the link between human rights and environmental protection. In human rights instruments, the existence of a supportive national and international social framework has already been recognized as necessary for the realization of the rights.³¹ In the environment-development fields, the solidarity dimension has been prominent in the sustainable development debate since the Bruntland report put so much emphasis on the concept of intra- and inter-generational equity.³² Sustainable development as expounded in Agenda 21 is also clearly based upon the idea that nations must recognize the community of interests uniting humanity, that calls in turn, *e.g.* for the richer countries to pay for the 'agreed incremental costs' of activities designed to implement the principles of sustainable development that will enhance not only local but global conditions of life.³³

With regard to a right to environment, the solidarity at stake draws upon these different aspects. The common good that is thereby protected is multi-faceted. Some problems, like

³⁰ Final report on human rights and the environment at Annex I (above note 15).

³¹ Article 28 of the Universal Declaration of Human Rights and Articles 2(2) & 3(1) of the Declaration on the Right to Development (above notes 5 and 23).

³² See World Commission on Environment and Development (G.H. Bruntland, chairperson), *Our Common Future*, OUP, Oxford 1987.

³³ See Chapter 33.14 of Agenda 21 (UN Doc. A/CONF.151/26 (Vol. III)).

atmospheric pollution, that may not be the most daunting today are to be solved through international cooperation while a number of other problems, though faced everywhere in a similar form (e.g. availability of drinking water) have to be addressed mostly at the local or regional level. In all cases, cooperation of all public and private actors, local and international players at stake has to be ensured.

The distinction between addressees and beneficiaries of the right disappears, because the only way to achieve an effective implementation of the right is to lay a duty on the holders of the rights, to participate in the enhancement of the environment, as their actions can have a significant impact on the state of the environment.³⁴ A duty has first to be laid upon all individuals as their combined actions can have a significant impact. However, this duty should extend to private enterprises especially in the industrial sector given their responsibility for a greater share of total pollution than capitalist States themselves. They should be made accountable either directly or through the State in application of the principle of due diligence. These particulars show that the active participation of all actors is a precondition for any meaningful implementation of the right.³⁵

Secondly, human rights provide a framework associating problems and solutions with a single State, whereas, environmental instruments recognized early that some locally created problems may have a transfrontier impact. Some of the latter instruments have acknowledged that harm is not necessarily caused by the State in which the effects are felt and thus allow, however imperfectly, the potentially affected individuals to influence decision-making of the source-State.³⁶ In human rights, the European Court on Human Rights has, for instance, acknowledged that acts of a Member State that produce effects outside its territory may still be held to fall within the jurisdiction of that State.³⁷ No precedent has been set with regard to transfrontier environmental harm and it is doubtful whether the Court would readily admit that transfrontier air pollution can produce effects that give rise to claims by affected individuals wherever they reside.

Thirdly, the principle of solidarity reminds us that we are dependent, in the short and long run, on the up-keeping of life on earth for our survival. We must thus acknowledge that all biological processes allowing life on earth should be preserved because once destroyed, they cannot be recreated in a vacuum. Consequently, the underlying philosophy of a right to environment points to humankind's dependence on the existence of life on earth and the necessity to take into account the limited availability of some natural resources or the limited

³⁴ The recognition of duties in human rights instruments can be found, e.g. in the African Charter at Articles 27-29, the Universal Declaration of Human Rights at Article 29 and the UN Human Rights Covenants at paragraph 5 of their respective preambles. In domestic law, Article 45(1) of the Spanish Constitution of 29 December 1978 states that '[e]veryone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it' (reported by Kiss, A.C., 'Concept and Possible Implications of the Right to Environment', in: Mahoney, K.E. & Mahoney, P. (eds.), *Human Rights in the Twenty-first Century - A Global Challenge*, Nijhoff, Dordrecht/Boston/London 1993, pp. 551-559, at p. 556, note 5).

³⁵ Cf. Koppen, I. & Ladeur, K.-H., 'Environmental Rights', in: Cassese, A., Clapham, A. & Weiler, J. (eds.), *Human Rights and the European Community: the Substantive Law*, European Union - the Human Rights Challenge, Volume III, European University Institute, Florence 1991, pp. 1-50, at p. 24 and Nickel, J.W., 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification', 18/1 *Yale J. of Int'l L.* 1993, pp. 282-295.

