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Summary

The number of situations where both people and nature are harmed by human activities are increasing in the same pace as mankind is augmenting its control and so called 'development' of the Earth. Although previously much debated, we have passed the stage when protecting human rights and preserving the environment were seen as conflicting interests. Instead we have reached the conclusion that a good life for millions of people is depending on preservation of the environment around us.

To add something to the twoheaded task of preserving both the environment and respecting human rights this thesis' focus is to analyse those problematic situations where environmental destruction is combined with human right violations, i.e. 'environmental human rights violations'. A very good example is the well-known complex and all encompassing case in Nigeria, where oil extraction caused environmental destruction, but also severe human rights violations.

To prevent or stop situations like this using international law, an analysis of both the international protection for the environment and the international protection of human rights is necessary. These violations are currently regulated in those two different areas of law and to provide the broadest protection possible it is necessary to look at what protection both of them could provide. The thesis analyses the advantages and the disadvantages of the two areas of law, and also pinpoint specific areas where the choice for either area of law provides advantages compared with the other. Thus, the material provisions, the rate of ratifications and the difficult process of implementation is discussed to look for viable ways to prevent 'environmental human rights violations'.

In conclusion, the thesis partly adheres to the traditionally recognised view that international human rights provides stronger protection than environmental laws and presents examples of how human rights has been used by environmentalists to stop environmental destruction including human rights violations. Anyhow, this thesis also suggests that for some areas the interchange could be reversed. The popular support for environmental protection, the flexible construction of environmental treaties and States self-interest in protecting the environment are proposed as reasons for human rights lawyers to look for the international environmental regulation when arguing the case of an 'environmental human rights violation'.

Finally, it is suggested that decisions on which area of law to use in a given situation have to be taken on a case-by-case basis. Facing such a problem, the author hopes the conclusions of this thesis to be a useful start for necessary considerations and a help to be able to benefit from the advantages of both areas of law.

Preface

The origin of this thesis was an essay for Katarina Tomasevski in 2005 on the subject of environment and human rights. Although studies on the environment was not as 'hot' as it is today, Katarina was very enthusiastic and encouraging and also offered much help and inspiration during the writing of the essay. Her sudden passing away last year left a great sorrow and an apparent need to continue her 'mission' to stop human rights violations wherever they take place. For me, this meant that her final words about my essay, that further studies on the area would "make a nice thesis", should be respected and a thesis there should be. Consequently, I wrote this thesis with Katarina very much in my mind and here want to express my gratefulness for her supervision and for all other challenging moments with her remarking and empathic appearance.

For the termination of the thesis, I was very much helped by my current supervisor Annika Nilsson. I am grateful for the input on environmental law she provided and also for her accurate outsiders observations on my human rights research. Furthermore, I am grateful for the inspiration I had from Graciela Ratti at Malmö Högskola, who urged the need to look at both nature and human rights when analyzing difficult international situations.

Finally, I want to mention a fourth woman that has meant a lot for the writing of this thesis and even more for everything else. My mother Anita has provided support 'here, there and everywhere', and by her mere presence made this thesis possible. Most important she has shown how important it is to care and for this I am heavily indebted and immensely grateful.

Tove Gladh

Lund 21st August 2007

Abbreviations

ACTA	Alien Tort Claims Act
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CETS	Council of Europe Treaty Series
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GEF	Global Environment Facility
HRC	Human Rights Committee
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEL	International Environmental Law
IHRL	International Human Rights Law
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-Governmental Organisation
O.A.S	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights
U.N.T.S	United Nations Treaty Series
UN	United Nations
UNEP	United Nations Environmental Program
UNHCHR	United Nation's High Commissioner on Human Rights
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

The reason for focusing on what hereafter will be denominated as ‘environmental human rights violations’ is that the number of such violations are growing and causing more and more trouble for people around the world. In spite of the delimitation to cases encompassing *both* human rights violations *and* environmental destruction, it is easy to find situations exemplifying this.¹ The reason is that environmental destruction and human rights violations do not occur independently but that environmental destruction often leads to human rights abuses. A very good example is the well-known complex and all encompassing case in Nigeria, where oil extraction caused environmental destruction. The oil extraction also caused violations of the right to water and food through pollution of fresh water leading to outbursts of cholera. Finally, it also contributed to the breaches of basic civil rights to life and a fair trial through the assassinations of Ken Saro Wiwa and eight of his compatriots of the Ogoni people, who were acting to stop this environmental disaster.²

Furthermore, I have chosen this topic because of my personal interest in both preserving the environment and protecting human rights. Looking for a good way to argue cases where both environmental destruction and human rights violations are taking place is thus an opportunity to combine those interests and possibly provide help for those affected by these tragedies.

1.1 Objective, Issues and Composition

The objective of this thesis is to see how international human rights law and international environmental law interchangeably can be used to prevent environmental destruction including human rights violations.

Therefore, the first issue is to investigate is how international environmental law and international human rights law materially prohibits ‘environmental human rights violations’. The second issue is to see how these provisions are implemented and what advantages and problems the different ways of implementation contain. Finally, my third issue is to investigate if one area of law appears to be more successful than the other when comparing the two areas, both materially and by the way of implementation.

For the composition of this thesis, I have chosen to present the material regarding international environmental law and international human rights law separately. Therefore, in chapter 2-4, I present everything regarding the human rights system, the material provisions, the implementation and the

¹ For more updated examples of ‘environmental human rights violations’ see e.g. the homepage of the NGO’s Earthrights <http://www.earthrights.org/home.html> or The Sierra Club <http://www.sierraclub.org/human-rights/> visited 17th July 2007

² I. Okonta and Oronto Douglas, *Where Vultures Feast* (Verso, New York, 2003) p.3.

discussion about problems and advantages. Chapter 5-6 consequently analysis the same issues regarding international environmental law, and chapter 7 will finally compare the conclusions drawn from the two parts.

1.2 Method and Material

The main method used in this thesis to analyse existing legal documents of international environmental law and international human rights law with the intent to classify situations causing environmental harm and human suffering as violations of international law. The method is thus a deliberate search for the broadest application possible of these treaties with the aim to include as many rightholders as possible in the protective framework of the international treaties discussed.

The origin of this method is partly the author's own human rights background, but the legal justification derives from the provision of the Vienna Convention stating that a treaty shall be interpreted in the light of its object and purpose.³ Suggesting that the object and purpose of human rights treaties is to protect the individual and that the object and purpose of environmental treaties is to protect both nature and humans,⁴ it is not hard to argue that international law, concerning these treaties, suggests an interpretation protecting humans and nature. As a classification of an act to be in breach of international law presumably protect the victims of that act, nature and humans alike, the method to proactively look for such a classification hence meets the demand to interpret a treaty in the light of its object and purpose. The thesis does however also include a discussion what problem this broad inclusion of rightholders could bring. Furthermore, the chosen method is, where such sources are available, complemented by a more traditional analysis of case studies where human rights tribunals and courts have considered situations of 'environmental human rights violations' to be in conflict with international law.

Concerning the sources, valuable material for the classification of breaches of international law has been collected from various human rights organisations and scholars aiming for a similar application of international law. For situations where materials were scarce the author has however herself applied the law directly onto an hypothetical or real 'environmental human rights violation'. Finally, the comparative study on which area of law to use in a given situation, was conducted mainly by studying teachings of scholars on international law and analyzing the previous findings in this thesis. However, popular articles and even fashion magazines were included to grasp a broader perspective on effectiveness than what the pure legal one could provide.

³ The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331. para. 31.1

⁴ See 2.1 and 5.1 for the detailed discussion.

1.3 Delimitations

Concerning the human rights part of this thesis, I have chosen the international framework for human rights protection to be the arena for discussion and analyses. Any reference to human rights is therefore to a right found either in the international bill of human rights,⁵ in the three regional systems for protecting human rights in Africa, Europe and America,⁶ in the core international human rights instruments or in one of the other treaties the UN defines as “universal human rights instrument”.⁷ For the material analysis of the international environmental law, I have chosen to analyse three specific treaties, namely the Convention on Biological Diversity, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Aarhus Convention. These are chosen because they regulates three different areas of environmental protection, i.e. conservation, pollution and procedure and thus could show how these different kinds of treaties can contribute to the prohibition of ‘environmental human rights violations’. The discussion regarding the implementation of international environmental law will however go further than these treaties and analyse experiences from the implementation of the whole system of international environmental law. By doing this, I hope the comparison between the two areas of law will be more complete.

⁵ The International Bill of Human Rights consists, according to the UN, of the following conventions: Universal Declaration of Human Rights 1948, International Covenant on Economic, Social and Cultural Rights 1966, International Covenant on Civil and Political Rights 1966, Optional Protocol to the International Covenant on Civil and Political Rights + the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. See

<http://www.ohchr.org/english/law/index.htm> last visited 6th Aug 2007

⁶ African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul

<http://www1.umn.edu/humanrts/instrree/z1afchar.htm> last visited 21 May 2006.

American Convention on Human Rights "Pact of San José, Costa Rica", 22 November 1969, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978. ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950,

<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, CETS No.: 005,

⁷ For a full list see <http://www.ohchr.org/english/law/> last visited 2 June 2007

2 How Does International Human Rights Law Prohibit ‘Environmental Human Rights Violations’?

The intent of this chapter is to show how to argue a case of ‘environmental human rights violations’ in terms of human rights. The reasoning here thus provides the material substance of law needed to seek remedy when an ‘environmental human rights violation’ has been committed. Such processes have been litigated in different national context as well as in international human rights bodies. They could possibly also take place in other forum adjudicating on human rights such as e.g. the International Court of Justice.⁸

2.1 Method of Interpretation

The reasoning in this chapter will be from a human rights lawyer’s perspective; actively arguing for the use of human rights to prevent ‘environmental human rights violations’. The reason for doing this is partly my own interest to protect victims of ‘environmental human rights violations’, but is also, and more importantly, the way IHRL should be interpreted according to the affirmed rules of interpretation in international law.

As all international law, international human rights law is submitted to the rules of interpretation in the Vienna Convention on the Law of Treaties.⁹ There it is stated that a treaty shall be interpreted ”in the light of its object and purpose.”¹⁰ The purpose of a human rights treaty is inherently to protect the individuals given certain rights by the treaty. The idea is to limit what the powerful State can impose on less powerful individuals. An interpretation of such a treaty must therefore always focus on the individual and choose a way to interpret the treaty that is as beneficial as possible for the potential victim. Therefore, the ‘object and purpose’ of human rights treaties, requires the interpretation to be as beneficial as possible for the individual. The European Court of Human Rights has also confirmed this

⁸ As shown by for example the recent Advisory Opinion on the Israeli Wall in Palestine the ICJ sometimes have the opportunity to use human rights law even if it is not a court for individual complaints. *E.g Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 9 July 2004, ICJ, Advisory Opinion paras. 102-137 at <http://www.icj-cij.org/docket> last visited 6th Aug 2007

⁹ The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331.

¹⁰ The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331. para. 31.1

approach, when stating that the European Convention should not, as other treaties, be interpreted as restrictively as possible, but instead prioritise the protection of the individual. This is shown e.g. in the *Wemhoff* case, where it is written: “Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”¹¹ In addition, the *travaux preparatoire* of the European Convention states that the aim of the Convention is to “widen as far as possible the categories of persons who are to benefit from the guarantees contained in the Convention”.¹²

The European Court has also evolved two principles that especially fit for protecting the individual in an encompassing way and exemplifies how a human rights treaty can be interpreted when looking at the purpose to protect the individual. Those are the ‘principle of dynamic interpretation’ and the ‘principle of effectiveness’. The first principle states that the Convention must be able to protect individuals from “dangers” that were unforeseen at the drafting time, but are urging in our present- day society.¹³ The second principle about effectiveness states that in case a pure textual interpretation would hinder the protection of the individual a more effective interpretation shall be opted for. The Court has rendered that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.¹⁴

However, these principles are to be used carefully and in every case to be balanced against the principle that no party of a treaty shall be bound to something else than what it intended to be bound to.¹⁵ Respecting this, these principles can be of good use when applied to the, at the drafting time, often-unforeseen problems of environmental degradation and adjacent violations of human rights. This also follows the practice of the ICJ and the International Law Commission regarding interpretation of general international law, that focus more on a textual (objective) approach than the subjective interpretation of the parties.¹⁶ Finally taking into account the clear preference of teleological interpretation of human rights treaties, the

¹¹ *Wemhoff v. Germany*, 27 June 1968, no. 2122/64, ECtHR, para 8 under “As to the Law”, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=wemhoff&sessionid=1677138&skin=hudoc-en> last visited 6 Aug 2007.

¹² Collected Edition of the “Travaux Préparatoires”, part III, 5 February 1950, (Martinus Nijhoff, The Hague, 1976) p. 200.

¹³ *Tyrer v. the United Kingdom*, 25 April 1978; ECtHR, no. 5856/72 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=1681694&skin=hudoc-en> last visited 6 Aug 2007

¹⁴ *Airey v. Ireland*, 9 October 1979, ECtHR, no. 6289/73 para.24 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=airey&sessionid=1681722&skin=hudoc-en> last visited 6 Aug 2007.

¹⁵ *Derek C. Smith*, Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in *U.S. v. Alvarez-Machain*, in *European Journal of International Law*, Vol. 6 (1995) No. 1, para. II.B.2

¹⁶ M. Fitzmaurice, *The Practical Working of the Law of Treaties*, in M. D. Evans (Ed), *International Law* (Oxford University Press, Oxford, 2003) p.199

following analysis will thereby adhere to both the rules of interpretation affirmed in the Vienna Convention and the jurisprudence of the European Court of Human Rights.

2.2 Civil and Political Rights

The analysis will start with how the civil and political rights prohibit 'environmental human rights violations' although environmental concerns most often are connected to the framework of economic, cultural and social rights. This is because civil and political rights often are violated in connection to environmental degradation. In contrast to the more discussed legal standing of the right to a clean environment, the civil and political rights have an outspoken binding status and available enforcement mechanisms, and could thereby be of more practical use. Thus including civil and political rights in the analysis, we will not only have the traditionally litigated rights of due process, information and participation included but also other important rights. The very foremost of these is the *right to life*,¹⁷ which can be used in several ways. Firstly, it can be used where the environmental destruction causes deaths directly as in Chernobyl or in the Bhopal gas leak.¹⁸ Secondly, it can be used when the right to life is indirectly threatened when people have no means left to support themselves due to environmental degradation and thus face deathly starvation.¹⁹

Another very basic right is the *right of non-discrimination*.²⁰ That right could for example be mobilized in a case where a waste deposition site, a storage of nuclear waste or oil production areas are placed close to the living areas of people of a certain race, colour or language. Such problems would arise in areas where one dominant group is in power and misuses its power by taking decisions like this to the detriment of other groups. The condition here is of course that the group concerned qualifies for one of the convention grounds barring discrimination.²¹

The *right to freedom from torture*,²² will not easily be argued as a direct consequence of the actual incident of environmental destruction. That is

¹⁷ See e.g. art 6 in ICCPR

¹⁸ See Earthjustice, *Issue Paper Human Rights and the Environment*, Material for the 60th session of the United Nations Commission on Human Rights, p. 6 found at <http://www.earthjustice.org/library/references/2004UNreport.pdf> last visited 6th Aug 2007

¹⁹ In such case, the right to life is used as a component of the right to food as the Nigeria case showed possible. See African Commission on Human and Peoples' Rights: Decision regarding communication No.155/96. *Social and Economic Action Centre v. Nigeria*, 27 October 2001.

