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Human Rights and Corporate Environmental Wrongs

On the prospects of norm-emergence in international human rights jurisprudence for the indirect environmental accountability of companies, with special regard to legal causation

Master thesis
30 credits (30 ECTS)

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Master's Programme in Human Rights and Humanitarian Law

Autumn 2010

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Summary

Countering the effects of human-induced environmental threats around the world is more urgent than ever. At the same time the power of companies has increased in the last decades. Activities of companies are capable of affecting human health negatively and in some cases the effects are so severe as to give rise to human rights violations. The question that is asked in this thesis is whether this *problematique* can be addressed through international human rights law.

One potential problem in this regard is the establishment of legal causation between corporate (mis-)conduct and effects on human health. In the modern technological society alleged victims falter in proving causation when for instance there are multiple sources of pollution, when sources and effects are geographically dispersed and when the effects of chemical reactions of a specific substance with other substances are complex.

Despite the urgency of countering environmental threats, there are few instances of recognition of an independent human right to a healthy environment. Instead, alleged victims have had recourse to existing human rights mechanisms. Therefore, the thesis asks the question what the prospects are for an emerging norm for the accountability of companies violating civil and political rights in environmental cases, within the legal framework of justiciable rules already in place.

For this purpose a norm-theory is used where law is understood as a multi-layered system of norms and legal practices. The norm goes in this theory through different phases, the 'life-cycle' of the norm. In the 'norm-emergence' phase the norm is strongly contested and 'norm entrepreneurs' are trying to convince other actors of adopting the norm. In the succeeding phase, 'norm cascade', the norm is more widely accepted, but still facing resistance. In the last phase, 'internalization', the norm is taken for granted. Another component in this theory is the three entry points of the norm. The norm has a will-input, a cognition-input and a systemic limitations-input.

After having examined case-law on human rights and the environment in the European, Inter-American and African human rights systems, and the UN Human Rights Committee, I conclude that there is an increasing recognition that environmental threats can be addressed in a human rights framework. In this regard, a number of judges function as 'norm entrepreneurs' pushing for the integration of environmental values in human rights law. At the same time, the doctrine of state positive obligations for acts of third parties giving rise to an interference with a human right has been internalized in all jurisdictions examined, and the case-law evidences an increased willingness to address the relationship between state and companies.

Regarding causation a theory more open to natural science is adopted. At the same time the use of evidentiary rules as to affect the assessment of legal causation is emphasized. A distinction is made between general and specific causation, the former indicating evidence of a general nature, such as effects from a toxic in the human body or on a population, while the latter

indicates specific effects on an applicant. In the European system certain judges, as 'norm entrepreneurs', have understood legal causation as a question of will and cognition in the legal culture rather than a systemic limitation in law. This has affected the understanding of legal causation in the European system as to be more accommodating to the integration of environmental values in the ECHR through the increased reliance on general causation. However, still lacking a wider support, the norm remains in the 'norm-emergence' phase.

By contrast, in the Inter-American and African systems, a different legal culture recognizing collective rights mitigates the problems of legal causation since it then suffices to evidence general causation. Therefore the prospects of an emerging norm may be better in these systems than in the European system.

Preface

I got the idea of writing a thesis on the topic of the relationship between human rights and the environment while attending a follow-up conference on to the Copenhagen climate meeting in 2009. The theme was 'climate justice' and I became interested in how environmental threats could be related to human rights and accountability. I attended the conference during an internship which was made possible through grants from SIDA (the Swedish International Development Cooperation Agency) and Yngve and Maud Möller's fund for international studies. I therefore want to thank them for giving me the opportunity to intern in New York.

I also want to thank teachers and students at the Raoul Wallenberg Institute for my time in Lund at the Master's Programme in Human Rights and Humanitarian Law.

Last but not least, many thanks to family and friends.

Abbreviations

ATCA	Alien Tort Claims Act
AmCHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CSR	Corporate Social Responsibility
ECC	European Economic Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ESC	Economic, social and cultural
GDP	Gross domestic product
HRC	Human Rights Committee
IAmCom	Inter-American Commission on Human Rights
IAmCourt	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IGO	Intergovernmental organization
ILC	United Nations International Law Commission
ILO	International Labour Organization
MNC	Multi-national corporation
MNE	Multi-national enterprise
MPL	Maximum permissible limits
OECD	Organisation for Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNEP	United Nations Environment Programme
UNESCO	United Nations Economic, Scientific, and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

1 Introduction

1.1 Introduction

The urgency of countering global environmental threats by mankind and her local, domestic, regional and international institutions cannot be emphasized enough. These threats are not seldom described in apocalyptic terms as irreversible and potentially catastrophic, and as challenging the very survival of mankind.¹

There is a widespread international consensus in the conviction that the measures in this regard must be holistic, engaging multiple levels of governance, from local to international, considering that environmental issues reach the whole planet and all levels of society.² Despite realizing the urgency of the situation and finding measures to respond to it, states, as actors on the international stage, has not met the expectations of the concerned public across the globe.³ The enforcement of existing international environmental law remains weak and ready rules on climate change remains absent.

Human rights, in a similar way, by their very nature touches upon an array of human activities across the globe. Their all-embracing and universal aspirations are both praised and criticized.⁴ Disregarding what opinion you might have on the issue, it is a fact that human rights are on both the international, and increasingly the domestic agenda, as an important ingredient in contemporary political and legal discourses. However, international human rights law remains, as international environmental law, largely unenforced, both *ratione materiae* and *ratione personae*, especially enforcement through judicial means.⁵

¹Concerning climate change, this thesis will take it as a given that there actually exist a human induced global climate change Therefore it is not for this thesis to analyze the scientific evidence pointing towards anthropogenic climate change and environmental degradation. For this issue see Solomon, S. *et al.* (eds.), *IPCC Fourth Assessment Report (AR4), Climate Change 2007: The Physical Science Basis*.

²P. Birnie *et al.*, *International Law and the Environment, Third Edition*, pp. 1-2; A. Boyle, 'Relationship between International Environmental Law and Other Branches of International Law', in D. Bodansky *et al.* (eds.), *The Oxford Handbook of International Environmental Law*, pp. 126-127.

³M. Mason, *The New Accountability: Environmental Responsibility across Borders*, pp. 3-5.

⁴For an overview of some general critique, see D.W. Kennedy, 'The International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* 99 (2001).