³⁶ See, e.g. the 1986 IAEA Convention on Early Notification of a Nuclear Accident, Vienna (reprinted in: 25 *ILM* 1986, pp. 1370-1376, 1986) or the 1992 UNECE Convention on the Transboundary Effects of Industrial Effects (above note 28).

³⁷ See European Court on Human Rights, *Drozd & Janousek v. France & Spain*, judgment of 26 June 1992, Series A, Vol. 240 (reprinted in: 14 *Eur. Hum. Rts. Rep.* 1992, p. 745).

land surface capable of sustaining human life.³⁸ This approach necessarily takes us beyond a pure linear approach seeking to preserve the human environment and to use natural resources wisely therein only to serve the material interests of humanity, and leads to a more holistic perspective acknowledging that all human influences on the environment will eventually have some sort of impact upon humankind even, for instance, in the case of an oil spill in Antarctica.³⁹ Environmental protection is thus understood not only as a meaningful instrument for the realization of all human rights but also as a goal in itself. This recognition does not necessarily involve granting legal rights to the environment or specific parts of it, given that the acknowledgement of humans' dependence on a 'healthy' ecosphere will already come a long way towards satisfying the claims put forward on behalf of nature.⁴⁰

Lastly, solidarity among groups having claims to the same resources must be considered. Intra-generational solidarity becomes, for instance, relevant when economic development entails the improvement of someone's environment or quality of life balanced by the loss of other resources and by deprivation for other people. Balancing the claims put forth by different groups of people should thus be one essential part of the development *cum* environmental protection paradigm. The Narmada dams in India are a good example of a project putting to test the inter-group solidarity while showing clearly the intricate relationship between environment and development.⁴¹ At Sardar Sarovar, the stated aim of the project is to provide irrigation water to drought-prone areas of Gujarat and electricity to all the three States sharing the project. But it may well end up feeding new water-intensive industries near the main urban centres without delivering water to its final destination after having displaced an estimated 100,000 people who have to be relocated on new land that is not freely available in India. Thus, this new apportionment of natural resources, while requiring the displacement of many rural people and causing significant environmental degradation may come to benefit the urban dwellers already enjoying a comparatively higher standard of living but not the people of the three States at large. Apart from the wider development and environmental problems associated with this type of mega-project, Sardar Sarovar stands out clearly as a failure to make all people, or at least the least well-off benefit from a development project partly aimed at improving environmental conditions on a regional scale.⁴²

³⁸ See Roots, E.F., 'Population, "Carrying Capacity", and Environmental Processes', in: Mahoney, K.E. & Mahoney, P. (eds.), *Human Rights in the Twenty-first Century - A Global Challenge*, Nijhoff, Dordrecht/Boston/London 1993, pp. 529-549.

³⁹ Nash, R. F., *The Rights of Nature: A History of Environmental Ethics*, The University of Wisconsin Press, London/Madison 1989, at p. 8 ff. *Contra* Emmenegger, S. & Tschentscher, A., 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', 6 *Georgetown Int'l Envtl. L. Rev.* 1994, pp. 545-592, at p. 561.

⁴⁰ Furthermore, it may be very difficult conceptually to include non-human rights holders in the human rights theory, given that it has been moulded since its inception in a strict anthropocentric framework associating the existence of a right with a corresponding obligation (See, e.g. Rolston, H. III, 'Rights and Responsibilities on the Home Planet', 18/1 *Yale J. of Int'l L.* 1993, pp. 251-279, at p. 256 ff.).

⁴¹ The facts surrounding the Sardar Sarovar Project are exposed in: Morse, B. & Berger, T.R., *Sardar Sarovar: Report of the Independent Review*, The Independent Review, Resource Futures International Inc., Ottawa 1992.

⁴² A sustainable development process should first of all aim at improving the situation of the most disadvantaged (see Rawls, J., *A Theory of Justice*, Clarendon Press, Oxford 1972).