²⁰ For codified examples of this right e.g., the ICCPR + ICESCR both art 2

²¹ The convention grounds are in the both Covenants art 2 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²² For codified examples of this right see e.g., the ICCPR art 7 and the whole Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *New York, 10 December 1984 (CAT)* United Nations *Treaty Series*, vol. 1465, p. 85. or http://www.unhchr.ch/html/menu3/b/h_cat39.htm last visited 21 May 2006

because even if the pollution may cause severe suffering it is almost never carried out with that intention.²³ This right is however good to remember because torture has been repeatedly used by governments to deal with human right defenders wanting to stop hazardous activities. The torture has often taken place with knowledge or even assistance by the company also carrying out the polluting activity. Thus, the action to stop torture could imply medial attention also for the environmental wrongdoings – as was shown by the earlier mentioned tragic story of the Ogoni people in Nigeria.²⁴

The *right to privacy and family life*²⁵ has been a useful tool for arguing cases of environmental harm before the European Commission and the European Court of Human Rights. Subjects as diverse as airport noises, flooding of grazing fields for reindeer and fumes of a tannery waste treatment plant have been dealt with.²⁶ Although the judges in several cases justified the violations with permissible limitations due to e.g. the economic wellbeing of the country etc. they admitted that these sorts of phenomena were an intrusion into the right to privacy of the complainant.

The famous case of the highway constructed through the Yanomani territory in Brazil²⁷ also shows that the *right to residence and movement*²⁸ can be a way to condemn environmental destruction. In the Inter-American Court of Human Rights, the Brazilian government was found guilty of not protecting the right to residence and movement for the Yanomani. The reason for this was that the construction of the highway forced them to move from traditional settlements –some times even in the form of organized compulsory transfers.²⁹

The Yanomani case also touches upon the connected areas of minority rights, rights of indigenous people and right to natural resources. The *minority rights* protection has gained a stronger position through the rather strict reading of article 27 of the ICCPR by the Human Rights Committee,

²³ Art. 1.1 CAT reads as follows: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him..."

²⁴ I. Okonta and Oronto Douglas, *Where Vultures Feast* (Verso, New York, 2003) p.3.

²⁵ ICCPR art 17, and ECHR art 8

²⁶ See D. Shelton, Background paper No. 2, Human Rights and the Environment: Jurisprudence of Human Rights Bodies, para 3i,ii,iii, found at <http://www.ohchr.org/english/issues/environment/environ/bp2.htm> last visited 6th Aug 2007

²⁷ See Resolution No. 12/85 - Case No 7615 (BRAZIL) March 5, 1985 found at www.wcl.american.edu/humright/digest/1984/res1285.cfm last visited 6 Aug 2007

²⁸ See e.g. art 12 ICCPR

²⁹ The project also violating the right to life and health when non-indigenous brought diseases not before present in the area which remained untreated and caused deaths and severe suffering among the Yanomani. An example of how these rights often interacts. See Resolution No. 12/85 - Case No 7615 (BRAZIL) March 5, 1985 found at www.wcl.american.edu/humright/digest/1984/res1285.cfm last visited 6 Aug 2007

HRC.³⁰ Among others, the Lubicon Band Case found a violation of minority rights when gas and oil exploitation threatened the way of life and culture of the aboriginal Indians in the band. Their culture was regarded to be in so close connection with the land they traditionally occupied, that the destruction of the land was seen as a violation of their right to enjoy their own culture.³¹

The *right to self-determination*³² can indeed be the crucial way to argue when illegal occupation forces people to live in camps and without normal way of supporting themselves have no choice but to harm the environment.³³ This right in its original definition, *i.e.* ‘external self-determination’, is a rights ascribed to all peoples with territories illegally taken with force after 1945. The clearest example of is the Palestinian territories occupied by Israel, where even the ICJ has stated that with the breach of the right to self-determination, environmental destruction including human rights violations has taken place when Israel constructed the wall in the Palestine territories.³⁴

Some scholars do however take a more wide approach to the right to self-determination. They argue that this right also can be used to grant not only absolute sovereignty but instead provide “a degree of political and economic autonomy within existing borders”,³⁵ also called ‘internal self-determination’. In that case, it appears to be more similar to the *rights of indigenous people* granted by the 169 ILO Convention.³⁶ There even *land rights* are explicitly recognized,³⁷ which could be used on numerous occasions where a State wants to use the lands of indigenous peoples for mining, oil exploitation, as well as road, railway or dam construction. I find it in any case better to simply use the self-determination argument for cases where it follows the original definition of ‘external self-determination’. Although a clear advantage when using art 1 of the Covenants is that those apply to more states than the ILO Convention, which is signed by only 18

³⁰ Art 27 of the ICCPR read as follows: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

³¹ See Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) from www1.umn.edu/humanrts/undocs/session45/167-1984.htm last visited 6 Aug 2007

³² See the common art 1 of the two Covenants

³³ *E.g.*, Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur, *Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, p 42

³⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, 9 July 2004, ICJ, Advisory Opinion para. 133 at <http://www.icj-cij.org/docket> last visited 6th Aug 2007

³⁵ *E.g.*, M. R. Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’, in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 6.

³⁶ ILO Convention C-169 Indigenous and Tribal Peoples Convention, Geneva, 27th June 1989 <http://www.ilo.org/ilolex/english/convdisp1.htm> visited 14 June 2007

³⁷ Art 13 of the C-169 Indigenous and Tribal Peoples Convention, 1989

states,³⁸ they are of less practical use when not giving right to an effective procedural remedy as it cannot be base for an individual complaint. This was a by-product of Lubicon Band Case, where the human rights committee took the position that self-determination is a collective right and therefore cannot be dealt with as an individual complaint. That does however not mean that the right to self-determination cannot be used as an argument for stopping environmental harm in an area populated by a minority, it is still legally binding.

Returning to art 27 of the ICCPR, there is a way to use that article to preserve land for indigenous people although it has no such absolute territory preserving effect. The protection of the *cultural, religious and linguistic rights* for minorities therein, are useful in cases where their lifestyle is so connected to their lands and the way of using them that it would not be possible to uphold without the lands. The *right to religion*³⁹ could also be mobilized in itself, but that will then in my view only work where there is a certain small religion very connected to the special conditions of the land or important worship places are involved.⁴⁰ I could imagine that if churches are unreachable due to flooding or pollution a precondition would be that no other church was available. This might be different if the church was that of St Peter in Rome, no catholic would accept a substitute in case of environmental harm caused there.

Last in the presentation of civil and political rights I will return to the most frequently invoked rights when dealing with environmental harm. The first of these are the *political rights and right to participate in decision-making*.⁴¹ A non-democratic government will have less incentive to protect its citizens from environmental harm and allowing affected people in the decision-making itself than one dependent on their vote for re-election. A government with full transparency in its behaviour cannot make decisions detrimental to the environment without people knowing. Here the *right of freedom of expression*⁴² will make it possible to go public for those discovering mal-administration concerning the environment. It can even be argued that the *right to information*⁴³ also includes a positive obligation to inform the public of risks thus making it possible for them to make their own risk assessment.⁴⁴ It can also reveal that a provision for a mandatory

³⁸ For the number of ratifications I have used the ILO database found at <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited 13 June 2007

³⁹ ICCPR art 18

⁴⁰ For a codified example of the right to religion *see e.g.*, art. 18 of the ICCPR

⁴¹ *E.g.*, art 25 of the ICCPR and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention)

⁴² art 19.2 ICCPR

⁴³ art 10 ECHR and art 19.2 ICCPR

⁴⁴ This was the outcome of the Lopez Ostra Case even if the ECtHR chose to rule on art 8 (privacy) instead of art 10 – right to information. *See López Ostra v. Spain*, 09 December 1994, *no. 16798/90*, EctHR, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=lopez%20%7C%20Ostra&sessionid=1753384&skin=hudoc-en> last visited 12th August 2007. For a summary of the case see D. Shelton, Background paper No. 2, Human Rights

environmental impact assessment might not even exist or such an investigation was poorly done.

*The right to remedy*⁴⁵ is crucial in the sense that it transforms pretentious writings about rights into reality. It can even be argued that although the International Covenant on Social, Economic and Cultural Rights does not contain a provision about remedy there must implicitly be one since otherwise the whole convention would lose its meaning.⁴⁶ *The right to a fair trial*⁴⁷ is also fundamental in this sense – any claim about its violation would be toothless if there would be no independent judiciary and rules of due process. This is sadly demonstrated by the case of Ken Saro Wiwa and his eight compatriots when they became victims not only of environmental destruction but also to false accusations and verdicts due to the Nigerian government not providing a fair trial or independent judiciary.⁴⁸

2.3 Economic, Social and Cultural Rights

In this sub-chapter I will present some of the economic, social and cultural rights that can be used to protect the environment. They do not always have the same enforcement mechanisms as the civil and political rights, but some options do exist. One example is the African Charter that includes all kinds of rights and has the African Court as an enforcement mechanism,⁴⁹ and the complaints procedure for the European Social Charter.⁵⁰ Furthermore, although enforcement might be missing, these conventions contain rights, are part of international law, and should therefore be respected in any case. Enforcement by extra-legal remedies, e.g. by using popular pressure is sometimes more useful than formal complaints and therefore the following rights are of interest.

and the Environment: Jurisprudence of Human Rights Bodies § 3 iii found at www.ohchr.org/english/issues/environment/envIRON/bp2.htm last visited 6 Aug 2007

⁴⁵ ICCPR art 2.3a

⁴⁶ See Committee on Economic, Social and Cultural Rights, *General Comment 3*, § 6 from HRI/GEN/1/Rev.7 p 16 from [www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) last visited 6th Aug 2007.

⁴⁷ ICCPR art 14

⁴⁸ See Amos Adeoye Idowu – *Human Rights, environmental degradation and oil multinational companies in Nigeria; The Ogoniland Episode*, Netherlands Quarterly of Human Rights, vol 17 1999 §IX p177-180 and the African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul <http://www1.umn.edu/humanrts/instree/z1afchar.htm> last visited 6th Aug 2007.

⁴⁹ African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul <http://www1.umn.edu/humanrts/instree/z1afchar.htm> last visited 6th Aug 2007 and the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).at

<http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> last visited 6th Aug 2007.

⁵⁰ European Social Charter (revised), CETS No.: 163, Strassbourg 3 May 1996, and the European Committee of Social Rights, see http://www.coe.int/T/E/Human_Rights/Esc/2_ECSR_European_Committee_of_Social_Rights/ last visited 23 July 2007

First of these right I want to state that environmental destruction can in almost all cases be argued under the *right to an adequate standard of living*.⁵¹ In Sweden we can hopefully soon argue that it is our human right to have a choice to eat organically grown vegetables instead of those grown with pesticides and fertilizers. We could also possibly claim that any artificially produced or manmade chemicals should be stopped from entering the ecosystem since it is so difficult to know what consequences they would have for our standard of living later on.⁵²

Elsewhere it is the more urgent need of actually being able to produce *anything* to eat that is mobilizing the connected *right to food*.⁵³ The earlier mentioned Nigeria case condemned the State for directly destroying food sources, allowing private companies to do the same and, through terror, creating significantly obstacles for the people to feed themselves.⁵⁴ The right to an adequate standard of living also includes the *right to housing and not to be evicted*⁵⁵, which is very often violated, for example by project like the Three Gorges Dam in China where nearly 700, 000 people have been forcibly removed to build the dam.⁵⁶

Coming to the *right to health*⁵⁷, there are numerous examples on how it can be used and how it has been used to fight ‘environmental human rights violations’. Pollution, hazardous wastes, radiation in case of nuclear power plant accidents, poisonous ground water and all other possible sad outcomes of non-environmental friendly activities can severely jeopardize the health of those affected. A well-known Hormoslyr case from Sweden, where children were born cripple due to exposure to Hormoslyr was certainly a violation of the right to health.⁵⁸ If Greenpeace allegations of damage to reproductive organs caused by Nonylphenol are found to be true, it could also be argued in terms of violation of the right to health.⁵⁹ The 15 times higher risk of giving birth to a child with cancer if living in Seascale close

⁵¹ See ICESCR art 11 on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

⁵² See discussion on precautionary principle under 3.3.

⁵³ Included in ICESCR art 11, and especially explained by the Committee on economic, social and cultural rights in its general comment 12 (1999)

⁵⁴ See African Commission on Human and Peoples’ Rights : Decision regarding communication No.155/96.Social and Economic Action Centre v. Nigeria, 27 October 2001.

⁵⁵ Genral Comments 4 and 7 by the Committee on economic, social and cultural rights

⁵⁶ See Earthjustice, *Issue Paper Human Rights and the Environment*, p. 41. Material for the 60th session of the United Nations Comission on Human Rights found at <http://www.earthjustice.org/library/references/2004UNreport.pdf> last visited 6th Aug 2007

⁵⁷ ICESCR art 12

⁵⁸ Hormoslyr is the Swedish equivalent to Agent Orange and was used to clear away unwanted vegetation in the 50’ to the 70’ when it was finally prohibited. See e.g., the article by Lennart Hardell at www.medikament.nu/PDF-filer/7-02/greenwash.pdf where he compares the resistance then against his research about the negative effects of hormoslyr with the resistance against accepting his theory about radiation from cellular phones now.

⁵⁹ See www.greenpeace.org/international/press/releases/gender-bending-chemicals-fou visited 6 August 2007

to UK's reprocessing plant Sellafield in Cumbria,⁶⁰ can, by the pure *risk* to have children born with some reproductive defect or cancer cause violation of the mental health of the parents.

It will also be a direct violation of the right to health if the described risk scenarios about reproductive damage turn into reality – i.e. there is a child born with cancer due to her parent's work at Sellafield.

In cases where a polluting industry is contaminating the surroundings as well as the factory and affecting the health of its workers the *right to work*⁶¹ can be called upon in at least two ways. First is the right to safe and healthy working conditions. The second is the right to be able to support oneself, which imposes an obligation on the State to protect individuals from hazards that interfere with that right. That could be the case where pollution made farmers crops worthless or when an area is so polluted that it is no longer possible to live there. In such a case, there can be a possible violation of the *right to education*.⁶² That is if the impossibility to enter the area where a school is located is not replaced with a school elsewhere, where it is practically and economically possible for the children to travel to. The right to education could also be mobilized to positively include knowledge about preserving nature and ecosystem in compulsory education.⁶³

The last economic right to ponder about when dealing with a case of environmental destruction in human rights terms is the *right to property*.⁶⁴ As formulated in the European Convention on Human Rights “the right to peaceful enjoyment of his/her possessions” it can very well be used to stop pollution of the property of the applicant. However, it can also be used the other way around, by landowner who, using their right to property, can stop a governmental effort to protect the environment.⁶⁵ Therefore, it is important to mention that the right to property is also discussed, not given the same attention in the different regional system and is, in the European system, subject to several restrictions.⁶⁶

⁶⁰ See news.bbc.co.uk/2/hi/health/2054694.stm last visited 6th Aug 2007

⁶¹ ICESCR art 6,

⁶² ICESCR art 13

⁶³ See M. R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 6

⁶⁴ ECHR protocol 1, art 1

⁶⁵ As in *Matos E Silva, Lda., and others v. Portugal*, 16 September 1996, ECtHR, no 15777/89 § 54.c www.worldlii.org/eu/cases/ECHR/1996/37.html last visited 12th Aug 2007. See also M. R. Anderson, 'Environmental Protection in India', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 215-216 where he among others mentions the Doon Valley Case, *Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh* AIR 1985 SC p. 652.

⁶⁶ See ECHR, protocol 1 art 1 where “preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

In a listing like this, we could also include some of the emerging “third generations human rights” as the *right to development and the right to peace*.⁶⁷ These are clearly applicable since development nowadays at least must include living in a satisfactory environment. As clear is that the absence of peace, i.e. war, brings environmental destruction in most cases. These rights have however nowhere been included in a binding treaty at the international level, and might be of little additional help while already having access to the binding human rights above.