⁵Examples of low levels of enforcement *ratione materiae* are rules often referred to as economic, social and cultural rights and the more contested "third generation" rights, *e.g.* the right to self-determination and solidarity rights. Concerning *ratione personae*, it can be noted that vast territories of the world still lack effective human rights monitoring bodies, *e.g.* Asia, that has yet to create a regional human rights regime (this absence could in a not too distant future be partly remedied if the ASEAN (Association of Southeast Asian Nations) Working Group for an ASEAN Human Rights Mechanism and the ASEAN Intergovernmental Commission on Human Rights succeed in setting up a human rights court for South East Asia, see <www.aseanhrmech.org/aboutus.html> and

The developments of the discourse on global environmental threats and human rights comfortably fit into the much used notion of globalization.⁶ Similarly, the phenomenon of powerful corporations, often with a global reach, able to exert considerable influence on states, and in some cases more economically powerful than states, is seen as a typical trait of economic globalization.

These three elements, individually and collectively, highlight the structural and cognitive obstacles inherent in a state-based international system.⁷ In several different ways they challenge this system and demand international cooperation.

The traditional notion of international law as a state-consensual system is thereby challenged, and the tensions between proponents of this notion and more progressive international law scholars become more apparent. Judge Rosalyn Higgins has in this regard noted that:

“international law is a system that provides normative indications for states in their relations with each other [...] The amelioration of interstate relations is largely directed to other ends – ends that are important, and may not be inimical to the needs of the citizen, but are essentially different. The problem is not only that the norms underpinning interstate relations are rarely addressed in any direct sense to the needs of individuals, but that it is to his own government that the individual will look for his most basic needs. In the same time, it is from his own government that an individual often most needs protection.

It is clear that classical international law has relatively little to offer in this regard [...] The individual is left with no direct access to a forum, no legal right that he can call his own, no redress against his own state.”⁸

<www.aseansec.org/22769.htm>, both visited on 20 November 2010, for information on the progress.

⁶The notion of *globalization* is contested and different definitions are suggested, one basic categorization resting on the *ratione materiae*, i.e. political, economic, legal or cultural. For a presentation of different notions of *globalization* see J. Osterhammel and N.P. Petersson, *Globalization, A Short History*.

⁷This does not imply the demise or end of the state in international law or politics. It appears to be a somewhat psychological characteristic to think of your own time as unique and bouleversing, see for instance a work on the League of Nations by Alfred Zimmern from 1939. In his book *The League of Nations and the Rule of Law, 1918-1935* in a chapter entitled *What is the League of Nations?*, we can observe the following reflections by the author: “But in fact the attempt to find old-fashioned political labels to fit new and unprecedented political entities is as futile in the case of the League of Nations as in the parallel instance of the British 'Commonwealth' or 'Empire'. In both cases the familiar categories no longer apply and the new material does not yet lend itself to scientific classification. Perhaps even the notion of 'state' is obsolete or obsolescent. Are the 'states members of the League' states in the same sense as the states of 1914? To ask the question is to realise how impossible it is as yet to give a satisfactory answer to it. We are in fact living through an interregnum in political science. The old books are out of date and the new cannot yet be written.”, p. 284. *C.f.* the self-identification by the ECJ of the status of ECC as a new kind of legal order – *sui generis*.

⁸R. Higgins, *Problems and Process: International Law and how we use it*, p. 95. See also P. Birnie *et al.*, *supra* note 2, pp. 188-189: “The orthodox view that international law is concerned with the rights and obligations of states, whether *inter se*, or within the context of an international community, is open to two objections. First, it fails to represent fully the reality of the international legal system as it applies to matters of environmental protection [...] Secondly, there are arguments of principle in favor of a more broadly based system which may accord rights, or in some cases obligations, to individuals, peoples, generations and animals and possibly to the natural environment itself [...] [A]s an articulation of

One of the above-mentioned systemic and cognitive obstacles of the state-centered legal system in this regard is the one of causation between corporate and/or state acts/omissions at the one hand, and specific violations of human rights at the other hand. This is the subject matter of the thesis. In this introduction I will provide the outlines, purpose, and structure of the study.

1.2 Purpose and relevance

This thesis concerns the intersections of the environmental law, human rights and corporate accountability, and investigates *one* potential way of responding to corporate activities negatively affecting the environment and having an impact on human rights. If there is merely one lesson to be learned from tackling the challenge of global environmental threats, then it is that there is no such thing as a quick fix. As emphasized above, this problem requires measures on all levels of society and in different scientific fields.

We have seen how cumbersome multilateral negotiations within the (rather divided) international community of states can be, and that many states are reluctant to make concessions to arrive at an updated and effective binding international climate convention. The COP-15 meeting in Copenhagen manifested these problems *par excellence*. It can be argued that one of the obstacles in these negotiations were the fact that the anticipated climate agreement was seen as *the* solution, which would save the planet from further degradation, through *the* collective effort by the international community of states.

The failure of Copenhagen has thus highlighted the fact that other ways of countering the climate threat, beyond the absence of compromise between states, are needed. One way has been to target corporate environmentally hazardous activities.⁹ With the rise of the discourse of corporate social responsibility (hereinafter CSR), there has been a flood of codes of conduct, human resources departments and human rights auditing in the sphere of corporate governance. Affected individuals and activists have unveiled major corporate scandals around the world, with legal, political and economic consequences for many actors concerned. These developments have challenged the perception of the company as a purely private matter and some authors argue that they now have become a part of the public sphere.¹⁰ But even within the more private liberal-economic paradigm of the separate, relatively non-regulated corporation as an entity without much

values, such rights do not cease to be significant merely because no formal means can be found for their expression.”

⁹The work of the ILC has also reflected the preferences among states for increasing the importance of private liability attached to operators of risk-bearing activities as the main mechanism for progressing international liability, *see* International Law Commission, *Report on the work of its fifty-fourth session* (29 April - 7 June and 22 July - 16 August 2002), UN Doc A/57/10, pp. 225-226.

¹⁰ A. Clapham, *Human Rights in the Private Sphere*, p. 137. It should be realized, however, that the public-private divide is not unchallenged, *see* for instance C. Chinkin, 'A Critique of the Public/Private Dimension', 10:2 *European Journal of International Law* (1999), p. 387.

relevance to public institutionalism, the so called *business case*¹¹ provides (in its ideal form) for bad reputation and consequently lower profit, if a company does not respect human rights.