B. The Principle of Prevention

Prevention is a cardinal concept of human rights and environmental protection. Environmental law has developed around this central issue that has culminated in the formulation of a precautionary approach that seeks to avoid the creation of any potentially hazardous situation.⁴³ It acknowledges that actual damages carry very often irreversible and unpredictable consequences harming both individuals and collectivities. Precaution includes averting further industrial accidents and building only installations whose safety for the local and global environment can be ensured at all times through proper maintenance. On a more general level, it requires the formulation of integrated policies taking account of economic, social and cultural factors in the long-term to avoid such dramatic problems as desertification, waterlogging and salinization of the water table or changes in the microclimates and global weather patterns.

International human rights law is also built on the premise that any violation of human rights should be averted. However, in practice the case law has tended to compensate individuals for specific violations having already taken place and then lay principles aimed at dissuading all future violations. It has thus in most cases not taken action before actual harm takes place. The Strasbourg jurisdiction has nevertheless in several instances accepted the claims put forward by 'potential' victims and acknowledged that the Convention may be infringed when the consequences of an interference are foreseeable, and of a serious and irreparable nature.⁴⁴ These developments may certainly be seen as laying strong foundations for a proper preventive approach to evolve in human rights.

To sum up, consideration of environmental problems in a human rights framework requires more than what is currently available in the case law. To this end, the specificities of the precautionary approach should be integrated in the human rights analysis to allow, *inter alia*, supervisory organs to take preventive measures, or to stop a potentially harmful activity before it gets under way even in such cases where the potential threat has not yet been scientifically ascertained or the causal link not been formally proven. This stems from the need to recognize that environmental harm is potentially very likely to affect a great number of individuals in many countries, and very often also carries irreversible consequences for both human beings and life-support systems. This is not to deny that all violations of fundamental rights leave permanent moral or physical scars, but to acknowledge the specificities of environmental challenges and appreciate the ways through which the linkage of environmental and human rights concerns come to enhance each other.

II Implementation

A. Implementation Mechanisms and Existence of Human Rights

Several issues have to be addressed in this regard because a number of intricate controversies have arisen. First, some opponents of the recognition of a right to environment have claimed that the claim is too wide-ranging, cannot be judicially enforced and is thus not a human

⁴³ A definition can, *e.g.* be found in the Rio Declaration (above note 22) at Principle 15 that reads: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

⁴⁴ European Court on Human Rights, *Soering v. UK*, judgment of 7 July 1989, Series A, No. 161 (reprinted in: 11 *Eur. Hum. Rts. Rep.*, p. 439). See also Cañado Trindade, A.A., 'Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (at Global and Regional Levels)', 202 *Recueil des cours de l'académie de droit international* 1987, pp. 271-296.

right. It must first be noted that human rights are not by themselves confrontational rights. Hence, the possibility to bring a claim to a Court is not a fundamental characteristic of a right given that a large part of the realization of human rights relates for instance to domestic policy-making by States, and some rights may be not or only partially enforceable before a tribunal.⁴⁵ The existence of the right and its implementation and enforcement procedures should consequently not be confused.⁴⁶

Another reason to distinguish enforcement and existence of the norm stems from the formulation of human rights on a universal level. Most rights can be formulated either as obligations of fulfilment (the right to food) or obligations of abstention (the right to be free from hunger) with a similar content and one should thus not examine only the wording but also the substance of the rights. Eventually, justiciability depends on whether a specific meaning can be attributed in a particular case. This needs not depend upon the wording of the provision at stake and human rights courts have already shown their ability to give a specific content to vaguely worded provisions and should therefore be able to do likewise for a right to environment.⁴⁷ These contentions are supported by the proposition put forth to the Committee instituted under the Covenant on Economic, Social and Cultural Rights to draw an optional Protocol that would grant it the power to examine specific claims in a similar way to the Committee on Human Rights.⁴⁸

At this juncture, it is worth examining non-judicial implementation mechanisms because of their significant impact on the realization of all rights. Such mechanisms were indeed already planned in the Universal Declaration that sets out teaching and education in human rights as important elements towards their universal recognition and application. Besides, a number of UN human rights treaties have instituted a State report procedure that allows the supervising body to monitor the progressive implementation of the rights and to take note of any problems faced by Member States in this regard. The Committee on Economic, Social and Cultural Rights thus requires reports to include information on environmental problems faced in relation to the implementation of the rights under review, thereby widening their purview.⁴⁹ These reports do not lead to the adoption of any binding and specific decision, but the official scrutiny by an international organ of the human rights record of Member States and the publication of the reports ensure that States do strive to abide by the provisions of the treaty at stake and make the rights meaningful at home.