2.4 A Possible Human Right to a Decent, Healthy or Viable Environment?

It is easy to use and define ‘the right to the environment’ when it exists as a subjective right in a human rights treaty like in the African and American system, which mentions it as a right to a ‘generally satisfactory environment’⁶⁸ and a ‘right to a healthy environment’.⁶⁹ Otherwise, the quality of what we have the right to remains to be settled, because, as professor Alan Boyle discuss, the scholars have not been able to agree whether there is a right to a satisfactory, a decent, a healthy, a viable or an ecologically sound environment.⁷⁰ Anyhow, this problem will not be as acute when there is no specific right to environment established. In such cases, we would have to claim that such a right exists even though not explicitly written in a treaty. We could argue this with help from derivation from existing treaties or as a human right existent in international customary law, and then the quality of the right will be determined on the way.

When choosing to derive this right from existing human rights treaties there are some practise of human rights institution and constitutional courts that have considered this right as an existing enforceable human right.⁷¹ In those cases the courts have examined existing human rights as we have done above- i.e. seeing how the consequences of environmental harm violates other human rights. In some cases, most notably in the Indian judiciary, the courts have not been satisfied even by that conclusion. Instead, they claimed that the right to life includes the right to a healthy environment as an independent right.⁷²

⁶⁷ E.g., Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur, *Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, p 60

⁶⁸ African Charter of Human and Peoples’ Rights (1981). Article 24

⁶⁹ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights “Protocol of San Salvador” 17th Nov 1988, article 11, see <http://www.oas.org/juridico/English/signs/a-52.html> last visited 12th Aug 2007

⁷⁰ A.E Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’, in and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) pp. 50-51.

⁷¹ See Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur, *Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, p 59

⁷² See M. R. Anderson, p 7

Hancock, who writes that the implementation of existing human rights would require the implementation of two special environmental rights, also advocates this road.⁷³ The first of those is a right to an environment free from toxic pollution, which can be derived from “the existing legal rights to private life, autonomy (non-intervention), security of the person and the right to life”.⁷⁴ Furthermore, a right to ownership of natural resources can be derived from the rights to cultural self-determination and the right to freedom from hunger.⁷⁵ According to Hancock, working for the realisation of these rights would provide a rights-discourse that would give environmental protection a higher status and therefore be a more viable way than working for improved environmental laws. He also claims that the history of environmental law shows that commercial interest has been prioritized over environmental concerns, and therefore he does not advocate working with environmental law only.⁷⁶

While Hancock, is focusing on the fact that if environmental right is not respected, other rights will be violated, Tim Hayward proposes a different approach. He claims that recognized human rights meet a “moral criteria of genuineness”,⁷⁷ and the right to an adequate environment meets each test of genuineness that can reasonably be proposed. His argument is based on the observation that “environmental problems can reach a level of severity, causing such widespread and large scale damage to the health and welfare of a community, that is matched by few human rights violations other than programmes of mass extermination.”⁷⁸ Although, how well justified this might be, such moral base is not enough when claiming that such a right is present. Instead, Hayward is indeed speaking *de lege ferenda* here, which he also admits when explicitly saying that a derived right is not enough and his foremost suggestion is to include an explicit right to an adequate environment in all constitutions. However, he also makes an analysis of existing international law and concludes that already as a “positive right it is *in the process* of acquiring an equivalent status”.⁷⁹ (author’s italicizing)

Continuing this road of examining the existence of a positive right, I also find Hayward’s findings that such a right is already included in many constitutions in the world, very interesting.⁸⁰ If we take art 38(1)(c) of the ICJ Statute literally and use ‘general principles of law’ as a source of international law we could draw the conclusion that the right to an adequate

⁷³ J. Hancock, *Environmental Human Rights*, Ashgate Publishing, Hants, 2003 p. 2

⁷⁴ J. Hancock, *Environmental Human Rights*, Ashgate Publishing, Hants, 2003 p. 133

⁷⁵ J. Hancock, *Environmental Human Rights*, Ashgate Publishing, Hants, 2003 p.155

⁷⁶ J. Hancock, *Environmental Human Rights*, Ashgate Publishing, Hants, 2003 p. 2

⁷⁷ T. Hayward, *Constitutional Environmental Rights* [Elektronisk resurs], Oxford : Oxford University Press, 2004, p. 26

⁷⁸ T. Hayward, *Constitutional Environmental Rights* [Elektronisk resurs], Oxford : Oxford University Press, 2004, p. 48

⁷⁹ T. Hayward, *Constitutional Environmental Rights* [Elektronisk resurs], Oxford : Oxford University Press, 2004, p. 58

⁸⁰ T. Hayward, *Constitutional Environmental Rights* [Elektronisk resurs], Oxford : Oxford University Press, 2004, p. 2

environment is a general principle of law because it is already existing in many constitutions in the world. Then, of course it is a matter of whether these 30 constitutions including such a right is a sufficient number. Popovic, as cited by Hayward, does not seem to think we are there yet and states instead that:

“ As more and more municipal legal systems recognize the legal right to a satisfactory environment, that recognition supports the establishment of a general principle of international law and contributes to the emergence of a norm of customary international law that binds all nations regardless of their domestic law”

This instead leads us into a second road to claim a right to a clean and healthy environment and that is the derivation of such a right from the existing customary law of environmental protection. Professor Guruswamy states that the most confirmed customary law regarding the environment is the prohibition against transnational harm.⁸¹ In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* the ICJ stated that protection of the environment is now part of international law.⁸² In the *Fisheries Jurisdiction case*,⁸³ the same court recognized States’ “duty to have due regard to the rights of other States and the needs of conservation for the benefit of all” when it emphasized the international obligation to the marine environment. In the *Gabcikovo-Nagymaros Case*, this Court stressed the importance it attached to “respect for the environment”, “not only for States but also for the whole of mankind”.⁸⁴ Even if the Court here does not define what exactly that protective law includes, it is possible to argue that this customary law already encompasses a human right to a clean and healthy environment, because the aim of the protection provided is, as with human rights, the well-being of humans. Not going that far I would however argue that the existence of both treaty law and customary law in the area of environmental protection are signs of the emerging *opinio juris* and state practise on having a human right protecting the environment, but so far not enough to establish such a customary right.

A third way would however be to claim that the treaties on environmental protection give raise to “environmental rights” and thus is the foundation for a human right to a clean environment. Treaties of environmental protection do include provisions that the State party have to implement in its national legislation to fulfil its treaty obligations but also with the purpose of protecting its citizens from a deteriorating environment. Especially explicit this is in treaties like the Convention on Persistent Organic Pollution where

⁸¹ L. Guruswamy, *International Environmental Law*, West Publishing, St Paul,US, 2003, p. 18

⁸² *Legality of the Threat or Use of Nuclear Weapon*, 8 July 1996, ICJ, Advisory Opinion, para. 29 at www.icj-cij.org/docket last visited 6th August 2007

⁸³ *Fisheries Jurisdiction Case (UK v. Norway)* 18 Dec 1951, ICJ, p. 116. www.icj-cij.org/docket last visited 6th August 2007

⁸⁴ *Case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia)*, 25 September 1997, ICJ para. 53. www.icj-cij.org/docket last visited 6th August 2007

art 10 aims at protecting human health from persistent organic pollutants.⁸⁵ Human rights treaties work in the same way. They have to be implemented due to an international obligation arising from the treaty but have also the aim to protect the citizens of the State party. If shown that the nature of the treaties protecting human rights and the environment is the same and the environmental treaties thus give environmental rights to the citizens concerned – we can argue that there is a human right to a healthy environment also on this ground. My personal opinion is however that the attempts of human rights scholars to derive a human right from environmental treaties or environmental customary law is not necessarily in practice more helpful for the environment or the people seeking remedies for an environmental human rights violation. As this thesis will show in later chapters just applying this international environmental law correctly would help both people and nature in practise, with or without a specific right to a clean environment established.

⁸⁵ E.g., D. Shelton, Background paper No. 1, '*Environment Issues in Multilateral Treaties Adopted between 1991 and 2001*', §11 found at www.ohchr.org/english/issues/environment/environ/bp1.htm visited 6th Aug 2007

3 Predictable Problems When Using International Human Rights

In this chapter, I will discuss the problems connected to the use of human rights argument in a case of ‘environmental human rights violations’ as well as the possible limitations to the human rights idea when used to stop environmental destruction. Since there are two parts of my chosen problem, the environmental part and the pure human part, it is important to discuss the problems that can arise when we want to analyze the environmental side of the problem. It is easy to suspect that, when discussing environmental harm and human rights, the very nature of environmental harm gives us problems. These are issues of time, risk, humanity and legal standing. Environmental harm does not always adversely affect a now living person, but instead affect future generations and non-human species. Environmental harm is also in some cases difficult to determine - will this substance be dangerous later on? In some cases, it will surely affect some humans but we do not know whom exactly – who is then to make a claim and are we even entitled to make a claim before a violation has taken place? Since it could be interesting to enter litigation in cases like this, I will also present some ideas around this.

3.1 The Problem of Time - Protecting Future Generations

When arguing a case of environmental harm in human rights terms it would indeed be very helpful to have human rights that protect future generations, and thus a corresponding duty for us now living. This is especially important when dealing with the part of environmental harm that does not affect us now but can possibly affect future generations such as global warming and storage of nuclear waste.

My first suggestion is that the human right of future generations must be with us, the present generations, as duty-holders. This is because we have no right of imposing regulations onto those generations even if we try to do so by asking for restrictions about how to alter a human rights instrument or making human rights non-retrogressive.⁸⁶

⁸⁶ That human rights are non-retrogressive is a point repeatedly stated by the CESCR – see e.g., Committee on Economic, Social and Cultural Rights, *General Comment 14*, § 48 from HRI/GEN/1/Rev.7 p 99 from [www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf)

Looking closely to the traditional human rights, we can see some tendencies to trace regarding regulations of our behaviour for the good of future generations. The human rights to life and health also want to protect the unborn child, obviously as in the American Convention where life is protected from the moment of conception or more generally by giving special rights to the pregnant woman.⁸⁷

A case where this reasoning has been recognized is in the Philippine Case of *Minor Oposa*,⁸⁸ where several parents issued a class-suit on the behalf of their children and generations yet unborn. They claimed that given logging licences violated their right to a ‘balanced and healthful ecology’ in the Philippine Constitution, because during the 25 previous years the amount of rainforest had decreased from 16 to 1,2 million hectares. There the Supreme Court decided that the plaintiffs were given *locus standi* on behalf of generations yet unborn with a motivation well worth reading:

“This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.”⁸⁹

The way the Philippine Supreme Court here reasoned is a good example of how legal reasoning can assign human rights to future generations and deserves to be considered also internationally or in other domestic circumstances.

Another and maybe more direct way to establish what we look for – i.e. protection for future generations is to see this protection *as our right* as well, which would also make the enforcement mechanisms more easily available. Merrill, who distinctively distances himself from the idea of

⁸⁷ Lars Adam Rehof, ‘Article 3’, in Gudmundur Alfredsson and Asbjörn Eide (Eds), *The Universal Declaration of Human Rights – A common standard of achievement*. (Kluwer Law International, The Hague, 1999) p 96

⁸⁸ *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994). For summary of the case see www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module15.htm last visited 12th Aug 2007

⁸⁹ *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994) found at West-Law para. 184

future generations as right-holders, still opens up for rights for the present living concerning the future.⁹⁰ In the line of that argument my suggestion is that we, the now living, have *a right to leave a clean environment to future generations*. I want no global warming because it will affect the means of livelihood negatively for future generations and I want no nuclear power because it will leave wastes that we cannot make safe for future generations. I could then make a claim where the environment is harmed because that is a violation of the right to leave a clean environment to future generations.

3.2 Protecting Nature and Non-Human Species

This very thought about indirect justification for broader rights can also be applied to non-humans and the very nature itself.⁹¹ The problem here is that the main virtue of human rights law is to protect humans and to changing to include nature and non-human species would dilute the moral justification for the whole human rights idea. So also regarding these non-human entities we have to have an anthropocentric point of view to still be able to argue in human rights terms. The solution Merrild presents is that we have a moral telling us that it is wrong to exterminate a species or to change an ecosystem or a place of scenic beauty. This moral could then be transformed not to a right attributed to these entities but directly to us the now living humans. We have a human right to not seeing species becoming extinct, lakes fertilized to death⁹² or a tropical rainforest cut down even if that does not affect us directly. For this reasoning to apply it will however be necessary to have a specific right to a clean and healthy environment as discussed in earlier chapters. Without such a right it will be impossible to fight cases of environmental harm where the consequences are not directly affecting human beings.⁹³ That is also one of the reasons for claiming that there is in fact already today such a right in international customary law as we did above in chapter 4.

Anyhow, I must admit that this creation of a right for us to save the world for the future and to have a un-touched nature, will possibly encounter well-justified critics concerning both the far-fetched legal interpretations and the

⁹⁰ See J.G. Merrilds, 'Environmental Protection and Human Rights: Conceptual Aspects', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 33

⁹¹ See J.G. Merrilds, 'Environmental Protection and Human Rights: Conceptual Aspects', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 33

⁹² This is what happens when fertilizers are making natural plants in a lake grow to the extent that the whole bottom is filled with dead plants and all oxygen in the lake goes to that process. See <http://www.ymparisto.fi/default.asp?node=100&lan=sv> last visited 6th Aug 2007

⁹³ See D. Shelton, 'The Links between International Human Rights Guarantees and Environmental Protection' at <http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf> last visited 6th Aug 2007

priorities about humans in need. Although possible, I think this might be easier to handle in the IEL, where long-term perspective should not be a problem. Therefore, the issue of protecting future generations and nature itself will be discussed more in the coming chapters on environmental law.

3.3 Is the Risk to Have Rights Violated Enough?

Earlier in the paper I have touched upon the issue of how even the prospect of risk of something harmful happening can be a violation of the right to health. Being able to assert that already the risk is a violation has a great value because it would change the focus for human right from reparation to prevention. Normally human rights work exactly through reparation when harm is already done. Even if it thereby gains a compensatory value, it would in most cases better for everyone to be able to prevent the harm. An example where the claimants actually succeeded in showing a clear risk of violation was in the Irish abortion case where two women in childbearing age were *risking* to have their right to information violated in case they got pregnant.⁹⁴ Thus that is an example on how human rights jurisprudence already today in some circumstances accepts that the risk of violation is enough to have your right violated. Although here the risk was apparent since there did exist a law that forbid dissemination of information concerning abortion, similar constructions should be able to argue in environmental cases.

Some support for arguing that risk is enough could possibly also be derived from the IEL and the well-known ‘precautionary principle’ originating from art 15 of the Rio Declaration 1992.⁹⁵ The advocates of this principle says that it means that if negative effects are feared to come from an activity you will not have to show beyond all doubt that the connection between the harm and the activity exists. Instead, the burden of proof is shifted so the establishment responsible for the harm has to show that their activities are harmless – instead of the environmentalists having to show that harm will absolutely result from the activity. Examples where this interpretation has succeeded can be found in the Pakistani and Indian case law, where the courts have authorized claims based on risk *before* a factual incident had occurred. Likewise, the European Union has explicitly recognized the

⁹⁴ *Open Door and Dublin Well Woman v. Ireland*, 29 Oct 1992, ECHR, Series A246-A para.44

⁹⁵ Principle 15 from the Rio Declaration reads as follows: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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.” See General Assembly, Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I)§15 from www.un.org/documents/ga/conf151/aconf15126-1annex1.htm last visited 6th Aug 2007

precautionary principle concerning environmental rights.⁹⁶ For jurisdictions not having dwelt upon the issue it is however questionable whether a precise reading of the wording of the Rio-declaration do support these findings. Instead, it could be interpreted as only *allowing* governments to lower their threshold of scientific proof in case where irreversible damage is about to take place. If reasoning as above, you might instead have to show *opinio juris* and state practise that the first and more encompassing interpretation of the principle is the right one. Although difficult, that might be possible further on when other domestic and international courts possibly follow the stated jurisprudence above.