Although acknowledging the progress that has been made in the field of more voluntary projects and partnerships for companies, mere voluntarism has also its shortcomings.¹²

In short, while acknowledging the importance and progress made, the thesis aims at exploring the area between pure state-based negotiation, at the one hand, and corporate voluntarism, at the other hand, in the search for redress for human rights-victims of climate change and environmental degradation. It seeks to do so within a legal framework of civil and political rights that already exists, considering the obstacles in making and agreeing on a new environmental right, and the enforcement of existing environmental law.

As noted above, one of the challenges facing international law in this regard is the problem of causation when multiple sources intermingle and have geographically dispersed effects. More specifically, my purpose is to provide an analysis of a potential re-conceptualization of traditional legal causation between corporate conduct and environmental human rights violations.

The *problematique* of causation in international environmental cases raises the fundamental question as to the definition of the environment. At the outset it should be noted that 'environment' have a range of meanings and connotations. However, it is difficult to find definitions in international legal and political instruments.¹³ Or to put it differently, "it is a term that everyone understands and no one is able to define".¹⁴ In a broad meaning, the environment is everything outside of the self or a specific system. If society is viewed as social autopoietic systems¹⁵ the environment is per

¹¹ The 'business case' in corporate governance, in short, means that there is an economic benefit for the company portraying itself as concerned with human rights. If you generate profit by respecting human rights, then this is the right way to go, within the rationality of pure economic theory. Critics of the doctrine of the 'business case' would say that its rationale is mere window-dressing and that it may be dangerous only to focus on human rights within an economic cost-benefit calculation. In this view, if it would be established that not respecting human rights would be more profitable than respecting them, than the 'business case' would be of no avail. This thesis does not aim at the debate on the 'business case', see e.g. A.B. Carroll and K. M. Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice', 12:1 *International Journal of Management Reviews*, (March 2010), pp. 85–105.

¹² International Council on Human Rights Policy, *Beyond Voluntarism, Human Rights and the Developing International Legal Obligations of Companies*.

¹³ The European Commission provides a rare example of a definition in its 'Action Programme on the Environment' in which it is stated that 'environment' means "the combination of elements whose complex inter-relationships make up the settings, the surroundings and the conditions of life of the individual and of society as they are and as they are felt", Council Regulation (EEC) No 1872/84 on Action by the Community Relating to the Environment, OJL 176 (1984) 1. See also P. Birnie *et al.*, *supra* note 2, pp. 4-6.

¹⁴ L.K. Caldwell, *International environmental policy and law, First Edition*, p. 170.

¹⁵ The concept of autopoiesis means that a system reproduces itself through self-referring operations and that it therefore retains an operative autonomy towards its environment, see N. Luhmann, *Ecological Communication*.

definition foreign to the system examined, be it the legal system or the human body, unable to understand the communication and inner logic of this system. The problem of causation between environment and system would in such a society be inherently difficult to grasp.

However, this broad definition of 'environment' seems to be inconsistent with the understanding of the term in international political and legal discourses, of which we are concerned in this thesis. In this regard, without providing an exact definition of the term, it appears to relate to the natural environment. This perception, in turn, seems to rely on the historic development of the modern industrial society where society is viewed as an opposition to nature (anti-ecological understanding with connotations of exploitation, *i.e.* nature is relevant to humans only in so far as its resources are directly useful for human ends). This understanding of a dichotomy of human society and natural environment in a similar way as the said relationship between an autopoietic system and its environment, provides an unaccommodating conceptual basis for the analysis of causation involving both society and nature. Therefore, in line with jurisprudence¹⁶ and literature on human rights and the environment¹⁷, the use of the term 'environment' in this thesis relates to not only the relationships between the natural environment and human society, but also issues surrounding the human which relate to activities that interfere with the condition in which a human is capable of living a dignified life, in particular, the quality of air, water and soil.

Obviously, this limits the term 'environment' to the environment of relevance to humans – an anthropocentric approach. Even though some authors advocate a more general right pertaining to the natural environment in a broader sense¹⁸, the issues of standing remains problematic and given the lack of recognition of such a broad approach to environmental protection in international human rights jurisprudence, the thesis is restricted to an anthropocentric understanding of the environment. This approach is, in part, also connected to the above-mentioned problems of enforcement of international environmental law.

It is argued that this *problematique* will become apparent as instances of harm to human health due to international environmental threats increase. My claim is that this leads to a greater awareness of the grounds on which causation assertions are made. Therefore, it can be argued that the relevance of the kind of study that this thesis is concerned with will become greater as the pressure on judicial institutions to handle complex causation mounts.

Furthermore, seen in a broader perspective, the thesis will to some extent explore the role of international law in general, and international human rights law in particular, in countering global environmental threats. This is linked to the question of the legitimacy of international law and its usefulness as a relevant system for urgent issues in society. Hence, the

¹⁶See part 3.4.

¹⁷P. Birnie *et al.* *supra* note 2, pp. 4-6.

¹⁸C. Redgewell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection*.

problematique of legal causation highlights the role and relevance of law in responding to an actual problem.

1.3 Research questions

Seen in the light of the foregoing, this thesis aims at answering two questions:

1. What are the prospects for an emerging binding norm in international law for the accountability of companies violating civil and political human rights in environmental cases, within the legal framework of justiciable rules already in place?
2. What are the obstacles in this norm emergence process with special regard to legal causation?

1.4 Method

The outlook of this thesis is perhaps somewhat peculiar. The data used in the thesis is mainly environmental jurisprudence from four international human rights institutions: The European, Inter-American and African human rights systems, and the United Nation Human Rights Committee. Why these four institutions then? The answer is rather pragmatic. These bodies are the only one's on the international level with a clear human rights jurisdiction and with environmental jurisprudence. In part 3.4 this jurisprudence is presented and interpreted through a traditional legal normative method.

In part 4.5.1, 5.3 and 6, however, I apply more clearly the theories on a legal system and norm emergence as presented in chapter 2. The use of these theories when analyzing corporate accountability and legal causation provides a perspective from which to analyze law at a distance. Hence, these theories are not legalistic but are rather interested in the interrelatedness of law with other social systems and practices and acknowledges the tendency of environmental issues and environmental law to challenge a narrow and traditional legalistic approach to law and legal adjudication.