Mention must be made here of the non treaty-based thematic procedures located within the Commission on Human Rights. There have been a number of thematic rapporteurs since 1980 whose mandates have been, broadly speaking, to monitor and report on the implementation of certain internationally recognized human rights standards. Even though no standard exists as yet with regard to the relationship between human rights and

⁴⁵ Eide, A, 'Realization of Social and Economic Rights and the Minimum Threshold Approach', 10/1-2 *Hum. Rts. L.J.* 1989, pp. 35-51, at pp. 36-38.

⁴⁶ O'Manique, J., 'Human Rights and Development', 14 *Hum. Rts. Q.* 1992, pp. 78-103, at p. 86 ff.

⁴⁷ Kiss, A.C., 'Définition et nature juridique d'un droit de l'homme à l'environnement', in: UNESCO, *Environnement et droits de l'homme*, Kromarek, P. (directrice de publication), UNESCO, Paris 1987, pp. 13-28, at pp. 20-21.

⁴⁸ See UN Doc. E/C.12/1994/12, 9 November 1994, Draft Optional Protocol Providing for the Consideration of Communications – Report Submitted by Mr. Philip Alston. It must be recalled that the justiciability (and existence) of cultural, economic and social rights has been forcefully contested until recently.

⁴⁹ See The Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, (Committee on Economic, Social and Cultural Rights, Report of the 5th session, UN Doc. E/1991/23-E/C.12/1990/8, pp. 88-110). The reports of State Parties, in particular on Articles 10-12 bear mention of these requirements and several of them discuss environmental problems under these headings.

environment, Mrs Ksentini's final report to the Sub-Commission has recommended the appointment of a thematic rapporteur thereon.⁵⁰ If endorsed by the Commission, the new rapporteur will have the mandate of examining situations in which environmental problems affect the realization of human rights and at the same time to promote the adoption of a text on human rights and the environment.⁵¹ The rather novel feature of this mandate is that it will draw upon a body of standards developed in another field of international law, *i.e.* international environmental law. It can tentatively be said that this new procedure may happen to be especially effective in accelerating the formal recognition of the relationship between human rights and environmental protection through, *e.g.* a General Assembly Resolution. The rapporteur's role will certainly be centred on raising awareness of the problems at stake among governments and upon making the relationship a mandatory part of the human rights debate accepted by the international community.

B. Implementation of a Right to Environment

Several commentators maintain that the implementation of the right to environment would be best achieved through the advocacy of rights to information, to consultation in the decision-making process and to access to courts, revamped in an environmental setting. These rights often referred to as procedural rights are very close indeed to their counterpart in the civil and political rights context. Others claim that these procedural rights should be distinguished from a substantive right to environment and examined as fully-fledged rights.⁵²

It appears first that access to information, participation and access to court can have a tremendous impact on the realization of the right to environment and its effective enforcement. They amount to a true democratization of environmental decision-making by bringing in individuals and private groups who are usually most affected by pollution, and limiting the discretionary power of decision-makers, by allowing an explicit balancing of interests between environmental protection and economic needs. In this sense these rights are instrumental in the implementation of the substantive right. However, in practice these procedures are mostly used in the framework of industrial development or urban problems, and will tend to reflect mainly concerns about the quality of life of people, whose lives are not directly threatened by their physical environment, and who have the financial capacity to vindicate their rights. Besides, the issues at stake reflect more often than not problems of local or personal interest and thus only offer a partial solution to the wider issues at stake.⁵³

Another school argues that there can be no substantive right to environment because the quality of the environment cannot be defined universally *a priori*, the norm is too imprecise and the claim is not enforceable.⁵⁴ They thus claim that environmental protection in a

⁵⁰ See the final report on human rights and the environment at p. 63 (above note 15) and Sub-Commission Resolution 1994/27, Human Rights and the Environment (UN Doc. E/CN.4/1995/2-E/CN.4/Sub.2/1994/56).