A special case of this problem is when scientific research can prove that some people will certainly suffer from an activity but it is not sure whom these persons will be. An example is the case of Dr S who already in 1960 tried to argue that his right to life was violated due to nuclear test that due to estimation would kill (any) 2,530,000 people worldwide.⁹⁷ With the precautionary principle established in the more radical form, the findings that nuclear tests would possibly condemn those people to death would certainly say that such tests violate the human right to life although these deaths have not yet materialized.

However, since this radical form of the precautionary principle is not yet established and most human rights institutions require a defined victim,⁹⁸ judicial avenues for individuals are difficult. Therefore, this might be a reason to work for creation of laws that forbids pollution, nuclear tests and other activities risking violating human rights. Then, again IEL will be a good option.

3.4 Public Interest Litigation

Lastly, in this part of possible problem we come to the practical question of who is entitled to make a claim based on these facts. Even if the violation is established – whose human rights were violated i.e. who is the victim? Since a lot of the development in these issues is driven by NGOs it would be a good thing that they also can be regarded as victims and initiate judicial proceedings. Using human rights, it is naturally a problem that someone else than the actual victim should claim that right in court. In my view, this is also only possible when arguing a substantive right to a clean environment since the NGO then can claim that their right to a healthy environment also is violated. If this substantive right is recognized, the same reasoning could

⁹⁶ E.g., M. R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996) p 11

⁹⁷ *Dr S v. Federal Republic of Germany*, 5 Aug 1960, European Commission of Human Rights, No. 715/60 from Lauterpacht Research Centre for International Law 2001, *Environmental Law Reports: Human Rights and the Environment* (Cambridge University Press, Cambridge, 2001) p. 707-709

⁹⁸ E.g. see art 1 ICCPR

then be applied and as continuation allow public interest litigation here. Not on behalf on the future generation but on the present one under risk.

That this is not only a theoretical idea is proven by the numbers of constitutions worldwide allowing public interest litigation.⁹⁹ Again I want to draw the attention to the Nigeria Case and the permission of *locus standi* of not only a Nigeria based NGO but also a US based NGO as claimants.¹⁰⁰

⁹⁹ *E.g.*, Dinah Shelton is mentioning among others the Antonio Horvath Kiss y Otros v. National Commission for the Environment (Supreme Court of Chile, March 19, 1997) in D. Shelton, 'The Link between International Human Rights Guarantees and Environmental Protection'. See D. Shelton, 'The Links between International Human Rights Guarantees and Environmental Protection' at <http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf> last visited 6th Aug 2007

¹⁰⁰ African Commission on Human and Peoples' rights : Decision regarding communication No.155/96.Social and Economic Action Centre v. Nigeria, 27 October 2001.

4 The Protection of the Human Rights System

In this chapter, there will be a discussion about enforcement and available human rights mechanisms in case an individual wants to raise a claim. This I have chosen to describe quite carefully since this is the part where international human right law differ from traditional international law and thereby from the way the international environmental law works. Although not in any sense complete, the idea ascribing rights on individuals and not only to States in international treaties between States, is an advancement from traditional State Sovereignty and a way to make human rights not only an internal affair, but subject to international scrutinizing. For the individual it is also essential to be able to raise a claim against the violating State, not only because that State has an internal regulation that might provide such a right, but because the State has taken on an international obligation to do so. Finally, it is also a unique feature of international human rights law that in some instances, the individual have access to international mechanisms where he/she can complain about his/her States not respecting its international obligations. I hereby want to show how this system works and how it contributes to stop 'environmental human rights violations'.

4.1 The Power of Using Justiciable Rights

The main reason for choosing to argue a case of environmental harm in human rights procedures is that such mechanisms are more available regarding human rights than in environmental law- especially for an individual suffering from an 'environmental human rights violation'. Yet another reason to turn the argument this way could be that the human rights system provides a broader material protection than the quite specific environmental conventions.

The justiciability is also the main reason to focus on civil and political rights although environmental concerns indeed would fall more likely under the economic and social rights' umbrella. That is because the civil and political rights can help us with the enforcement the economic and social rights presently lack. They are also handy to use in cases of environmental destruction where no substantive right to a clean environment exists. Indeed it is like letting the civil and political rights replace a non-justiciable economic and social right. That this is possible was shown by the opinion of the human rights committee's opinion in the two Dutch cases, Broeks and Zwaan-de Vries. There the committee applied the art 26 of the ICCPR, barring discrimination, on a case about gender-specific distinctions in unemployment law. Although the committee had no jurisdiction concerning

the economic right itself, the discriminatory access to an economic right was seen as discrimination and therefore justiciable under the ICCPR.¹⁰¹

The power of using justiciable rights rather than those more directly affected is of course that adjudication in itself always has a point. It might be far-fetched to have a government condemned for not giving appropriate access to justice instead of failing to protect its citizens from environmental degradation when there is a clear case of environmental destruction. However, that government would be marked as a human rights violator in case of a guilty verdict and all governments would like to avoid that by not repeating the original wrongdoing concerning the environment. The second advantage of using a legal procedure is that in most cases the facts of the case will reveal not only the wrongdoings concerning the civil and political rights but also the wrongdoings towards the environment.

4.2 The State's Responsibility regarding International Human Rights Law

The entities primarily responsible for human rights are *States* because human rights, as earlier mentioned, have the focus on protecting the individual from the State. States have the monopoly on the use of violence and are therefore in a position of power that needs control not to be misused. The responsibility taken on by adhering to human rights agreements also includes the regulation of the behaviour of private actors. The monitoring committee of the International Covenant on Civil and Political Rights, the ICCPR, has clarified that the obligation taken on is also protect the individual from violation by private parties.¹⁰² The monitoring committee of the International Covenant on Social, Economic and Cultural Rights, the ICESCR, has also repeatedly stated the obligation of the parties to *respect, protect and fulfil* human rights.¹⁰³ This adds to the first definition that in case of failure to protect the individual from a violation of a private party of i.e. the right to food the State has a *positive obligation* to fulfil that right by directly providing food for the starving people. So even if litigation can and should be against the private violator it can also be possible against the State already at the domestic level as the State is the one with primary responsibility in all cases. Therefore all cases of human rights violations can

¹⁰¹ *E.g.*, the jurisprudence from the ICCPR about the Dutch cases, Broeks and Zwaan-de Vries, about gender-specific distinctions in unemployment law where the non-discrimination clause had to be respected even in a case where there was no human rights entitlement to the economic right itself. I.e. when the non-compulsory law is there it has to follow the ICCPR art 26. From M. Novak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, (N.P.Engel Verlag, Kehl, 2005) p. 605

¹⁰² Human Rights Committee, *General Comment 31*, para. 9 from HRI/GEN/1/Rev.7 p 194 from

[www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf)

¹⁰³ Committee on Economic, Social and Cultural Rights, *General Comment 12*, para. 15 from HRI/GEN/1/Rev.7 p.66 from

[www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf)

end up being adjudicated against the State and this chapter will explain how such procedure works, to be able to judge their effectiveness.

4.2.1 Enforcement Where the Violation Takes Place, i.e. Host State Responsibility

The necessary way to assess responsibility for human rights abuses from States is to start with the State where the harming activity is taking place. Domestically, the first law to check is the national constitution where there hopefully is a provision securing one or several human rights that could apply in the case. That could be both a substantial right to a clean and healthy environment, an implicit environmental right by jurisprudence derived from another existing right or another `normal´ human right also violated. However, it could be quite some work in finding out how human rights are secured in the national law, since it is not always that a binding convention is directly applicable.

If there is a suitable provision, it is necessary continue to check *who* can make the claim. Is it allowed only for directly affected victims or does it grant standing to NGO for public interest litigation? Is it then allowed only for accredited NGOs or any NGO? Does it exist in some other form of jurisprudence in that country, which allows standing on behalf of someone else as in the *Minor Oposa Case*?¹⁰⁴ All this need to be checked – especially in the difficult case where a victim does not exist yet or when nobody harmed has the courage to enter into a court litigation concerning a powerful foreign company. If so, remember to make use of the arguments already presented earlier concerning the possibility of making claims for others as our own rights when officially recognized public interest litigation is missing.¹⁰⁵ It could also be useful to redefine a substantial right as the right of the individual seeking justice instead of claiming the right on behalf of someone else. Worth noticing is also that since non-discrimination is the base for the very existence of human rights, all persons, nationals, non-nationals, legally and illegally present should be granted the same protection. The only possible limitations are concerning political rights and the right to movement.¹⁰⁶

The last obstacle in the domestic arena would be to check, if we actually find a provision and the *locus standi* for either the victim or an NGO, that the process can be said to be fair and impartial and thus providing an effective remedy? If similar cases never have been fair treated in domestic

¹⁰⁴ *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994) found at West-Law. For summary of the case see www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module15.htm last visited 6th Aug 2007

¹⁰⁵ See chapter 3.1

¹⁰⁶ ICCPR para. 12.4 explicitly tell that “No one shall be arbitrarily deprived of the right to enter his own country.” and para. 25 that “Every citizen shall have the right and the opportunity...”

courts we could possibly advance to a higher level already here,¹⁰⁷ including, in my view, also a case where human rights defenders are known to suffer severe persecution even while trying to bring attention to a case. In a case where the State has no such reputation, it is indispensable to make the claim in the appropriate domestic forum and follow the appropriate path for appeal until reaching a verdict in the highest available domestic court. It is first then you have exhausted domestic remedies, which the condition for entering any litigation against the State on the international level.¹⁰⁸

4.2.2 Enforcement Where the Violating Party Is Situated, i.e. Home State Responsibility

The possibly most interesting but also the most difficult way to assess responsibility for some 'environmental human rights violations' is however not to make a claim in and against the State where the violation occurred. Instead, that could be done in another State that is in some way connected to the wrongdoing abroad. Most often that is the home State of the private company involved in the environmental wrongdoing due to the right of a State to exercise jurisdiction over its citizens abroad the so-called personal jurisdiction.

The reason for this would be to reach the real violators, the big companies that have budgets much bigger than most developing countries' whole gross domestic product, GDP. These are also often situated in a rich State, which appears to be doing good human rights work and thus have available complaint mechanisms there.

The first hurdle here is that although there is the possibility for a State to have jurisdiction over its citizens, including companies, also when acting abroad, the victim often lacks legal standing in that country. In my opinion, this contradicts that State's human rights obligations, which states that if a violation is taking place 'within the jurisdiction' of that country then the State must provide a remedy for that victim – no matter the victim's nationality. A possible road out of this is therefore that home states of companies or persons violating human rights abroad, are responsible for regulating the behaviour of those companies in the same way as they do for residents citizens. If that is then not happening – it should be possible to enter litigation against the home state, domestically, in an administrative court.¹⁰⁹

¹⁰⁷ See the Akdivar case as cited in C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights* (Oxford University Press, Oxford, 2002) p. 410

¹⁰⁸ E.g., para. 2 of the ICCPR, the African Charter art 56.5 or the ECHR art 35

¹⁰⁹ For more detailed explanation of this theory see author's previous thesis 'Being Indirect – a Viable Way to Assess Legal Responsibility for Corporations' Human Rights Violations Abroad?' at

<http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/EssayBySubject?Open&ShowCategory=Folkr%E4tt> last visited 2 Aug 2008

4.2.3 Human Rights Instruments

However, if we fail to find an appropriate provision in domestic law, standing is not granted or the procedure is not fair, we can continue to one of the human rights instruments. Here it is required that the State concerned has signed the appropriate instrument and that the instrument has a working complaint mechanism. Lastly, it is crucial to check that the State has also ratified the protocol or the provision granting the individual complaint mechanisms. At the time writing this, the UN Covenants and Conventions governing civil and political rights (the ICCPR), torture (CAT), women's rights (CEDAW) and racial discrimination (CERD) have such procedures.¹¹⁰ For the regional human rights instrument, both the European Convention and the American Convention on Human Rights have a court where individuals can issue complaints, for the European Convention directly to the court and for the American Convention to a commission that can further the complaint to the court.¹¹¹ The African Charter is supposed to work in the same way but there the Court is not yet working. Instead, the African Commission on Human Rights does the supervision whereto individuals can issue complaints.¹¹² If the violation thus fit into one of these mechanisms, the victim can file a complaint to the most appropriate human rights organ. For the UN bodies there are instructions at the website of the High Commissioner for Human Rights and for regional bodies at their respective websites.¹¹³ Anyhow, it is far from sure that this construction for the human rights part is still the overall solution for 'environmental human rights violations'. Two factors decrease the possibility for this kind of implementation; firstly the possibility that a signatory State to the ICCPR does not ratify the protocol and secondly the limitation of the Human Rights Committee to give 'opinions' instead of binding judgements.

In case the instrument lacks such mechanism, there is still the possibility of giving a *shadow report* to the monitoring committee when a country is providing its own annual report.¹¹⁴ This can be the way to treat the rights in the, for us important, ICESCR or the CRC, that both lack such mechanism. Such an effort concerning e.g. the right to an adequate standard of living and the implied right to a clean and healthy environment should however not stop action in other way. Remember to check whether any rights present in a convention that the country actually *has ratified* and which is actually

¹¹⁰ Information on the individual complaints mechanism for the UN instruments is found at <http://www.ohchr.org/english/bodies/petitions/index.htm> last visited 8th Aug 2007.

¹¹¹ Information on the individual complaints mechanism for the American Convention is found at <http://www.cidh.org/what.htm> and for the European Convention at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> last visited 8th Aug 2007.

¹¹² Information on the individual complaints mechanism for the African Charter is found at http://www.achpr.org/english/info/communications_procedure_en.html last visited 8th Aug 2007.

¹¹³ See e.g., <http://www.ohchr.org/english/bodies/petitions/individual.htm> There is a description of how to go about to raise an individual complaint in the HRC.

¹¹⁴ To read a typical reasoning behind such a report see http://www.stopvaw.org/A_Note_About_Shadow_Reports.html last visited 6th Aug 2007

subject to individual complaints have been violated. Then the more diplomatic way of working via the shadow reports could be complemented by a concrete complaint in another mechanism.