1.5 Scope

There are several limitations in the scope of this research. Firstly, the thesis reaches over different themes in law such as environmental law, human rights law and legal theories on causation. It is rather obvious that this thesis will not give justice to each of these themes. This is one of the inherent methodological shortcoming of multi-pronged approaches in science. Secondly, the study on the emergence of a new norm in international law is restricted to analyzes of decisions of international institutions. This leaves the vast domestic material outside of the thesis. This is certainly a setback considering that domestic practice is important in providing evidence of customary international law. Nevertheless, national judgments are not

totally ignored, not the least since they may sometimes be referred to in international fora. Thirdly, the research on the prospects for a possible emerging norm focuses on causation requirements in law. This means that other questions, that may certainly be of relevance for this prospect is left outside of the thesis.

1.6 Disposition

The structure of the thesis is as follows: Chapter 2 provides the theoretical foundations for the succeeding study, outlining the concept of a 'world risk society', the legal system as norms and practices, and theories on norm emergence. Chapter 3 concerns the interrelatedness of international environmental law and international human rights law and presents case law on this issue from the four human rights institutions. Chapter 4 deals with corporate accountability in international law and what the contribution of the jurisprudence studied have been in this regard. In Chapter 5, we explore the issue of legal and actual causation and examine the understanding of international actors of this *problematique* in said jurisprudence. Finally, in Chapter 6 the case law is analyzed in light of the theories applied.

2 Theoretical framework

This part intends to provide a theoretical framework within which to base the succeeding thesis. It will for these purposes firstly outline the notion of contemporary society as a risk society and the problems of positioning accountability in this society. Secondly, I will present an eclectic theory on norm emergence in international law. The more specific theoretical questions linked with the accountability of companies in international law and causation will be analyzed in Chapter 4 and 5 as they relate more directly to the outcome rather than to the overall theoretical framework of the thesis. The object of this Chapter is therefore to provide a theory of a system of international human rights law and the norm making processes within this system, to enable the succeeding parts to investigate the 'fit' of the studied norm in this system. This part is therefore devoted to a theory on the legal system and norm emergence in this system.

2.1 A world risk society

To be able to construct a coherent and convincing theory on norm emergence, we must first outline the elements in societal developments giving rise to problems of accountability for environmental risks and causation.

Sociologists Ulrich Beck and Antony Giddens have constructed and developed theories on a world risk society.¹⁹ The starting point of the theories is the observation that one decisive difference that distinguishes today's society from earlier one's is the issue of man-made risk with potential global reach and the knowledge and relative acceptance of this risk as part of everyday life.²⁰ These threats include anthropogenic greenhouse gas emissions and international environmental pollution. In this reality the legitimacy of traditional methods and theories on impact and probability, causation and risk, is tested. The problems of risk and causation are further complicated by the combination of multiple sources and their interaction potentially multiplying the harm of the impact. Furthermore, scientific knowledge in this complex reality is sometimes uncertain regarding assessment of risk and causality. Another complicating factor is according to Beck and Giddens that global risk assessment as a construction through science becomes increasingly politicized.

¹⁹Beck and Giddens have not been writing together on the issue. Their independent theories are nonetheless so similar that it is justified to outline their theories under one head, at least in this limited thesis that is not concerned with a sociological analysis of the risk society as such. See U. Beck, *Ecological Politics in an Age of Risk*; A. Giddens, *Runaway World: How Globalization is Reshaping Our Lives*; and 'Risk and Responsibility', 62:1 *Modern Law Review* (1999), pp. 1-10.

²⁰The transnational or global hazards can within the framework of globalization be seen as a "globalization of side effects", see A. Mol, *Globalization and Environmental Reform*, p. 71-93.

What is then the result of all this? The issue of uncertainty and how to deal with it seems to be of great importance in this regard. One of Beck's conclusions is that the governing logic of the world risk society is 'organized irresponsibility'²¹, conventional risk-assessment becomes overwhelmed and insufficient in causation judgments. Connected to this is, of course, also the issue of evidence. With complex causation, affected individuals falter in identifying the responsible actor and in convincing the judge or decision-maker as to the connection between acts/omissions and harm in an existing legal or political framework. In the global risk society there is consequently an 'accountability deficit'.²²

How, then, do state-based legal-regulatory systems accommodate these issues? Beck and Giddens seem to suggest that our state-centered legal-regulatory system is inapt in dealing with global risk issues. Mason describes this challenge of state accountability in five aspects, which are more or less interrelated. Firstly, at a governance level, state actors increasingly lose influence while non-state actors gain in power. According to Mason, this challenges the very concept of citizens holding state actors accountable. Secondly, political accountability in environmental issues is exposed *ex ante* and the politicians are unable to assess risk, this unveils their dependence upon technical expert-knowledge. Thirdly, the legitimacy of state accountability erodes when the state fails to protect its citizens from extraterritorial environmental threats. The affected public often lack the means to hold actors outside of their own states' jurisdiction accountable. It is argued that this 'protection failure'²³ undermines the credibility of state authority. Fourthly, the inability of state power to provide protection against environmental threats raises the issue to the international level. It is argued that we need to look for accountability through international norms, such as human rights, both in hard legal rules and through soft leverage from activists and NGOs. Fifth, state accountability detached from economic institutions highlights its own limitations if corporate accountability is defined merely by the company's responsibility towards its shareholders. This creates an accountability gap in between the increasingly limited state accountability and corporate accountability *sensu stricto*.

2.2 An eclectic theory on norm emergence in international law

Having outlined above in very broad terms some aspects of risk and accountability in contemporary society, this part aims more at providing a theory on an international legal system and the norm-making processes within this system. For this purpose I involve several distinct theories and intend to emerge these into a coherent eclectic theory.²⁴ This theory firstly

²¹U. Beck, *supra* note 19, pp. 54-58.

²²M. Mason, *supra* note 3, p. 2.

²³C. Jones, *Global Justice: Defending Cosmopolitanism*, pp. 217-22.

²⁴I am well aware of the obstacles when using eclectic theories in scientific research and my intention has been to constantly throughout the research process have these obstacles in the

outlines characteristics of a legal system, secondly I present a theory on norm creation. In the third part, I connect these theories more explicitly to the requirement of sources in international law, and lastly I discuss the dynamic of soft-law – hard-law dialectic in norm creating processes in international human rights law.