⁵¹ For a comprehensive analysis of the special procedures, see Alston, P. (ed.), *The United Nations and Human Rights - A Critical Appraisal*, Clarendon, Oxford 1992, pp. 161 ff.

⁵² See Shelton, D., 'Human Rights, Environmental Rights and the Right to Environment', 28/1 *Stan. J. Int'l L.* 1991, pp. 103-138, and UN Doc. E/CN.4/Sub.2/1991/8, 2 August 1991, Human Rights and the Environment - Preliminary Report Prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur.

⁵³ Other factors that affect the 'representativity' of the claims in the same vein include a lack of resources or ignorance of the existence of the procedure (See UN Doc. A/CONF.157/62/Add.5, at §39).

⁵⁴ Handl, G., 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View', in: Cançado Trindade, A.A. (ed.), *Human Rights, Sustainable Development and the Environment*, Instituto Interamericano de Derechos Humanos/Banco Interamericano de Desarrollo, San José de Costa Rica/Brasilia 1992, pp. 117-142 and Birnie, P.W. & Boyle, A.E., *International Law and the Environment*,

human rights setting can only be realized through specific procedural rights as a right to environmental information. Such claims do not appear well-founded on several counts: as stated earlier, neither the imprecision of the formulation nor its enforceability bear on the status of a fundamental right. Secondly, the dichotomy between procedural and substantive rights is intrinsically based on the former arguments that served to distinguish civil and political rights from economic and social rights and must be rejected because it is today widely accepted that all rights require positive and negative measures and that all rights can be made justiciable.⁵⁵ Besides, procedural rights do not have by themselves any substantive content and would be meaningless if they were to be entirely cut from material considerations or would become disguised substantive rights if they were to include such considerations.

Finally, we consider that procedural rights should more properly be labelled instrumental rights as they give the structural framework necessary for the realization of all substantive fundamental human rights and not only the right to environment. There is a key difference between fundamental and instrumental rights in that the latter rely on positive law as their unique formal source whereas fundamental rights are usually deemed to form the very basis on which international law stands.

It is interesting that the emphasis put on procedural rights stems from developments in international environmental law. This field of international law has until now developed mostly within the classical context of inter-State relations and private parties are usually not granted immediate rights.⁵⁶ However, some recent treaties have included specific procedural obligations to force States to assess the (transboundary) environmental impacts of their activities.⁵⁷ Though these environmental law procedures do not grant the citizens a right to request the assessment of all industrial projects and are not framed within a human rights logic, they are of much practical significance in a world where States are less reluctant to ratify binding obligations in the field of environmental law than in human rights law.

One should nevertheless not overlook the fundamental differences between human rights and environmental law. The perceived necessity to bring environmental considerations into the human rights sphere stems from the need to assert environmental preoccupations as a fundamental consideration and to benefit from the more elaborate machinery offered to citizens by the human rights instruments. If procedures embodied in environmental law instruments can have a dramatic impact in some specific and mostly technical instances, a fundamental human rights claim encompasses a much broader set of issues. In a sense, the contents of a right to environment embrace fundamentally the whole of environmental law and represent the fundamental tenets on which international environmental law has been built.

C. Case Law

In the preceding sections, the lineaments of a right to environment have been outlined. Yet, consideration has to be given to what has already been achieved in practice. Some judicial organs in the field of human rights have striven to interpret some of the established rights in relation to environmental protection. In this way, environmental conservation evolves into a new interpretative element to rights that were established before the international community discovered environmental protection as an area of high priority. This represents

Clarendon, Oxford 1992, chapter 5.

⁵⁵ See Inter-American Court on Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Series C No. 4, p. 154.