4.3 The Possibility to Use Civil Proceedings

If States, however, has fulfilled their obligation to provide remedy for victims of human rights abuses, it might also be possible to sue a private violator of human rights. The respondent could either be a domestic company or a foreign company sued in their home state. Concerning the latter there is an interesting development going on in the US because the earlier mentioned Alien Tort Claims Act, the ACTA,¹¹⁵ is an example where a country is actually granting foreigners the standing to sue a US based company for violations occurring abroad. That law can both be used in cases of human rights abuses and in cases of environmental harm if

“no state condone the act in question and that there be recognizable “universal” consensus of prohibition against it; there are sufficient criteria to determine whether given action amounts to prohibited act and violates the norm; and prohibition against it is nonderogable and therefore binding at all times on all actors”.¹¹⁶

This criteria for universal prohibition has sadly enough led to the fact that pure environmental destruction is not dealt with but must be accompanied by worse crimes to be subject to litigation in the US.¹¹⁷ However, so could be the case and the, for the applicant, favourable settlement in the *Doe v. Unocal* Case showed that that the Alien Tort Claims Act contributed to compensate the villagers suffering from forced labor, rape, and murder during the placement of a gas pipe-line through their lands.¹¹⁸

Interesting to note is that this way to bring cases against foreign companies in their home State or where they have sufficient assets can also be applied where that home State in some way is a stakeholder in the company responsible for a violation abroad. As long as such activities are not exclusively possible to be performed by a state they are to be regarded as private activities and can therefore not be hidden away behind the ‘act of State doctrine’.¹¹⁹

¹¹⁵ See Alien's action for tort, 28 U.S.C.A. § 1350

¹¹⁶ *Xuncax v. Gramajo*, D.Mass. April 12, 1995, found in Westlaw as 886 F.Supp. 162

¹¹⁷ *Flores v. Southern Peru Copper Corp.* S.D.N.Y., July 16, 2002, found in Westlaw as 253 F. Supp. 2d 510

¹¹⁸ *Doe v. Unocal*, 110 F. Supp. 2d. p. 1309, For a detailed description of the outcome of the case that was settled see

http://www.earthrights.org/site_blurbs/doe_v._unocal_case_history.html last visited 23 July 2007

¹¹⁹ The ‘act of State doctrine’ means that a court in State A country cannot judge the behaviour of State B acting within its own territory. *E.g.*, H. Fox, ‘International Law and Restraints on the Exercise of Jurisdiction by National Courts of States’, in M. D. Evans

Regarding the EU, the possibility of adjudicating cases in the domestic courts of the EU States could be advocated with the help of 1968 Brussels Convention.¹²⁰ Although constructed for dealing with conflicts within the European Union, it could possibly also be used for granting standing to applicants outside the European Union and thus providing a more fruitful for a to sue where in the home-state of a violating company.¹²¹

4.4 Extra Legal Remedies

If nothing is accomplished the legal way there is of course as always the possibility of finding extra legal protection via media showing the wrongdoings, claiming that the right exists even if the legal standing is not constructed for this kind of violations – yet. Then it is useful to show all the rights and examples we had above concerning how environmental destruction violates a number of ordinary human rights as well as an substantial right to a clean and healthy environment. The opposite road of confidential negotiations with the government concerned could also be a good way. That is true especially in cases where governments are little affected by criticism by media and condemnation by other States.¹²²

My point is that this argumentation in public or confidential negotiations to seek extra legal enforcement is never useless. Of course, it can be argued that a right is not a real right until someone can be responsible for its fulfilment in a legal forum. However, my opinion is that a right does exist even if the enforcement is not there yet. The corresponding duty is there and can exist even if enforcement is missing. Then we continue to argue the right-based-approach and can claim that environmental destruction should stop not only because someone should be nice enough to do so – but that it is their obligation to stop it due to international human rights law!

(Ed), *International Law* (Oxford University Press, Oxford, 2003) p. 376, where among other the famous Luthor v. Sagor Case is mentioned. (Luthor v. Sagor (1921) 3 KB532)
¹²⁰ 18 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. 1998, C27, 1 (consolidated version after the 1996 Accession Convention) and the parallel 1988 Lugano Convention, O.J. 1988, L319, 9.

¹²¹ International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy, Versoix, 2002, p 51

¹²² A good example of this is the well known confidentiality promised by the Red Cross that are given almost worldwide access to detention centres of prisoners of war. See <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5FMFN8> last visited 8th Aug 2007

5 How Does International Environmental Law Prohibit ‘Environmental Human Rights Violations’?

The objective of international human rights law is to protect individuals while, in short, the aim of international environmental law is to protect nature – let be that it is mainly for the purpose of giving us, the human beings living here, a chance to continue to do so in the future. In the interaction between international human rights law and international environmental law scholars have mostly focused on how the human rights regime can contribute to protect the environment.¹²³ In this part, including this and the following chapter, I will instead investigate contributions in another direction and thus discuss the question whether environmental law also can protect human rights.

Due to the mentioned different objectives of international human rights law and international environmental law, the detours of using international environmental law to protect human rights, let them be ‘environmental’ also need some motivation. Even if the human rights system is not by any means perfect it is constructed especially for protecting an individual that suffers from a human rights abuse, while the IEL is part of the traditional international law system, where only States can have rights and duties. The first issue to address is therefore whether this traditional State-focused system also is providing some benefits for the individual and thus can be a viable way to protect her/his human rights indirectly. The second issue is if there are some reasons to do so, i.e. if there are instances where the protection from the environmental law system could be stronger than the protection of human rights.

My method of examining this is firstly to briefly analyse three of the major IEL treaties to look for examples whether their provisions contain substance that can be of use for protection for the individual. Secondly, I need to consider the strength of these provisions by analysing how IEL today is implemented and enforced.

5.1 Method of Interpretation

Also in this chapter there will arise issues of interpretation, i.e. situations where it could be questioned how a provision should be applied in a specific

¹²³ E.g. the entire A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, Oxford, 1996)

case. The answer to any such question must of course investigate the individual characteristics of that case, but, as with human rights, guidance should also always be sought for in the the rules of interpretation in the Vienna Convention on the Law of Treaties.¹²⁴ As mentioned before, there it is stated that a treaty shall be interpreted “in the light of its object and purpose.”¹²⁵ As a way to find the object and purpose of a treaty is to look at the preambles of that treaty, it is interesting to see what the preambles of the three treaties this thesis analyse says about this.

In the preamble to the Biodiversity Convention it is stated that “the fundamental requirement for the conservation of biological diversity is the in-situ conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings”. Further it is stated that “that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population.”¹²⁶

In the preamble to the Basel Convention it is stated that the States are “determined to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes.”¹²⁷

In the Aarhus Convention it is finally stated that the Parties are “affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound environment” and furthermore “recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights.”¹²⁸

Together these statements very well demonstrate that the protection of the environment and humans are both essential objects of these treaties. Thus, according to the rules in the Vienna Convention it is an obligation to seek for the protection of the environment and of humans rights when interpreting international environmental law. Consequently, this is the way this thesis will approach these situations.

¹²⁴ The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331.

¹²⁵ The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331. para. 31.1

¹²⁶ The Convention on Biological Diversity (The Biodiversity Convention), Concluded at Rio de Janeiro on 5 June 1992. Entered into force December 29, 1993. UNTS Vol. 1760 I-30619, preamble

¹²⁷ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22nd March 1989, preamble at <http://www.basel.int/text/con-e-rev.doc> last visited 5th Jan 2008.

¹²⁸ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention), 25th June, 1998, Aarhus, Denmark, preamble, <http://www.unece.org/env/pp/treatytext.htm> last visited 5th Jan 2008

5.2 Analyse of the Possible Use of Some Environmental Treaties

For the analysis of the international environmental law, I have chosen to analyse three specific treaties, namely the Convention on Biological Diversity, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Aarhus Convention. These are chosen because they are examples of conservation, pollution and procedural IEL treaties respectively, with the purpose to see examples of what these different treaties contributes to the prohibition of ‘environmental human rights violations’.

5.2.1 The Convention on Biological Diversity

When starting to examine the treaty text of the Biodiversity Convention,¹²⁹ I am immediately hit by a positive insight of what help the human rights system can have from the IEL. This concerns the possible human right to a “secure, healthy and ecologically sound environment,” as the UN special rapporteur on human rights and the environment, has claimed we have a right to.¹³⁰ Using IEL, we can namely avoid the difficult exercise to derive such a right from other human rights, from the IEL itself or submit that it is a part of customary international law as human rights scholars have tended to do.¹³¹ Although the Biodiversity Convention does not give the individual an outspoken right to an ecologically sound environment, the obligation and implementation of many of its provisions would lead to an improved human rights situation for the individuals concerned. E.g. the obligations to develop plans for the conservation of biological diversity and to integrate sustainable use of biological diversity into existing activities¹³² could be a strong method to secure a human right to an ecologically sound environment.

Furthermore, the Biodiversity Convention provides good protection for the rights of indigenous people in its articles 8 and 10. As long as the indigenous people concerned has a traditional lifestyle that is relevant for the conservation and the sustainable use of biological diversity, article 8 j obliges the signatory State to “respect, preserve and maintain knowledge, innovations and practices” of these peoples. Article 10 c further obliges the State to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”. The lifestyle of indigenous peoples often has been developed very close to nature. Since nature’s

¹²⁹ The Convention on Biological Diversity (The Biodiversity Convention), Concluded at Rio de Janeiro on 5 June 1992. Entered into force December 29, 1993. UNTS Vol. 1760 I-30619 pp. 142-169

¹³⁰ Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur, *Human Rights and the Environment*, E/CN.4/Sub.2/1994/9 -appendix 1

¹³¹ See chapter 2.3 and 2.4 of this thesis.

¹³² The Biodiversity Convention, art 6.a + art 6.b

diverse recourses thus is their way to subsistence –they know very well how to respect biodiversity. E.g. they do not harvest or hunt one specie more than another, but instead collecting dozens of different plants and hunt many different sorts of animals and fish.¹³³ Interestingly, some indigenous people have also developed ways to increase biodiversity. Although the negative connotations ‘forest burnings’ has due to the harm some of its versions are doing to the rainforest, the controlled burnings has been used by the aboriginal people in North America to promote growth of “wild “ food plants as camas, a special lily, and to create pastureland for wild animals that would not otherwise survive.¹³⁴ Therefore, it would not be difficult to argue that such lifestyles are ‘relevant’ or ‘compatible’ to a sustainable use of biological diverse recourses.

The Biodiversity Convention has also in practise been proved to protect the right of indigenous peoples. According to Anja Meyer, the Convention has “emerged as the primary instrument permitting indigenous groups to express their interest and demand for protection of their knowledge”.¹³⁵

5.2.2 The Basel Convention

This Convention rose out of the fierce debate in the 80’s about the waste traders that exported hazardous wastes from developed to developing countries. This happened because environmental protection in the North made it costly to deal with the waste locally and an economic alternative was to send it far away. The developing countries were happy to receive the extra income from the waste traders and had a policy that in many instances did not sufficiently protect people and nature from the waste. Food chains were contaminated and there were increased numbers of cancers and birth defects in the proximity of those dumps.¹³⁶ Thus, the Basel Convention aimed to prevent instances like this to happen and the method for achieving that goal is twofold.

Firstly, the Basel Convention has the objective to minimize hazardous wastes,¹³⁷ and promote environmentally sound management of wastes.¹³⁸ Consequently, it is obvious that it can also support the idea of a human right to a ‘secure, healthy and ecologically sound environment’, as mentioned before. Secondly, the Basel Convention aims to stop export of waste

¹³³ P. Harrison, *The Third Revolution*, Penguin Books Ltd, London, 1992, p. 3

¹³⁴ S. Jentoft, H. Minde and R. Nilsen, (Eds.), *Indigenous Peoples – Resource Management and Global Rights*, Eburon Academic Publishers, Delft, 2003. pp. 45-46

¹³⁵ A. Meyer, *International Environmental Law and Human Rights: Towards the Explicit Recognition of Traditional Knowledge*” in *Review of European Community & International Environmental Law (RECIEL)*, vol .10 no 1. pp 37-46

¹³⁶ L.Elliott, *The Global Politics of the Environment*, Palgrave MacMillan, New York, 2004, pp.60-61

¹³⁷ *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22nd March 1989 art 4.2 at <http://www.basel.int/text/con-e-rev.doc> last visited 8th Aug 2007

¹³⁸ *The Basel Convention* art 4.d and L. Elliott p. 62

between the developed and the developing world.¹³⁹ In my opinion, it has also therefore an interesting aspect of non-discrimination, and thus possibly defending the right not to be discriminated *globally*. Why should poor people with dark skin in the developing countries take care of the wastes of the rich world? At least morally, it can be argued that waste trading in this form is discrimination based on race, social origin or nationality, which is prohibited in both the civil and social covenants.¹⁴⁰ Here, it is anyhow important to note that the protection from the IEL currently goes further than the protection of the human rights system, since HR can only defeat non-discrimination within a State.¹⁴¹ In my opinion, this possible progressive development is a clear advantage, but it is important to pinpoint this as a development, so we do not pretend to defend this ‘IEL created human right’ as a traditional human right.

However, another way of referring to existing rights is to claim that this Convention is also providing support for some of the more confirmed economic and social rights. Considering the impacts of the dumps mentioned above, it is obvious that the Convention can safeguard e.g. such as the right to health,¹⁴² and the right to a decent standard of living,¹⁴³ including the right to food, housing and water.¹⁴⁴ Consequently, if the ban actually prevents this hazardous waste trading, it can therefore be of good use for individuals possibly suffering from waste disposal in the South.

5.2.3 The Aarhus Convention

This Convention distinguishes clearly from the rest of the treaties in the IEL. Although it does not explicitly create ‘rights’, the objective and the methods of the Convention are truly right-based.¹⁴⁵ The full name of the Convention is ‘Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’.¹⁴⁶ Therefore, already the title reveals that it protects procedural and

¹³⁹ See The Basel Ban in the Basel Convention, new article 4a, as amended to the Convention in the third meeting of the Conference of the Parties 22nd Sept 1995.

¹⁴⁰ International Covenant on Civil and Political Rights, (ICCPR) New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm last visited 8th Aug 2007, art 2.1 and International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_cescr.htm last visited 8th Aug 2007, art 2.2.

¹⁴¹ See e.g. the ICCPR art 2.1, where signatory States are required to “respect and to ensure to all individuals within its territory and subject to its jurisdiction”

¹⁴² ICESCR art 12

¹⁴³ ICESCR art 11

¹⁴⁴ See General Comment number 4, 12, 15 from the committee on the ICESCR at <http://www.ohchr.org/english/bodies/cescr/comments.htm> visited 13 June 2007

¹⁴⁵ J. Ebbesson, Access to Justice in Environmental Matters in the EU, Kluwer Law International, The Hague, 2002, p. 12

¹⁴⁶ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention), 25th June, 1998, Aarhus, Denmark, http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm last visited 12th Aug 2007

participatory rights, basic human rights to be found in the international bill of human rights as well as in the European Convention.¹⁴⁷ Concerning the environment, these rights are important mainly for what they can achieve, but as human rights, they are important as independent rights. Therefore, it is interesting to note that e.g. the right to information is not as defined in human rights law as in the Aarhus Convention. In the ICCPR, the right to freedom of expression includes the freedom to seek, receive and impart information, but article 4 of the Aarhus Convention is much more elaborated and defines e.g. time limits, methods, and justifiable exceptions to the right to information. Consequently, the Aarhus Convention may have an additional value also for these very procedural rights as independent rights.

The principal idea of the procedural rights in the Aarhus Convention is nevertheless their function to prevent other human rights abuses, occurring as consequences of environmental harm, or to seek redress and compensation after such violations have taken place. The reasoning is that the inclusion of affected and local people in deciding matters of environmental concern will lead to more environmental protection. People, directly affected by pollution do certainly take more precaution than profit-minded decision-makers far away do. The environmental degradation risks polluting the soil where they are growing their food and thus violate e.g. their right to support oneself and their right to health.¹⁴⁸ In my opinion, this is the true advantage of this Convention and moreover a reason to conclude that also this Convention contributes to protect the possible human right to a secure, healthy and ecologically sound environment.

5.3 Implementation of International Environmental Law Treaties

When looking at the implementation of the IEL treaties we will look at the effect these treaties have practically when coming to prevent ‘environmental human rights violations’. Although it is of course justified to ask whether the material provisions in itself are too weak to actually protect nature and people,¹⁴⁹ it is important to investigate, whether the provisions agreed upon actually are implemented.

5.3.1 Judicial Measures

In previous chapter it was demonstrated how the rights in the IHRL can be enforced via regional courts and monitoring committees issuing ‘opinions’. This was also regarded as the main difference from IEL and the reason why

¹⁴⁷ J. Ebbesson, *Access to Justice in Environmental Matters in the EU*, Kluwer law International, The Hague, 2002, p. 15

¹⁴⁸ ICESCR art 6 and art. 12

¹⁴⁹ M. Bothe, *The Evaluation of Enforcement Mechanism in International Law*, in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer, Berlin, 1996, p.15

many environmentalists choose to argue a case of environmental harm in human rights terms.¹⁵⁰

Analyzing the implementation of the IEL, mostly relying on non-judicial measures, it is however worth noticing that the IEL is not totally without such measures. Some environmental treaties, as the Convention on Third Party Liability in the Field of Nuclear Energy¹⁵¹ and the International Convention on Civil Liability for Oil Damage,¹⁵² are enabling private individuals to sue a company violating the convention in national courts. The agreement between the States is thus that they take on an explicit commitment to make it possible for private persons to sue according to the convention rules in their courts. This is the same kind of provision as in the Aarhus Convention where article 9 obliges the contracting States to provide access to justice to every person denied its access to justice. There is also the possibility for the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, to accept complaints from individuals in a very limited form.¹⁵³

However, the big difference still remains, since what really matters is what happens if the State does not provide that judicial access for the individual that is included in all human rights treaties explicitly or indirectly and, as shown above, happening in rare cases in the IEL. If you cannot get the State to listen to your human rights complaint you can in some cases take it further to an international court or monitoring body, while you via the IEL only can hope for a foreign State to run the case for you.