2.2.1 Law as a multi-layered system of norms and practices

To be able to conduct a norm-study in international law we must establish what framework the potential norm is supposed to fit into. In short – a theory on international *law*. For this purpose I use the theory elaborated by legal theorist Kaarlo Tuori.²⁵

Tuori describes law as a legal system with two faces: norms and practices, which constantly interact. According to Tuori, law as a set of norms represents a legal order that an average continental European lawyer would typically equate with law.²⁶ Tuori gives us an account of the story this lawyer would tell of the law:

“For her, the law is an autonomous, rational, consistent and coherent system of norms. The main source of the law is legislation enacted in a legally regulated procedure. The legislative 'inputs' are interpreted and systematised by legal scholars and applied to particular cases by judges. What happens before the enactment of legislation and after its application falls outside the scope of this narrative. It may, though, hint at the existence of a Power, a sovereign, behind the act of legislation, and even include a reference to the coercion which, as a means available to the sovereign Power, ultimately guarantees the realisation of the law. But the form of legislation, as well as the neutral and rational methods of its interpretation, systematisation and application, have effaced the traces of this Power. On the other hand, as a neutral and rational system of norms the law constitutes an efficacious obstacle to the illegitimate exercise of power, or so a typical lawyer is inclined to think.”²⁷

Tuori refers this narrative to a kind of 'spontaneous positivism', given an explicit content through positivist theory.²⁸

Tuori rejects this, as he calls it, 'uni-level conception of law', as represented by traditional legal positivist philosophers such as Hart and Kelsen.²⁹ His claim is that the traditional legal positivism approach fails, since it is unable to answer questions related to the limits and the criteria of legitimacy of the law. This is due to internal contradictions within these

back of my head. I am not in this thesis elaborating on these obstacles, *see* instead S. Tobias and T.M. Duffy (eds.), *Constructivist instruction: Success or Failure?*

²⁵ K. Tuori, *Critical Legal Positivism*.

²⁶ *Ibid.*, p. 121.

²⁷ *Ibid.*, p. 7.

²⁸ Tuori in this connection makes reference to the notion of *habitus* as understood by sociologist Pierre Bourdieu. In short, *habitus* means certain dispositions and schemes in the human mind inclined to a certain behavior. This behavior is non-reflective since it involves roles that the actor are trained in and takes for granted.

²⁹ K. Tuori, *supra* note 25, p. 147.

legal positivist theories, and a consequence of their adherence to pure positivity.³⁰

As an alternative Tuori presents a theory he calls 'critical legal positivism'. This theory shares one feature with traditional legal positivism, while rejecting the two other basic tenets. The theory shares the contention of the fundamental positivity of modern law, while rejecting the strict separation between the 'Ought', normative orders, and the 'Is', empirically observable facts. Furthermore, Tuori rejects the traditional legal positivist distinction within the 'Ought', between law and other normative orders, especially morality.³¹ Tuori puts it this way:

“[C]ritical legal positivism relativises the separation of 'Is' and 'Ought' by emphasising the constant interaction between the law as a symbolic normative phenomenon and the legal practices producing and reproducing this phenomenon. Through its understanding of law as consisting of multiple layers, critical positivism also rejects the strict separation between law and morals.”³²

The other face of law, legal practices, are regarded as communicative practices which appear not only as linguistically formulated norms at the surface level of law (law as a symbolic normative phenomenon), but also as practical knowledge in deeper levels of law. Legal practices can be divided into legal practices *sensu largo* and *sensu stricto*. Tuori describes legal practices *sensu largo* as social communication where the application, interpretation or amendment of the legal order is explicitly thematized. All members of society are potential members of these communications as they are affected by law and therefore has an internal point of view on the legal order.³³ Legal practices *sensu stricto* is a product of the differentiation of modern society. Actors in these practices are professionals with a legal education. This narrow community of lawyers is the main actor in producing and reproducing the legal order.³⁴

As opposed to the expressions of spontaneous positivism, critical legal positivism goes beyond the “visible, discursively formulated surface” level of law. Tuori explains that:

“‘mature’ modern law does not consist merely of regulations that can be read in the collections of statutes or court decisions to be found in law reports. It also includes deeper

³⁰*Ibid.*, p. 8. Without going into detail, a short account of Tuori's argument is provided here: Regarding the problem of limiting the power of the state only through the state, Tuori argues that Kelsen, in his hierarchical and positivist legal theory “emptied the concept of *Rechtsstaat* of its very last substantive normative implications by equating the state with the legal order”. A further critique of Kelsen's hierarchy of positive law is that the basic norm at the top of the hierarchy (a procedural norm which order all succeeding norms to follow the preceding order, a hypothetical point of origin of all law) itself does not follow the demands of positivity, since it is presupposed. In short, it is not a valid rule and is blurring the line between law and facts, 'Ought' and 'Is', which legal positivists consider fundamental. Tuori furthermore criticizes Hart's theory on the recognition of positive legal rules through a procedural norm, the 'ultimate rule of recognition', in a similar fashion, since it is uncertain where to position this rule between law and facts, K. Tuori, *ibid.*, pp. 24-27.

³¹ *Ibid.*, pp. 7-8, 29.

³² *Ibid.*, p. 29.

³³ *Ibid.*, p. 132.

³⁴ *Ibid.*, p. 133.

layers, which both create preconditions for and impose limitations on the material at the *surface level*. I call these sub-surface levels the *legal culture* and the *deep structure of the law*. The multi-layered nature of 'mature' modern law is the key to the solution that this type of law can offer to the problem of its limits and criteria of legitimacy."³⁵

Even though modern law is post-traditional law, positive law is not without a past and a memory. This is represented by the *legal culture* in the law. Thus, the 'legal culture' "calms down the storms of the surface of law". It is elitist in the sense that it is produced and reproduced by the narrow community of legal professionals in the legal practice *sensu stricto*. The legal culture can be said to be expressed, for example, in interaction with the surface layer in a decision made by a judge. For instance, she makes express use of specific laws in this decision, but she applies this law with her tacit knowledge, including a legal method, of the legal culture within which legal system the law is located.³⁶

This second layer, the 'legal culture', contains principles and doctrines which are familiar to the lawyer. But Tuori argues that there has to be another layer further down, since there seems to be some kind of core in modern law that is common to legal systems with different legal cultures. This layer is what Tuori calls the 'deep structure of law'.³⁷ This emphasizes

³⁵ *Ibid.*, p. 147. The multi-layered component of Tuori's critical legal theory is inspired by theorists influenced by the French Annalist historiography. Fernand Braudel, in his theory on how time obeys different speeds, distinguished between 'short time' (individual conscious human actions), 'conjunctures' (which determine the rhythm of such actions, but of which individuals are not necessarily aware), and *longue durée* (in short, geographical time as interaction between man and nature). Michel Foucault's 'archeology of knowledge' resembles this theory. He uses the notion of *episteme* which could be said to imply a cultural deep structure which both constitutes and limits historical epochs and their substances. Foucault also distinguished between *savoir* and *connaissance*, where the former denotes a cultural deep structure in the form of a certain rationality underlying institutionalised practices of power and their discursive practices, while the latter is a more explicit knowledge produced by discursive practices, *ibid.*, pp. 147-149.