⁵⁶ Cf. Allott, P., *Eunomia – A New Order for a New World*, OUP, Oxford 1990, chapter 16.

⁵⁷ 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (above note 29).

a first and logical way to introduce environmental considerations into the human rights debate as rights are widely known to evolve over time according to the socio-economic context. However, this approach is strictly limited insofar as environmental concerns can only arise with the violation of another right.

In this respect, it is worth looking at the line of thought followed by the Strasbourg organs, as the link between environment and human rights has been on the agenda of the Council of Europe for more than twenty years.⁵⁸ In the case law, environmental considerations have been dealt with at the level of two main rights, the right to respect for private life, and the right to the peaceful enjoyment of one's possessions.⁵⁹ The Commission has however refused to consider the environment in its own right, stating repeatedly that neither a right to nature is included in the Convention nor a right to a peaceful environment nor the peaceful enjoyment of one's possessions in a pleasant environment.⁶⁰ One should not overlook that a vast number of environmentally related applications have involved fair trial issues under Article 6 of the Convention, but it is significant that the case law has not devised any specific principles on environmental protection and these cases can thus be analyzed in the wider context of Articles 6 and 13.

The Commission and Court have nevertheless recognized that environmental protection represents one legitimate aim at restricting rights contained in the Convention on the same level as other recognized limiting clauses. Thus, environmental policies of Member States have been repeatedly upheld against the restriction of another protected right,⁶¹ but so far States have not been forced to adopt measures to protect the environment if domestic legislation is non-existent or insufficient in one area.⁶² Consequently, national efforts are approved but no standardization of norms in this field is yet sought. Neither the Court nor the Commission have attempted to guide or intervene in the economic, energy and environmental policies of States. In the case of a newly built nuclear energy plant they have only stated that it was necessary for the well-being of the country, and decided that the monetary compensation awarded to people whose rights, protected in the Convention, had been violated by the building of the plant and its daily operation was sufficient to satisfy the requirements of the Convention.⁶³ In this case, the economic development and well-being of the community at large take precedence over the protection of the environment. It thus appears that the Strasbourg case law has acknowledged the existence of collective interests, at least at the level of one single sovereign State. However, it has up to now applied strictly

⁵⁸ See Steiger, H. (Rapporteur for the Working Group for Environmental Law, Bonn), *The Right to a Human Environment – Proposal for an Additional Protocol to the European Human Rights Convention*, Beiträge zur Umweltgestaltung A13, Erich Schmidt Verlag, Berlin 1973.

⁵⁹ Respectively Articles 8 and 1 Protocol 1 of the European Convention on Human Rights (European Treaty Series Nos 5 & 9).

⁶⁰ See Application No. 9310/81, 47 *Decisions & Reports* (hereafter *D & R*) 5, 1986, *Rayner v. UK*, Decision of 16 July 1986 on the admissibility (admissible) and Application No. 7407/76, 5 *D & R* 161, 1976, *X & Y v. Germany*, Decision of 13 May 1976 on the admissibility (inadmissible).

⁶¹ E.g. Application No. 11185/84, 42 *D & R* 275, 1985, *M. Herrick v. UK*, Decision of 11 March 1985 on the admissibility (inadmissible) and European Court on Human Rights, *Fredin v. Sweden*, judgment of 18 February 1991, Series A, No. 192 (reprinted in: 13 *Eur. Hum. Rts. Rep.*, p. 784).

⁶² In Application 13724/88, *B. Kjellberg v. Sweden*, Decision of the Commission as to the Admissibility, 5 March 1991 (inadmissible), in which the applicant wanted the Swedish government to take action to prohibit gravel exploitation so as to preserve the environment, the Commission did not explicitly balance environmental interests against the owner's economic interests but simply considered that the exploitation was lawful and aimed at protecting the rights of the pit owners to enjoy their property.