In the IEL there are namely no such avenues open for the individual and instead, in most cases, judicial measures within the IEL are invoked through inter-state action.¹⁵⁴ Then only transnational harm can be dealt with, which means that the pollution must take place in one State and cause damage in another State. The concept of such a breach is then defined by the secondary rules of State responsibility in the ICJ statute,¹⁵⁵ and could consequently give rise to a case of State Responsibility in front of the ICJ.

The docket of cases from the ICJ also shows examples of environmental cases already being brought to the courts attention. The well-known case of *Gabcikovo-Nagymaros Case*, was brought to the Court because of the

¹⁵⁰ See chapter 4 of this thesis.

¹⁵¹ Convention on Third Party Liability in the Field of Nuclear Energy, (Paris Nuclear Liability Convention) July 29, 1960, art 3, U.N.T.S. 251

¹⁵² International Convention on Civil Liability for Oil Pollution Damage, art III, Nov 29, 1969, <http://sedac.ciesin.org/entri/texts/civil.liability.oil.pollution.damage.1969.html> last visited 8th Aug 2007

¹⁵³ United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay, Jamaica, art 153+ 187
http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm last visited 8th Aug 2007

¹⁵⁴ L. Guruswamy, *International Environmental Law*, West Publishing, St Paul, US, 2003, p. 66

¹⁵⁵ Statute of the International Court of Justice, 26 June 1945, art 36.2.C. <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> last visited 8th Aug 2007

different view from Slovakia and Hungary on how the Danube were to be environmentally harmed from a dam projects.¹⁵⁶ The Court also has the case *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* pending, where Argentina is asking Uruguay to suspend the works on two mills that would come to pollute River Uruguay. Argentina is also asking the Court to declare that Uruguay has to cooperate with Argentina “in order to protect and preserve the aquatic environment and prevent its pollution”.¹⁵⁷ Although the provisional measures there asked for was not accorded, the tendency of States to bring other States to the ICJ for environmental matters is well illustrated here.

5.3.2 Non-Judicial Implementation

“In the absence of bodies empowered to enforce compliance, the pressing goal of the parties is to persuade the defaulter to comply,”¹⁵⁸ is a pertinent observation from Professor Guruswamy. It describes how international law works in general and thus how both IEL and IHRL work, when falling outside the limited avenues of judicial remedies.

Then implementation is dependent on the political will of the Parties, often a consequence of how much public attention the issue has rendered. Then NGO’s have an important role also regarding IEL, in creating public opinion and pointing at defaulting States.¹⁵⁹ The global campaigning organisation Greenpeace has long worked to create public awareness on environmental issues,¹⁶⁰ as well has the more grass-root oriented Friends of the Earth.¹⁶¹ Private parties creating public awareness can also encourage implementation of IEL, a current example being the former US vice – president Al Gore and his contribution to raising importance of the environmental issues.¹⁶²

The UN also contributes to the non-judicial implementation of IEL. It has an environmental program (the UNEP) that assumes a growing responsibility in implementing and developing IEL, most currently illustrated by the reports from The Intergovernmental Panel on Climate Change (IPCC),¹⁶³ and the action now taken in the General Assembly.¹⁶⁴ Regarding the treaties analyzed here, the most prominent feature is however the complex

¹⁵⁶ Case concerning the Gabčíkovo-Nagymaros project (*Hungary/Slovakia*), 25 September 1997, ICJ, para. 25. See www.icj-cij.org/docket last visited 8th Aug 2007

¹⁵⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for Indication of Provisional measures, Order, 23 Jan 2007, ICJ, para.3 See www.icj-cij.org/docket last visited 8th Aug 2007

¹⁵⁸ L. Guruswamy, *International Environmental Law*, West Publishing, St Paul, US, 2003, p. 64

¹⁵⁹ L. Guruswamy, *International Environmental Law*, West Publishing, St Paul, US, 2003, p. 55

¹⁶⁰ <http://www.greenpeace.org/international/about/victories> last visited 6 Aug 2007

¹⁶¹ <http://www.foei.org/en/who-we-are/about/history.html> last visited 6 Aug 2007

¹⁶² <http://www.climatecrisis.net/> last visited 6 Aug 2007

¹⁶³ <http://www.ipcc.ch/> last visited 6 Aug 2007

¹⁶⁴ <http://www.un.org/apps/news/story.asp?NewsID=23364&Cr=climate&Cr1=change> last visited 8th Aug 2007

construction for compliance in the treaty itself. Looking at the Biodiversity Convention, it provides a number of measures to secure implementation. It creates a secretariat, a conference of the parties, a subsidiary body on scientific, technical and technological advice and obliges the State Parties to report to the Conference of the Parties.¹⁶⁵ In addition, the Basel Convention provides for a Conference of the Parties and a Secretariat, and urges the Parties to set up a “Competent Authority and Focal Point” nationally.¹⁶⁶

In addition, the treaties obliges the contracting States to cooperate,¹⁶⁷ to collect data and exchange information,¹⁶⁸ to undertake research and training,¹⁶⁹ and to raise public awareness about the issue of the convention.¹⁷⁰ Although the extent of this is unclear and therefore an area where it is utterly difficult to measure compliance,¹⁷¹ these are important areas since environmental issues is complex and especially research is crucial to establish what impact different activities and substances has on the environment and human health.¹⁷² In addition, these incentives, as often called ‘environmental policies’, are considered more flexible and more effective than ‘environmental law’, due to the easier way to reach conclusions.¹⁷³

Another interesting aspect concerning the non-judicial means of implementing the IEL, is also the attempt to master the fact that the developing countries with little resources may prioritize economic development prior to environmental protection. This led to the creation of the Global Environment Facility (GEF), which is the administrator of the provisions in the IEL treaties referring to a financial mechanism.¹⁷⁴ One example of this is how the Biodiversity Convention obliges the developed country parties to provide additional resources for their developing counterparts, and how there shall be a financial mechanism administrating this burden sharing.¹⁷⁵ Although criticized for not enough taking into account the needs of the developing countries,¹⁷⁶ this is a start for this necessary

¹⁶⁵ The Biodiversity Convention articles 23-26

¹⁶⁶ Basel Convention art 15,16 and 5

¹⁶⁷ E.g. the Basel Convention art 10

¹⁶⁸ E.g. the Basel Convention art 13

¹⁶⁹ The Biodiversity Convention art 12

¹⁷⁰ The Biodiversity Convention art 13

¹⁷¹ M. Bothe, the Evaluation of Enforcement Mechanism in International Law, in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer, Berlin, 1996, p.15

¹⁷² L. Guruswamy, *International Environmental Law*, West Publishing, St Paul,US, 2003, p. 61

¹⁷³ A. Kiss, *The Protection of Environmental Interests of the World Community Through International Environmental Law*, in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer, Berlin, 1996, p.11

¹⁷⁴ M. Bothe, the Evaluation of Enforcement Mechanism in International Law, in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer, Berlin, 1996, pp. 33-34

¹⁷⁵ The Biodiversity Convention art 20-21

¹⁷⁶ M. Bothe, the Evaluation of Enforcement Mechanism in International Law, in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer, Berlin, 1996,? p. 34

redistribution needed for compensating the fact that the developed countries have polluted so much that there is not possible for the developing countries to do the same.

6 Problems and Advantages when Using International Environmental Law

So far, we have observed that the provisions of IEL treaties materially very well can be beneficial for the individual in protecting human rights and listed the ways IEL is implemented. Anyhow, it remains to be seen if they in some cases could be more useful than the human right regime itself in protecting such rights. To examine this delicate issue, we need to know what possible *effect* the IEL treaties can have, and compare them with the *protection* the human rights treaties can provide.

To measure the effect the IEL treaties have it is important to look on how international law works and to recognize that since it works more on the consensual basis than a national legal system, it is important to consider not only possible judicial measures. To ensure compliance with international norms it is necessary, as professor Guruswamy states, that the rules themselves have an internal force or dynamic that encourages compliance.¹⁷⁷ Although IHRL also has the feature of working in this way, it is important to investigate how this wide aspect of implementation works regarding the IEL especially. That is necessary because individuals seeking to prevent 'environmental human rights violations' here rely only on this co-operational implementation.

In this chapter, I will focus on some particular areas where IEL and IHRL differ, knowing that a thorough analysis and comparison of all implementation measures of the two areas of law would be too extensive for this thesis. My aim is however that this selective analysis may serve as guidance for those who in reality address an issue of 'environmental human rights violations'.

6.1 The Lack of a Rights Discourse

A good thing to start with when analysing the effect of IEL is to establish what degree of protection the material provisions of the treaties provide. I will therefore compare the texts of the environmental treaty with a HR treaty concerning the material right.

Concerning the right to health, it present in the Basel Convention in the way that the State parties are obliged to:

¹⁷⁷ L. Guruswamy, *International Environmental Law*, West Publishing, St Paul, US, 2003, p. 59

Art 4.2 (d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will *protect human health* and the environment against the adverse effects which may result from such movement;(italics by the author)¹⁷⁸

International Covenant on Economic, Social and Cultural Rights on the other hand states in its art. 12 that:

1. The States Parties to the present Covenant recognize *the right of everyone* to the enjoyment of the highest attainable standard of physical and mental health.¹⁷⁹ (italics by the author)

Evidently, these treaties both aims to protect the health of humans. The difference, however, is that the IEL treaty mentions human health as an object of protection, while the HR treaty explicitly states that *everyone* has the right to the highest attainable standard of health. Although this could be a one-time event – a look at the both Covenants shows that the drafter of the Covenants has chosen this way to formulate consequently. In almost every article ‘everyone, anyone or no one’ have ‘the rights’ or ‘shall be subject to’, and leaves no one in doubt that this is intended to create justiciable rights.

In the same way comparing the protection for indigenous people in the Convention on Biological Diversity and the ICCPR, the IEL treaty states that the contracting States shall:

Subject to its national legislation, *respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles* relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;¹⁸⁰ (authors’ italics)

On the other hand, art 27 of the ICCPR states that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall *not be denied the right*, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.¹⁸¹ (authors’ italics)

¹⁷⁸ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22nd March 1989 art 4.2.d at <http://www.basel.int/text/con-e-rev.doc> last visited 8th Aug 2007

¹⁷⁹ International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_cescr.htm last visited 8th Aug 2007, art 12

¹⁸⁰ The Convention on Biological Diversity (The Biodiversity Convention), Concluded at Rio de Janeiro on 5 June 1992. Entered into force December 29, 1993. art 8.j. UNTS Vol. 1760 I-30619 pp. 142-169 <http://www.cbd.int/convention/convention.shtml> last visited 8th Aug 2007

¹⁸¹ International Covenant on Civil and Political Rights,(ICCPR) New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm last visited 8th Aug 2007, art 27

Although there is still a difference between “persons shall not be denied the right” and that States shall “respect...practices of indigenous peoples”, it is not as clear as in the first case. Then instead it is interesting to see whether the individual actually can claim the right to culture – as these two provisions must be said to at least imply.

As shown above, the Biodiversity Convention provides a number of measures to secure implementation. Nevertheless, it is not provided for the individual to have access to any of these bodies if his/her right to culture as implied above is violated. Instead, it is left for the individual in such a case to use extra-legal measures to make its own State change its behaviour. This is quite different from the functioning of the ICCPR, which by the creation of an additional protocol has given the individual the possibility to complain to the Human Rights Committee in case of violation of the Covenant. The lack of enforcement for the individual must therefore be seen as further one weakness of the IEL system.

As shown in the chapter on IHRL above, it is however far from sure that this judicial measure is available and appropriate and thus maybe not the best way to stop an ‘environmental human rights violation’. Therefore, it is interesting to continue to see what other implementation available could differ between the two areas of law.

6.2 Flexible Development of the IEL

Continuing the examination whether IEL can have a better effect than the protection the IHRL provides, it appears that the IEL treaties clearly has one feature that quite thoroughly distinguish them from the human rights treaties. That is the possibility to continuously amend and improve the treaties via the creation of institutions like “Conference/Meetings of the Parties”,¹⁸² and the delegation of power to them. These meetings shall review the implementation of the conventions but also interpret and propose amendments and protocols clarifying the commitments of the parties. One example of this is where the Conference of the Parties for the Basel Convention is presumed to:

Consider and adopt, as required, amendments to this Convention and its annexes, taking into consideration, *inter alia*, available scientific, technical, economic and environmental information;¹⁸³

The effect of such writing is however thoroughly dependent on whether the conferences actually happen and if they also take some action based on the delegated mandate. Encouraging enough, these Conferences do take place

¹⁸² See e.g. the Aarhus Convention art.10, the Biodiversity Convention art.23 and the Basel Convention art 15

¹⁸³ See Basel Convention art 15.5 b , further developed in art 17 of the Basel Convention

and, although the success may vary,¹⁸⁴ is materializing and clarifying the more vague commitments taken on in the original Convention. Two examples are the earlier discussed Basel Ban incorporated into the Basel Convention and the Cartagena Protocol on Biosafety established by the Conference of the Parties to the Biosafety Convention.¹⁸⁵ The Basel Convention has also a binding amendment listing which substances are regarded as hazardous, and the following quotation from that annex footnotes very well illustrates the complex, but fruitful amending process:

The amendment whereby Annex VIII was added to the Convention entered into force on 6 November 1998, six months following the issuance of depositary notification C.N.77.1998 of 6 May 1998 (reflecting Decision IV/9 adopted by the Conference of the Parties at its fourth meeting). The amendment to Annex VIII whereby new entries were added entered into force on 20 November 2003 (depositary notification C.N.1314.2003), six months following the issuance of depositary notification C.N.399.2003 of 20 May 2003 (reflecting Decision VI/35 adopted by the Conference of the Parties at its sixth meeting). The amendment to Annex VIII whereby one new entry was added entered into force on 8 October 2005 (depositary notification C.N.1044.2005), six months following the issuance of depositary notification C.N.263.2005 of 8 April 2005 (re-issued on 13 June 2005, reflecting Decision VII/19 adopted by the Conference of the Parties at its seventh meeting). The present text includes all amendments.¹⁸⁶

In this aspect, it is proposed that this way of continuous development of the IEL could be more efficient than the treaty bodies created by the human rights instrument.¹⁸⁷ As Committees of Experts, these have made interesting and updated interpretations of the original conventions through the general comments,¹⁸⁸ that unfortunately not always been taken into account by the signatory States.¹⁸⁹ Anyhow, as A.Kiss states, it is important to ask, “whether too much flexibility is not a danger for the definition and protection of major environmental interests”.¹⁹⁰

¹⁸⁴ See e.g. the referred negotiations on the Framework Convention on Climate Change in Elliot pp. 84-92

¹⁸⁵ Elliot p. 41 and the Basel Convention with new paragraph 4a and the Cartagena Protocol on Biosafety's official homepage: <http://www.cbd.int/biosafety/default.shtml> visited 14 June 2007

¹⁸⁶ The Basel Convention, Annex VIII, p. 56

¹⁸⁷ E.g. see the Human Rights Committee established by art. 28 in the ICCPR

¹⁸⁸ See General Comments issued by these Committees e.g. in the UN document HRI/GEN/1/Rev.7 at

[www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf)

¹⁸⁹ The most well known example is general comment nr 24 from the Human Rights Committee, which states that no reservations contrary to the object and purpose of a human rights treaty is allowed. States anyhow keeps making such reservations see e.g. R.Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded?, EJIL, vol.11, no 2, 2000 pp. 413-415.