³⁶ *Ibid.*, pp. 162-163. In his analysis of the notion of 'legal culture' Tuori distinguishes between its methodical, conceptual and normative elements. The methodical element consists of the legal method using a certain rationale for distinguishing relevant from irrelevant, based on the validity of sources and an inner structural logic of the legal order, *ibid.*, pp. 166-167. The conceptual element comprises certain legal concepts which play a central role in the symbolic power of law, e.g. contract, intent, distress and emergency powers, *ibid.*, p. 174. The normative elements, in turn, consist of general legal principles, such as *pacta sunt servanda*, *nulla poene sine lege*, equality etc., *ibid.*, p. 177.

³⁷ The constraints on the present study does not allow for a more precise presentation of Tuori's theory. He emphasizes that the deep structure of law involves conceptual, normative and methodological elements. "The *basic legal categories* of the deep structure open up the very possibility of legal thinking, and clear a conceptual space where legal practices, such as law-making, adjudication and legal science, become possible", *ibid.*, p. 186. The normative aspect of the deep structure is influenced by Habermas, and involves human rights and *Rechtsstaat* principles, although Tuori makes it clear that the very identification of these normative elements in itself involves a normativity that is not innocent and objective, *ibid.*, p. 190. Further, the methodological aspects of the deep structure is related to the perception of which type of rationality that the law expresses. Methods of interpretation and legal method therefore is contingent upon this rationality. Tuori, in this regard, seems to come close to the Habermian theory on institutionalized practical discourses and he sees the legal discourses as discourses of justification which are limited by the validity criteria of legal norms, *ibid.*, pp. 190-191.

that law is a continuum, a 'historical type of law'.³⁸ The deep structure of law in a sense corresponds to the *longue durée* of the law³⁹ and reflects the unreflected, or even subconscious 'deepest sedimented layer'.⁴⁰ Legal globalization, according to Tuori, is best understood as integration of different national legal deep structures. In this sense, legal globalization, is more than just the common legal rules and principles articulated in a discourse at the surface level of law. It rather touches upon the very mind-set of the lawyer and her practical, unreflected knowledge. In other words, the very *habitus* of the lawyer is increasingly streamlined across national boundaries.⁴¹

2.2.2A theory on the emergence of international norms

In the preceding part we have seen how law as a legal system can be understood. I have not, in greater detail, discussed theories on change within this legal system, whether these changes come from inside the system or from its environment. This part and the subsequent part attempt to provide a theoretical ground for this. In short, we have already dealt with the structure, the system, and inner logic of law. What is missing is a theory on how norms can emerge and develop in this setting. Firstly, I will present a theory on the life cycle of the norm. Secondly, I apply a theory on three entry-points in the analysis of the norm.

A theory by Martha Finnemore and Kathryn Sikkink on the 'life cycle' of the norm is here used. The first question one should ask is – what is a norm? A norm, in short, can be considered to be a "standard of appropriate behavior for actors with a given identity".⁴² It should be distinguished from social institutions, which are collections of norms. Norms can also be divided into different categories. Regulative norms order and constrain behavior, while constitutive norms create actors or frameworks for other norms.⁴³ To be sure, the meaning of a norm changes whether we talk about legal, political, social or economic norms.

³⁸ Tuori argues that "if we claim that modern law is fading away and a new era of post-modern law is dawning, in order to substantiate our claim, we should be able to demonstrate that fundamental changes are occurring in the law's deep structure", *ibid.*, p. 184.

³⁹ Tuori furthermore claims that natural law theories can be perceived as "attempts to reconstruct the *normative* deep structure of the law" while Kelsen's pure theory of law represents an attempt to systematize the 'conceptual' aspect of the deep layer, *ibid.*, p. 184.

⁴⁰ Even though the deepest layers of law are unreflected, the "*reflexivity* of modern culture makes it possible to transform even practical knowledge about the deep structure into a discursive shape" while it is noted that it is more disputed whether it is possible to articulate the subconscious as conscious, *ibid.*, p. 184. Tuori furthermore discusses the methodological difficulties in attempts to reconstruct the deep structure of the current *episteme* in the light of the fact that the researcher also is a member of this same *episteme*, *ibid.*, p. 185. However, I will not elaborate on this point in the thesis.

⁴¹ *Ibid.*, p. 185.

⁴² M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* 887 (1998), p. 891.

⁴³ *Ibid.*, p. 891.

In the present study, we are examining the possible change of norms within an existing legal framework of rules and principles. It must be emphasized that a norm in this regard is capable of changing the content of a legal rule, which itself has the capacity to incorporate, and indeed has already incorporated, a range of different norms within its scope. In our study, therefore, we analyze how a norm containing environmental concerns have the possibility to be subsumed under an explicit human right formulated more generally. Hence, we are concerned with the role of international judicial institutions interpreting legal rules over which they have jurisdiction. In line with the theory here advocated, the role of judges cannot realistically be understood as restricted to merely apply law as provided to them.⁴⁴ I will further dwell on this issue below.

The norm 'life cycle' is a three-stage process: 'norm emergence', 'norm cascade' and 'internalization'. At the first stage, norm emergence, 'norm entrepreneurs' try to convince a certain critical mass of relevant actors to adhere to the norm. At the next level, the norm cascade, the convinced actors, called 'norm leaders', attempt to socialize other actors into becoming norm followers. At the third stage, internalization, the norm is taken for granted and is therefore not visible in the immediate debate.