⁶³ See Application 13728/88, *X v. France*, Decision of 17 May 1990 of the Commission as to the admissibility (inadmissible).

the old adage that what boosts gross national product benefits the community at large, thereby overlooking that improvement of the quality of life of European residents will only be achieved through economic growth that takes into account the protection of the environment.⁶⁴

Secondly, in some cases the Strasbourg jurisdiction has found excessive noise to constitute an interference with Article 8 and a breach of this right has been found when some noise level set by the Court is reached. Claims on noise-related issues have been upheld several times by the Commission or the Court and constitute the only area in which they have viewed the environment as a positive interpretative element rather than only as an authorized limitation clause. However, in the recent *López Ostra* case, the Court has acknowledged that nuisances caused by a tannery's waste-treatment plant can amount to a breach of Article 8.⁶⁵ This decision bears mentioning as the first specific recognition in Strasbourg that pollution can seriously affect individuals' well-being in such a way as to prevent them from enjoying the rights recognized in Article 8. By considering that a violation of the Convention can occur even if pollution does not significantly threaten the health of human beings, this decision may signal a new willingness to consider the impact of environmental problems upon the realization of the protected rights. Besides, it entails a further recognition of the States' positive duties in the field of environmental protection which is a welcome development in the European context where a significant share of polluting activities is carried out by the private sector.

In the end, it must be noted that the scope for further expansion of the case law in the current legal framework, and notwithstanding the inclusion of a proper right to environment, is still immense. Cases in which environmental considerations have influenced a decision are to be found mainly within the realm of physical health problems but the Court has until now refused to move further and rule in cases where economic development and environmental protection as bearing upon the realization of human rights come to clash. Following the lead shown by some other jurisdictions, the Court could still go a long way towards realization of a right to environment without formal inclusion of a right in the Convention but through a broad reading of the right to life in particular.

Concluding Remarks

Today, the right to environment is enshrined in many domestic legal orders and the importance of the relationship between environment and human rights is unquestionably high in international law. However, given the opposition voiced in some quarters to the inclusion of environmental consideration within a human rights framework, different avenues towards environmental protection have been devised in an attempt to progressively build up a comprehensive coverage of the relevant issues. In human rights law, the first step has been to progressively reinterpret rights formulated before the 'ecological era' as some monitoring and supervisory human rights bodies have already undertaken. Second, procedural rights embodied in the two UN human rights Covenants and informed by developments in

⁶⁴ On this point, see Déjeant-Pons, M., 'Le droit de l'homme à l'environnement, droit fondamental au niveau européen dans le cadre du Conseil de l'Europe, et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', *Association Européenne de Droit de l'Environnement, Journée d'étude sur 'le droit de l'homme à l'environnement en droit constitutionnel comparé dans les Etats de la Communauté Européenne'*, Douai, 24 novembre 1992, Strasbourg, April 1993 (mimeographed/restricted circulation).

⁶⁵ European Court on Human Rights, *López Ostra v. Spain*, judgment of 23 November, 1994, Series A, Vol. 303-C (No. 41/1993/436/515).

international environmental instruments can be used on their own in some circumstances and finally, a full right to environment allows environmental considerations to be looked at in their own right without reference to other human rights and to take into account the global dimension of the problems. These alternatives should be seen as complementary rather than incompatible as they all tend towards the same goal. A right to environment represents in theory the ultimate goal to attain in view of the special attention paid to internationally recognized human rights, but practical considerations may dictate concentration on the 'partial' solutions that have the significant advantage of allowing for some measure of protection as of today.

It must however be stated that the realization of what is sought through the recognition of a right to environment will never fully come about unless it is encompassed in a broader strategy. First, the tight separation between the different branches of international law is not conducive to positive interactions between environmental and human rights law. Secondly, at the UN level, it is clear that the most important part of the realization of a right to environment has to be carried out by the operational agencies. The task of the Human Rights Centre should be to foster awareness of the existence of the link between the two fields and set up standards whereas such agencies as the UNDP should strive to integrate these principles into their everyday work. This reminds us that if environmental protection is to some extent to be sought independently, a number of issues are linked to development-related concerns. Besides, environmental protection and development are both a necessary condition and outcome of the realization of other human rights and integrated strategies have to be devised, whether the protection of the environment is framed in human rights terms or not. It is then not surprising to see so much controversy over the recognition of a right to environment given the pervasive and significant economic implications resulting from the formal acceptance of this right.