¹⁹⁰ A. Kiss, The Protection of Environmental Interests of the World Community Through International Environmental Law, in R. Wolrum (ed), Enforcing Environmental Standards:Economic Mechanisms as Viable Means?, p.11

6.3 Soft Law versus Hard Law

The discussion about flexibility versus decided law touches upon another crucial issue which is the effectiveness of soft law and hard law respectively. It is certainly necessary to carefully balance between the dangers of achieving a lot in treaties that States do not respect, or achieving less that are respected. If there exists a lot of 'law' that has no value as law, in the end it might undermine the complete legal idea. Although achievement through institutions where all State Parties are represented, as in the IEL treaties, might achieve less progressive interpretations, the prospect to have these agreements respected is hopefully better than if a Committee of Experts is the author.

Myself not adhering to the idea of critical legal studies that claims that the distinction between international law and politics is an illusion,¹⁹¹ still thinks that the value of something stated as law has an impressing weight that cannot be underestimated. As international law however is built on cooperation, it might be wiser to work for including States instead of aiming to have them marked as violators of international law.

The increasing use of non-binding instrument in the IEL context does therefore necessarily not have to be something negative. In an encompassing study by Victor, Raustiala and Skolnikoff,¹⁹² it is proposed that although binding treaties are seen to be more effective due to its high compliance rate, they attain this high compliance because its modest commitments. Instead, non-binding treaties with more ambitious commitments might enjoy lower compliance but in the long run be more effective in influence actual behaviour. Therefore, they advocate a mixed use of binding and non-binding treaties to "maximize effectiveness".¹⁹³

6.4 The Number of Ratifications

Further, something as obvious as the number of ratifications is important. The situation could occur that an environmental treaty applies in a country, which is not a signatory to a human rights treaty protecting the same right. In this case, the IEL treaty better protects the individual possibly suffering a human rights abuse because of environmental degradation, since the human rights treaty is not applicable. An example is the well-written and encompassing ILO Convention 169,¹⁹⁴ protecting the rights of indigenous

¹⁹¹ Guruswamy p.95

¹⁹² D.G. Victor, K. Raustiala and E.B Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments*, The MIT Press, Cambridge, 1998

¹⁹³ D.G. Victor, K. Raustiala and E.B Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments*, The MIT Press, Cambridge, 1998 p.xi

¹⁹⁴ ILO Convention C-169 Indigenous and Tribal Peoples Convention, Geneva, 27.06.1989 <http://www.ilo.org/ilolex/english/convdisp1.htm> visited 14 June 2007

people, compared with the protection of the Biodiversity Convention. Eighteen countries have ratified the ILO Convention,¹⁹⁵ while the Biodiversity Convention has 190 State parties.¹⁹⁶ The very reason for the low number of signatures is that countries do not at all adhere to the idea of giving indigenous groups landrights e.g. Sweden, Finland, Australia, Canada and New Zealand all have problems with the land rights and are not signatures of this convention.¹⁹⁷

Although a convention, also as little ratified as the ILO 169, can contribute a lot to “the general consciousness of indigenous rights”,¹⁹⁸ most scholars argue that legally binding instruments are the most effective international commitments.¹⁹⁹ Considering this, it is quite easy to say that even if the ILO instrument includes much more rights than the two articles in the IEL treaty protecting the rights of indigenous people,²⁰⁰ they might anyhow in reality have more help from the IEL treaty than from the ILO treaty signed by only 18 states.

This trend of having environmental treaties more signed than human rights treaties seem to be true regarding the major IEL treaties as the Basel Convention, 170 signatories,²⁰¹ compared with the ICESCR, 156 signatories,²⁰² and the Biodiversity Convention as shown above. This is however not true concerning all IEL and all IHRL treaties. E.g. concerning the participation rights in the Aarhus Convention the situation is quite the opposite. The Aarhus Convention only applies in Europe,²⁰³ and although

¹⁹⁵ For the number of ratifications I have used the ILO database found at <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited 13 June 2007

¹⁹⁶ For the number of ratifications I have used the Conventions homepage: <http://www.cbd.int/convention/parties/list.shtml> visited 13 June 2007

¹⁹⁷ For info on Nordic countries and Australia’s attitudes to the 169 ILO Convention see http://www.sacredland.org/world_sites_pages/Sami.html and http://www.users.fl.net.au/~lyndenal/IP-Australian_Responses.htm last visited 12th Aug 2007 The said countries are not signatory States according to <http://www.ilo.org/ilolex/english/convdisp2.htm> last visited 12th Aug 2007

¹⁹⁸ P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester University Press, Manchester, 2002, p 366

¹⁹⁹ D.G. Victor, and K. Raustiala, ‘Conclusions’ in D.G. Victor, K. Raustiala and E.B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments*, The MIT Press, Cambridge, 1998 p.685

²⁰⁰ As mentioned before, articles. 8 and 10 of the Convention on Biological Diversity do protect some aspect of the rights of indigenous people.

²⁰¹ <http://www.basel.int/>

²⁰² <http://www.ohchr.org/english/countries/ratification/3.htm>

²⁰³ The Convention is only open for States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe. For the current numbers of ratifications see http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm last visited 24th July 2007.

stated to be important also on the international level,²⁰⁴ it has no binding status outside Europe, which the participatory rights in the ICCPR do have.

6.5 Better General Implementation Because IEL Currently More Popular

Currently, it is popular to talk about environmental protection. Even one of the worlds biggest fashion magazines Elle, confirm this by their recent article on ‘Green is Chic’, a special guide how to consume environmentally friendly and how movie stars like Julia Roberts buy environmentally friendly diapers for her twins.²⁰⁵ The origin of this trend is supposedly the focus on climate change catalysed by the filmed slideshow Al Gore has called An Inconvenient Truth, which even won an Oscar for best documentary 2006,²⁰⁶ and contributed to that Al Gore and the IPCC Panel won the Nobel Peace Prize 2007.²⁰⁷

This momentary public popular position of the IEL is important when trying to make more States ratifying existing IEL treaties and to make all State signatory adhere to the commitments made there. Public pressure is an important component of making States actually fulfil their commitments, as at least democratic governments need public support to be re-elected. Public pressure is therefore also a way to make more soft-law instruments being implemented, a good example is how the Agenda 21 been incorporated in local officials work in many countries although its soft law status.²⁰⁸

Although this being the state of the world now, it is however not sure that such a trend will last, as trends are inherently short-lived. Therefore, it is difficult to foresee what impact on the implementation of IEL this recent wave of environmental public concern will bring. Anyhow, it is important not to underestimate the public awareness and power of media regarding these issues. One example when such medial attention had a great impact is the Basel Convention that was created partly due to public exposure of the environmental disasters the export of hazardous wastes had brought.

²⁰⁴ E.g., on the Conventions webpage the following quotation from Kofi Annan is found: “Although regional in scope, the significance of the Aarhus Convention is global.” <http://www.unece.org/env/pp/welcome.html> last visited 24th July 2007

²⁰⁵ See <http://www.elle.com/features/11158/green-is-chic.html> last visited 12th Aug 2007 and in paper, the Swedish Elle, nr 7, 2007 pp.78-86

²⁰⁶ See <http://www.climatecrisis.net/> last visited 20th Aug 2007

²⁰⁷ See <http://nobelpeaceprize.org/> last visited 4th Aug 2008

²⁰⁸ For example see the works of ICLEI (International Council for Local Environmental Initiatives)-Local Governments for Sustainability at <http://www.iclei.org/index.php?id=1613> visited 13 June 2007

6.6 Possibly Stronger Political Will to Use State - State Measures

Welcoming the extra-legal avenues above, it is still for this report important to see what judicial means are available to make IEL effective. As seen above there is no judicial measures available *for the individual* regarding IEL. Instead, left to investigate is whether a State Party to an IEL can take another State party to court if that State party is violating the treaty. Although there is no universal compulsory jurisdiction supervising compliance to international norms, States can give the International Court of Justice that roll. They can issue a declaration that it recognises such a competence permanently or on case-by-case basis.²⁰⁹ It is also a common feature that treaties themselves contain a paragraph of how to settle possible disputes between the State Parties to the Convention. The three treaties here discussed all contains such a paragraph,²¹⁰ with a more or less similar content. Firstly, it encourages the Parties to negotiate, and if that fails, the Parties can refer the case to arbitration or to the International Court of Justice.

So far, concerning both IEL and IHRL, it is unfortunately quite few States have declared that they accept the jurisdiction of the ICJ as a compulsory ipso factor,²¹¹ and regarding human rights these State-to-State measures have never been used.²¹² Still I am more optimistic regarding the possibility of protecting the individuals' rights indirectly by interstate action based on IEL than regarding human rights claims. This is because environmental problems are transnational and what one State does affect the others directly. Most clearly, for atmospheric pollution and climate change the problem is created in another part of the world than the one suffering the consequences, while human rights abuses far away do not affect your country. In plain language, there is little hope that States care enough to judicially force another State to stop violating the rights of that foreign State's citizens, but would do so due to their self-interest in a clean environment.

²⁰⁹ The Statute of the International Court of Justice art 36.1-2

²¹⁰ See Aarhus Convention art.16, Biodiversity Convention art 27 and Basel Convention art 20

²¹¹ E.g. for the Aarhus Convention 2 States that has authorized reference to the ICJ and for the Basel Convention 1 State that has actively authorized such reference. See http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm and <http://www.basel.int/ratif/convention.htm>. For the International Covenant on Racial Discrimination 22 State Parties that have actively denied such reference. See <http://www.ohchr.org/english/countries/ratification/2.htm> visited 14 June 2007

²¹² See UNHCHR official homepage on complaints procedures: <http://www.ohchr.org/english/bodies/petitions/index.htm> visited 15 the June 2007

7 Looking For the Most Viable Way to Argue

This thesis has dealt with the problem of ‘environmental human rights violations’ and how international law can be used to prevent such violations. As there were two components of the problem from the beginning – the environmental part and the human rights part – a natural first assumption could be that it would be easiest to let international environmental law deal with the environmental part and international human rights law with the human rights part. As it always had... My initial research however showed that this is not always possible, because e.g. international environmental law and international human rights law treaties are not ratified in the same extent. It was here also revealed that they also work in different ways and therefore it might be wiser to see how both international environmental law and international human rights law both could be complementary valuable for preventing these violations.

In fact, the human rights framework has already in practise been used to prevent ‘environmental human rights violations’. International human rights law has the individual in focus and provides help in situations where the environmental degradation only is a part of the problem and where international environmental law does not provide the same protection. Human rights law provides identified rights for individuals and complaints mechanism, which is far more elaborated than for the international environmental law. Due to the States’ obligations to not only respect, but also protect and ensure human rights, it is possible to seek judicial remedy from the States also in case of a private company causing ‘environmental human rights violations’ - also in cases where the State has not provided a way to take legal proceedings against such violators. Even if the first way to address harm is to look for remedy in the State where the violation occurs, it is in some jurisdiction already possible to sue a company in a State where they are registered, with all the benefit that might give regarding financial resources and credibility. In my opinion, it is also a part of all States human rights obligation to ensure that their companies do not commit ‘environmental human rights violations’ abroad.

Judicial remedy for the individual using international human rights law is however, compared to what the human rights regime aims to achieve, not possible everywhere and for all kinds of violations. E.g., it is mostly only civil and political rights that are given such practical rights to remedy and the right to an adequate environment is not among those. There are in reality also often a problem of legal standing, and especially so when claiming that we have to take action based on the rights on future generations and nature. Also to prevent ‘environmental human rights violations’ by claiming that an individual suffers a risk to have her/his rights violated is difficult, since human rights institutions often requires a clearly defined victim. Therefore,

my next and main alternative to act would be to publicly argue that this State, by this behaviour, or lack of behaviour, is breaching existing human rights law, and should take action to change that.

Concerning the international environmental law, I have been convinced that working for extended and applied environmental treaties can in the long run help prevent individuals from becoming victims of human rights abuses created by environmental degradation. The material provisions of the environmental treaties are in some cases clearer, more detailed and more confirmed than similar rights within the human rights system. E.g. we have seen that the Aarhus convention is more detailed than the ICCPR on right to information, that the Basel Convention has an extra global non-discrimination value and that the ILO 169 is much less ratified than the Biodiversity Convention. Further, it could be suggested that the international environmental law is defining the right to a 'secure, healthy and ecologically sound environment' better than the human rights provisions currently do and provides additional values in protecting the environment and future generations. Due to a political will to deal with environmental issues, good institutional arrangement and an increasing use of State-to-State measures, the international environmental law provides a good complement to the human rights regime.

I do admit that further research on this issue is required to compare the functioning of these two systems. Especially a comparison of the result so far achieved by the different regimes would shed light on this question. Unfortunately, this is a too short a thesis to thoroughly examine this. Instead this thesis has provided concluded that when judicial measures is lacking, which happens often also within the human rights regim, both areas of law are objects to the "international law of cooperation",²¹³ where, as contrast to national law, there is not one easy way to go when correcting an unlawful behaviour. Instead it is necessary to use a whole battery of means, that taken one-by-one might seem useless, but together actually can make a change and in the end stop 'environmental human rights violations'.

When there is even not even a binding agreement but instead some kind of soft law that appears the two areas of law the effectiveness of both system will depends on medial attention and the persuasive force of your arguments. What you then have to do is to choose arguments due to your own belief and to what you reckon fit the situation and the current political and medial atmosphere. Something to think about then is that while both Hayward²¹⁴ and Hancock²¹⁵ means that the right-based approach has a value that pure environmental law lacks, at least at the time I am writing

²¹³ R. Wolfrum, International Law of Cooperation, in R. Bernhardt (ed), Encyclopedia of Public International Law, Vol 2, North-Holland, Amsterdam, 1995 p. 1242-1244 and P-T Stoll, The International Environmental Law of Cooperation, in R. Wolfrum, Enforcing Environmental Standards: Economic Measures as Viable Means?, Springer Verlag, Berlin, 1996 p. 39-43

²¹⁴ T. Hayward, Constitutional Environmental Rights [Elektronisk resurs], Oxford: Oxford University Press, 2004, p. 2

²¹⁵ J. Hancock, Environmental Human Rights, Ashgate Publishing, Hants, 2003 p. 2

this, the medial attention focus a lot on the protection of the environment. You could also take into account that the extra –legal driving force for implementation of human rights is the call for compassion, while environmental protection relies more on States self-interest. This difference could then be used when choosing your way to argue depending of what fits you and the decision-makers you want to persuade.

Certainly, it wise to decide which of the two areas of laws that provides you with the strongest legal argument on a case-by-case basis. Then you know which ‘environmental human rights violation’ to handle and you know whether there is an appropriate provision in either an environmental treaty or in a human rights treaty. You would also know if there are judicial means available, or if you would have to try implementing via public pressure with e.g. proposals to amend environmental treaties via the reoccurring Conferences of the Parties. Where transnational harm is present you can encourage State Responsibility, you can use human rights system where judicial and monitoring bodies exist and the object and purpose theory to actually interpret both areas of law to fit today’s challenges.

To both human rights lawyers and environmentalists I therefore finally want to give the advice not to forget the other area of law. That “other” area of law could possibly complement some of the defaults of your ordinary specialized law and therefore contribute to a more complete protection for the victim of these violations and prevention of more environmental harm to take place.