At the first stage, norm emergence, norm entrepreneurs have a crucial role in framing the issue with different methods. This important process is engrained with problems of fitting in the proposed new norm into an already existing norm-structure. It is therefore vital that norm entrepreneurs have resources and techniques that enable them to justify their norm and presenting it as preferable to competing existing norms.⁴⁵ An organizational platform can provide norm entrepreneurs with these resources to be able to promote the norm at the international level. This platform can for instance be an NGO or an IGO.⁴⁶ Finnemore and Sikkink argue that “[i]n most cases, for an emergent norm to reach a threshold and move toward the second stage, it must become institutionalized in specific sets of international rules and organizations.” At the same time, “[i]nstitutionalization is not a necessary condition for a norm cascade, however, and institutionalization may follow, rather than precede, the initiation of a norm cascade.”⁴⁷

When the norm has been accepted by a 'critical mass' of international actors⁴⁸ it reaches a tipping point where it enters a new stage in the life

⁴⁴ A much used expression for this restrictive role of judges as “la bouche de la loi” (“the mouth that pronounces the words of the law”, my translation) is based on the theory of the separation of powers of C.S. Montesquieu, *De l'esprit des lois*. In the contemporary literature, many authors have rejected the strict distinction between judicial application and creation of law. It is argued that this distinction is unrealistic as a matter of fact, see e.g. E. Hambro, 'The Reasons Behind the Decisions of the International Court of Justice' 7 *Current Legal Problems* 212 (1954), p. 214; M. Shahabuddeen, *Precedent of the World Court*, p. 67 *et seq.*; P. Sands, 'Turtles and Torturers: The Transformation of International Law', 33 *New York University Journal of International Law and Politics* 527 (2000), p. 555; R. Higgins, *supra* note 8, p. 2.

⁴⁵ M. Finnemore and K. Sikkink, *supra* note 42, p. 897.

⁴⁶ *ibid.*, p. 899.

⁴⁷ *ibid.*, p. 900.

⁴⁸ Finnemore and Sikkink acknowledge the importance of states in the international system. The 'critical mass' in their theory consists of states exclusively, although non-state actors and international organizations are seen as for instance organizational platforms for norm

cycle. What constitutes a critical mass cannot be predetermined in absolute numbers. It depends on the subject matter and the interest and normative weight each actor has. Finnemore and Sikkink in this regard talk about 'critical states' as those states "without which the achievement of the substantive norm goal is compromised".⁴⁹ If states that are regarded as successful and respected adopt the norm it would increase its prominence and be more likely to succeed.⁵⁰

When the norm is elevated to the norm cascade stage, international actors attempt to persuade other actors to accept the norm. This process of socialization, as compared with the norm emergence phase, involves a certain 'peer pressure' among international actors. At this level compliance with the new norm is connected to the self-perception of the actors as members of the international community. Thus it is about the identity of states and other actors. Finnemore and Sikkink claim that three possible motivations are influencing the response to this peer pressure: legitimation by other international actors or by the citizens of the state; conformity, it is perceived as important to demonstrate that you belong to a certain social environment; and esteem, involving fears of losing reputation and identity for more emotional reasons.⁵¹

If the norm reaches the tipping point in the norm cascade it enters the stage of internalization. This level is where the norm is more or less taken for granted and compliance is nearly automatic.⁵² Here the practice of certain professional groups increasingly consolidates the norm and through the iteration of this practice it becomes more and more non-reflexive.⁵³

The theory on the life cycle of the international norm above informs us about the process of norm-making, and what roles different actors play in this regard. It does not, however, provide us with a tool to investigate the prospects of the norm considering its own characteristics. Older norms that have survived several challenges are more likely to succeed. So are also norms that are clear and specific. Those norms that aim at protecting individuals from violations of their human dignity are further more likely to succeed.⁵⁴ Two important aspects of the prospect analysis of the norm is its 'environmental fit' and 'coherence'. The former means its ability to handle the surrounding issues and conditions in the social system, a political or social 'fit'.⁵⁵ The latter concerns the ability of the norm to logically 'fit' into the legal framework, if it is coherent with existing legal norms.⁵⁶

entrepreneurs and norm institutionalizers. In this thesis, the 'critical mass' may also include international organizations such as international courts and their judges.

⁴⁹ *supra* note 42, p. 901. One example could be how states with a substantial fishing industry might be more important in the norm making of rules concerning fishing quotas than a land-locked country. Finnemore and Sikkink further claim that states can be 'critical' due to their special moral standing in the international community and makes reference to South Africa under Nelson Mandela in the process of making a universal land-mine treaty.

⁵⁰ *Ibid.*, p. 906.

⁵¹ *Ibid.*, p. 903.

⁵² *Ibid.*, p. 904.

⁵³ *Ibid.*, p. 905.

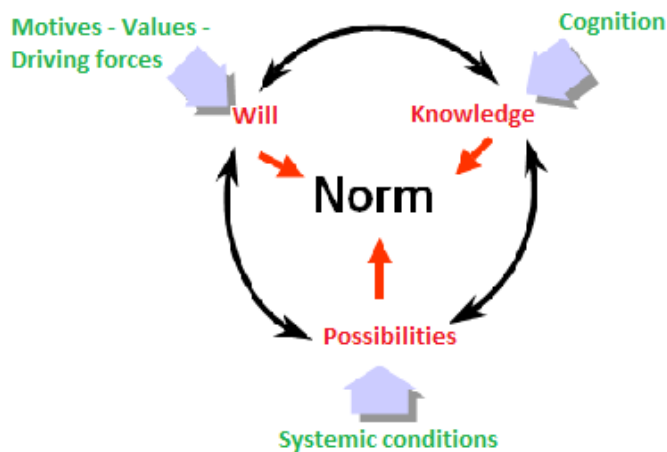
⁵⁴ *Ibid.*, p. 907.

⁵⁵ *Ibid.*, p. 908.

⁵⁶ *Ibid.*, pp. 914-915. Finnemore and Sikkink also point to the psychological aspect of persuasive norms: "[B]oth cognition and affect work synergistically to produce changes in

2.2.3 Three points of entry into the norm

The theory on norm emergence above is in this study combined with a certain methodology on the analysis of norm-formation. This norm model, which is created by Håkan Hydén and Per Wickenberg, contains three points of entry into the norm: 'will', 'knowledge', and 'possibilities'. These three points of entry are not statically separated, but are more or less interlinked and the importance of each one of them depends on the type of norm you are analyzing.