Bibliography

Books

- G. Alfredsson and A. Eide (Eds), *The Universal Declaration of Human Rights – A common standard of achievement*. Kluwer Law International, The Hague, 1999
- R. Bernhardt (ed), *Encyclopedia of Public International Law*, Vol 2, North-Holland, Amsterdam, 1995
- A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, Oxford, 1996
- J. Ebbesson, *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, The Hague, 2002
- L.Elliot, *The Global Politics of the Environment*, Palgrave MacMillan, New York, 2004
- M. D. Evans (Ed), *International Law*, Oxford University Press, Oxford, 2003
- L. Guruswamy, *International Environmental Law*, West Publishing, St Paul,US, 2003
- J. Hancock, *Environmental Human Rights*, Ashgate Publishing, Hants, 2003
- P. Harrison, *The Third Revolution*, Penguin Books Ltd, London, 1992
- T. Hayward, *Constitutional Environmental Rights* [Elektronisk resurs], Oxford : Oxford University Press, 2004
- International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy, Versoix, 2002
- S. Jentoft, H. Minde and R.Nilsen,(Eds), *Indigenous Peoples – Resource Management and Global Rights*, Eburon Academic Publishers, Delft, 2003
- Lauterpacht Research Centre for International Law 2001, *Environmental Law Reports: Human Rights and the Environment* ,Cambridge University Press, Cambridge, 2001
- M. Novak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, N.P.Engel Verlag, Kehl, 2005

I. Okonta and Oronto Douglas, *Where Vultures Feast*, Verso, New York, 2003

C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights* (Oxford University Press, Oxford, 2002)

P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester University Press, Manchester, 2002

D.G. Victor, K. Raustiala and E.B Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments*, The MIT Press, Cambridge, 1998

R. Wolrum (Ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer Verlag, Berlin, 1996

Articles in Books

M. R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, Oxford, 1996

M. Bothe, 'The Evaluation of Enforcement Mechanism in International Law', in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer Verlag, Berlin, 1996

A.E Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, Oxford, 1996

M. Fitzmaurice, *The Practical Working of the Law of Treaties*, in M. D. Evans (Ed), *International Law*, Oxford University Press, Oxford, 2003

H. Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans (Ed), *International Law*, Oxford University Press, Oxford, 2003

J.G. Merrilds, 'Environmental Protection and Human Rights: Conceptual Aspects', in A.E Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, Oxford, 1996

A. Kiss, 'The Protection of Environmental Interests of the World Community Through International Environmental Law', in R. Wolrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, Springer Verlag, Berlin, 1996

L. A. Rehof, 'Article 3', in Gudmundur Alfredsson and Asbjörn Eide (Eds), *The Universal Declaration of Human Rights – A common standard of achievement*. Kluwer Law International, The Hague, 1999

P-T Stoll, 'The International Environmental Law of Cooperation', in R. Wolfrüm, *Enforcing Environmental Standards: Economic Measures as Viable Means?*, Springer Verlag, Berlin

D.G. Victor, and K. Raustiala, 'Conclusions' in D.G. Victor, K. Raustiala and E.B Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments*, The MIT Press, Cambridge, 1998

R. Wolfrum, 'International Law of Cooperation', in R. Bernhardt (ed), *Encyclopedia of Public International Law*, Vol 2, North-Holland, Amsterdam, 1995

Other Articles

A. Meyer, 'International Environmental Law and Human Rights: Towards the Explicit Recognition of Traditional Knowledge' in *Review of European Community & International Environmental Law (RECIEL)*, vol .10 no 1, 2001 found at <http://www.blackwell-synergy.com/doi/pdf/10.1111/1467-9388.00259> last visited 20 Aug 2007

D. Shelton, 'The Links between International Human Rights Guarantees and Environmental Protection' at <http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf> last visited 6th Aug 2007

D. Shelton, Background paper No. 2, Human Rights and the Environment: Jurisprudence of Human Rights Bodies, para 3i,ii,iii, found at <http://www.ohchr.org/english/issues/environment/environ/bp2.htm> last visited 6th Aug 2007

A. A. Idowu, 'Human Rights, environmental degradation and oil multinational companies in Nigeria; The Ogoniland Episode', *Netherlands Quartely of Human Rights*, vol 17, 1999

Derek C. Smith, Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain, in *European Journal of International Law*, Vol. 6 (1995) No. 1

R.Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?', in *European Journal of International Law*, Vol. 11, no 2, 2000

Legal Documents

International Human Rights Treaties

International Covenant on Civil and Political Rights,(ICCPR) New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm visited 21 may 2006

Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_opt.htm visited 21 May 2006.

International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, http://www.unhchr.ch/html/menu3/b/a_cescr.htm visited 21 may 2006

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *New York, 10 December 1984 (CAT)* United Nations *Treaty Series* , vol. 1465, p. 85. or http://www.unhchr.ch/html/menu3/b/h_cat39.htm last visited 21 May 2006

International Convention on the Elimination of All Forms of Racial Discrimination, ICERD, 21 December 1965, *United Nations Treaty Series*, vol. 660, p. 195.

ILO Convention C-169 Indigenous and Tribal Peoples Convention, Geneva, 27th June 1989 <http://www.ilo.org/ilolex/english/convdsp1.htm> visited 14 June 2007

Regional Human Rights Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocol No. 11, Rome, 4.XI.1950, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, CETS No.: 005

Travaux preparatoire for the ECHR in Collected Edition of the “Travaux Preparatoires”, part III, 5 February 1950, (Martinus Nijhoff, The Hague, 1976)

European Social Charter (revised), CETS No.: 163, Strassbourg 3 May 1996

African Charter on Human and Peoples' Rights, adopted June 27, 1981, Banjul <http://www1.umn.edu/humanrts/instree/z1afchar.htm> last visited 6th Aug 2007

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).at

<http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> last visited 6th Aug 2007.

American Convention on Human Rights "Pact of San José, Costa Rica", 22 November 1969, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador" 17th Nov 1988, <http://www.oas.org/juridico/English/sigs/a-52.html> last visited 12th Aug 2007

International Environmental Treaties

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters(The Aarhus Convention), 25th June, 1998, Aarhus, Denmark, <http://www.unece.org/env/pp/treatytext.htm> last visited 5th Jan 2008

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22nd March 1989 at <http://www.basel.int/text/con-e-rev.doc> last visited 8th Aug 2007

The Convention on Biological Diversity (The Biodiversity Convention), Concluded at Rio de Janeiro on 5 June 1992. Entered into force December 29, 1993. UNTS Vol. 1760 I-30619
Cartagena Protocol on Biosafety's official homepage: <http://www.cbd.int/biosafety/default.shtml>

Convention on Third Party Liability in the Field of Nuclear Energy, (Paris Nuclear Liability Convention) July 29, 1960, U.N.T.S. 251

International Convention on Civil Liability for Oil Pollution Damage, art III, Nov 29, 1969, <http://sedac.ciesin.org/entri/texts/civil.liability.oil.pollution.damage.1969.html> last visited 8th Aug 2007

United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay, Jamaica, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm last visited 8th Aug 2007

Other Treaties of International Law

The Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969, United Nations Treaty Series, vol 1155, p. 331.

Statute of the International Court of Justice, 26 June 1945, 15 U.N.C.I.O. 335. <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> last visited 8th Aug 2007

European Union Law

18 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, O.J. 1998, C27, 1 (consolidated version after the 1996 Accession Convention) and the parallel 1988 Lugano Convention, O.J. 1988, L319, 9

US National Law

Alien's Action for tort, 28 U.S. Code. Chapter 85, section 1350 (1994)
Adopted in 1789

UN Documents and Material

Reports on the action in the general assembly regarding the reports from the Intergovernmental Panel on Climate Change (<http://www.ipcc.ch/> last visited 6 Aug 2007) see <http://www.un.org/apps/news/story.asp?NewsID=23364&Cr=climate&Cr1=change> last visited 8th Aug 2007

Rio Declaration on Environment and Development, General Assembly, (A/CONF.151/26 (Vol. I))§15 from www.un.org/documents/ga/conf151/aconf15126-1annex1.htm last visited 6th Aug 2007

Final Report by Mrs. Fatma Zohra Ksentini, Special Rapporteur, Human Rights and the Environment, E/CN.4/Sub.2/1994/9 -appendix 1

General Comments issued by the Committees monitoring the different human rights treaties, in the UN document HRI/GEN/1/Rev.7 at [www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf). They are also listed as htm-documents e.g. the General Comment number 4, 12, 15 from the committee on the ICESCR at <http://www.ohchr.org/english/bodies/cescr/comments.htm> visited 13 June 2007

UNHCHR official homepage on complaints procedures:
<http://www.ohchr.org/english/bodies/petitions/index.htm>

UN website of International Law
at<http://www.ohchr.org/english/law/index.htm> last visited 6th Aug 2007

NGO websites

ICLEI (International Council for Local Environmental Initiatives)-Local Governments for Sustainability at <http://www.iclei.org/index.php?id=1613> visited 13 June 2007

Greenpeace – for history of Greenpeace see <http://www.greenpeace.org/international/about/victories> last visited 6 Aug 2007 and for info on Nonylphenol from Greenpeace www.greenpeace.org/international/press/releases/gender-bending-chemicals-four visited 6 August 2007

Friends of the Earth <http://www.foei.org/en/who-we-are/about/history.html> last visited 6 Aug 2007

The Red Cross about visiting detention centres <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5FMFN8> last visited 8th Aug 2007

Earthjustice, *Issue Paper Human Rights and the Environment*, Material for the 60th session of the United Nations Commission on Human Rights, p. 6 found at <http://www.earthjustice.org/library/references/2004UNreport.pdf> last visited 6th Aug 2007

Earthrights' website <http://www.earthrights.org/home.html>

The Sierra Club's website <http://www.sierraclub.org/human-rights/> visited 17th July 2007

Circle of Rights, at www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module15.htm last visited 12th Aug 2007

Minnesota Advocates for Human Rights http://www.stopvaw.org/A_Note_About_Shadow_Reports.html last visited 6th Aug 2007

Other Internet Sources

Info on popular status of the environment at <http://www.elle.com/features/11158/green-is-chic.html> last visited 12th Aug 2007 and in paper, Swedish Elle, nr 7, 2007 pp.78-86

Info on Nordic countries and Australia's attitudes to the 169 ILO Convention at http://www.sacredland.org/world_sites_pages/Sami.html and http://www.users.fl.net.au/~lyndenal/IP-Australian_Responses.htm last visited 12th Aug 2007

Info on Hormoslyr at www.medikament.nu/PDF-filer/7-02/greenwash.pdf last visited 7th Aug 2007

Info on Sellafield found at news.bbc.co.uk/2/hi/health/2054694.stm last visited 6th Aug 2007

Info on Al Gore's movie the Inconvenient Truth
<http://www.climatecrisis.net/> last visited 20th Aug 2007

Info on the Nobel Peace Prize at <http://nobelpeaceprize.org/> last visited 4th Aug 2008

Info on fertilization of lakes at
<http://www.ymparisto.fi/default.asp?node=100&lan=sv> last visited 6th Aug 2007

Information on the individual complaints mechanism for the UN instruments is found at
<http://www.ohchr.org/english/bodies/petitions/index.htm> last visited 8th Aug 2007.

Information on the individual complaints mechanism for the American Convention is found at <http://www.cidh.org/what.htm>

Information on the individual complaints mechanism for the European Convention at
<http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> last visited 8th Aug 2007.

Information on the individual complaints mechanism for the African Charter is found at
http://www.achpr.org/english/info/communications_procedure_en.html last visited 8th Aug 2007.

Information on the complaints procedure of the European Social Charter see the European Committee of Social Rights at
http://www.coe.int/T/E/Human_Rights/Esc/2_ECSR_European_Committee_of_Social_Rights/ last visited 23 July 2007

Information on current numbers of ratification of some treaties:

- ILO database at <http://www.ilo.org/ilolex/english/convdisp1.htm>
- For the Biodiversity Conventions at
<http://www.cbd.int/convention/parties/list.shtml>
- For the Convention of the Rights of the Child at
<http://www.ohchr.org/english/countries/ratification/11.htm>
- For the Aarhus Convention at
http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm

- For the Basel Convention at <http://www.basel.int/ratif/convention.htm>
- For the International Covenant on Racial Discrimination at <http://www.ohchr.org/english/countries/ratification/2.htm>

Tove Gladh's previous thesis 'Being Indirect – a Viable Way to Assess Legal Responsibility for Corporations' Human Rights Violations Abroad?' <http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/EssayBySubject?Open&ShowCategory=Folkr%E4tt> last visited 4th Aug 2008

Table of Cases

International

International Court of Justice:

Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, 9 July 2004, ICJ, Advisory Opinion, at www.icj-cij.org/docket last visited 6th August 2007

Legality of the Threat or Use of Nuclear Weapon, 8 July 1996, ICJ, Advisory Opinion, para. 29 www.icj-cij.org/docket last visited 6th August 2007

Fisheries Jurisdiction Case (UK v. Norway) 18 Dec 1951, ICJ, p. 116. www.icj-cij.org/docket last visited 6th August 2007

Case concerning the Gabčíkovo-Nagymaros project (*Hungary/Slovakia*), 25 September 1997, ICJ, www.icj-cij.org/docket last visited 6th August 2007

Pulp Mills on the River Uruguay (Argentina v. Uruguay), Request for Indication of Provisional measures, Order, 23 Jan 2007, ICJ, para.3 See www.icj-cij.org/docket last visited 8th Aug 2007

Human Rights Committee:

Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) from www1.umn.edu/humanrts/undocs/session45/167-1984.htm last visited 6 Aug 2007

Regional

African Commission on Human and Peoples' Rights:

Decision regarding communication No.155/96. *Social and Economic Action Centre v. Nigeria*, 27 October 2001

European Court of Human Rights:

Open Door and Dublin Well Woman v. Ireland, 29 Oct 1992, ECHR, Series A246-A

Matos E Silva, Lda., and others v. Portugal, 16 September 1996, ECtHR, no 15777/89 § 54.c www.worldlii.org/eu/cases/ECHR/1996/37.html last visited 12th Aug 2007

López Ostra v. Spain, 09 December 1994, no. 16798/90, EctHR, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=lopez%20%7C%20Ostra&sessionid=1753384&skin=hudoc-en> last visited 12th August 2007

Wemhoff v. Germany, 27 June 1968, no. 2122/64, ECtHR, para 8 under “As to the Law”, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=wemhoff&sessionid=1677138&skin=hudoc-en> last visited 6 Aug 2007.

Tyrer v. the United Kingdom, 25 April 1978; ECtHR, no. 5856/72 at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=1681694&skin=hudoc-en> last visited 6 Aug 2007

Airey v. Ireland, 9 October 1979, ECtHR, no. 6289/73 para.24 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=airey&sessionid=1681722&skin=hudoc-en> last visited 6 Aug 2007.

European Commission of Human Rights

Dr S v. Federal Republic of Germany, 5 Aug 1960, European Commission of Human Rights, No. 715/60 from Lauterpacht Research Centre for International Law 2001, *Environmental Law Reports: Human Rights and the Environment* (Cambridge University Press, Cambridge, 2001)

Inter-American Court of Human Rights:

Resolution No. 12/85 - Case No 7615 (BRAZIL) March 5, 1985 found at www.wcl.american.edu/humright/digest/1984/res1285.cfm last visited 6 Aug 2007

National

The Philippines

Minors Oposa v. Secretary of the Department of Environmental and Natural Resources, 33 ILM 173 (1994), para. 184. To be found at Westlaw) For summary of the case see www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module15.htm

U.S:

Xuncax v. Gramajo, D.Mass. April 12, 1995, found in Westlaw as 886 F.Supp. 162

Flores v. Southern Peru Copper Corp. S.D.N.Y., July 16, 2002, found in Westlaw as 253 F. Supp. 2d 510

Doe v. Unocal, 110 F, Supp. 2d. p. 1309. For a detailed description of the outcome of the case that was settled see http://www.earthrights.org/site_blurbs/doe_v_unocal_case_history.html last visited 23 July 2007