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Behind the three points of entry are further background information that affect the substance of each point of entry. Behind the entry-point 'will' are different motives, values and driving forces. Behind these, in turn, you may find different motivation systems that are based on religion, politics, economy, conscience, ethics, power and interests.

Turning to the 'knowledge' input of the norm, cognition which shapes our world-view is determining our knowledge. Cognition, in turn, is dependent upon aspects such as education, experience, tradition, power, status, gender, ethnicity etc. The education aspect can be divided into concrete knowledge, explicit and discursively formulated, at the one hand, and quiet, practical knowledge acquired through experience, on the other hand.⁵⁸ The conditions for knowledge are also limited by the economic and social status of the individual.

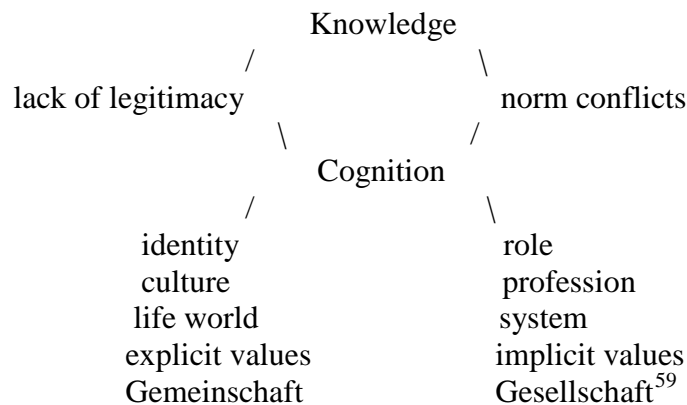
Knowledge is furthermore formed differently depending on in which stage in the socialization process you are. Hydén and Wickenberg in this regard

attitudes, beliefs, and preferences [...] stresses communicative processes that happen through argumentation, but, unlike the legal approach, logic alone does not dictate the result, since appeals to emotion may well be used to strengthen or undermine logical extensions of norms.”, *ibid.*, p. 915.

⁵⁷ H. Hydén, *Normvetenskap*, pp. 280-284.

⁵⁸ *supra* note 28. Foucault also distinguished between *savoir* and *connaissance*, where the former denotes a cultural deep structure in the form of a certain rationality underlying institutionalized practices of power and their discursive practices, while the latter is a more explicit knowledge produced by discursive practices. Giddens has similarly distinguished between practical and discursive knowledge, K. Tuori, *supra* note 25, p. 149.

apply an approach inspired by Habermas, where knowledge acquired in the primary socialization, outside of the professional sphere, in the 'life world', is more influenced by will and cognition than by systemic limitations. In the secondary socialization, mainly within the framework of your professional life, knowledge is mainly determined by the systemic-limitations-input. Hence, the so to say starting point of the norm differs: While primary socialization through the 'life world' emphasizes the order will – cognition – systemic limitations, secondary socialization through the system maintains the order systemic limitations – will – cognition:



2.2.4 Sources of international law

A study in norm-making in international law would typically base its analysis and conclusions on the doctrine of sources of international law. This, it is often argued, is the validity criteria of an international legal norm. While not contesting this claim as a fact of positive law, I maintain that other, legal and non-legal processes also are of relevance.⁶⁰ The sources of law doctrine rests upon the legal positivist understanding of law as detached from morals or politics.⁶¹ But my interest in this thesis is, in part, how a norm can be constructed *before* the entry into the legal order. The sources of law doctrine therefore, in this thesis is, first and foremost, important as a formal requirement for entry into the legal order, it is not seen as the exclusive creator of legal norms. While legal positivism is disinterested in the processes of formation of a pre-legal norm, this is just what the thesis is about. In short, what we are interested in is the formation of a norm that is *capable* of entering the international legal order before being formally validated in the doctrine of sources.

⁵⁹ H. Hydén, *supra* note 57, pp. 285-288. The distinction between life world and system is based on the theory of Habermas, while the notions of Gemeinschaft (community, implying traditional values and a collective emotion of belonging together) and Gesellschaft (society, implying professionalism and modernization/differentiation) are from Tönnies.

⁶⁰ This approach would correspond to what Tuori has called the 'descriptive doctrine of the sources of law', as compared with the 'normative doctrine of the sources of law', K. Tuori, *supra* note 25, p. 157.

⁶¹ G. Abi-Saab, 'Éloge du "Droit Assourdi"', 'Quelques réflexions sur le rôle de la soft law en droit international contemporain', in *Nouveaux itinéraires en droit, Hommage à Francois Rigaux*, p. 62.

These issues furthermore draw our attention to the question of what the object and legitimate fields of legal research are. Abi-Saab acknowledges the importance of understanding the building bricks of international law and the history of mature legal rules. He emphasizes the notion of the process of the development of a rule “from its conception, through different phases towards its maturity”.⁶²

In any case, it is obviously of great importance that the norm, in fact, passes this gate if we are to seriously analyze *legal* norm-emergence.⁶³ The traditional account of the sources of international law takes its point of departure in the codification of these sources in Article 38 of the ICJ Statute.⁶⁴ The sources, according to the Statute are international conventions, international customary law and general principles of law.⁶⁵ Judicial decisions and legal doctrine⁶⁶ are “subsidiary means for the determination of rules of law”.

In the tension between traditional international law lawyers and modern international law scholars⁶⁷, the former would generally hesitate to go

⁶² *Ibid.* (my translation), pp. 63-64. In Abi-Saab's words: “quels sont l'objet et le champ légitimes de l'investigation juridique? Est-ce seulement prendre acte du droit une fois qu'il a atteint pleine maturité, pour l'interpréter en l'état, c'est-à-dire comme une donnée statique; ou plutôt d'appréhender le phénomène juridique dans sa globalité, dès sa conception, à travers des différentes phases vers la maturité, et dans ses transformations ultérieures aussi bien que dans ses différentes variétés, qu'elles soient justiciables ou non justiciables? Et comment peut-on comprendre complètement l'édifice juridique fini sans prendre en considération les différentes pierres de construction et les différentes phases de sa formation qui constituent son parcours et ses origines «génétiques», quel que soit le nom qu'on leur donne: *soft law*, *hard law*, *lex lata*, *lex ferenda*? La pertinence juridique du droit en formation n'est cependant pas exclusivement épistémologique ou cognitive ni seulement retrospective en ce sens qu'elle ne se présente qu'une fois que les règles ont atteint leur maturité, pour comprendre comment elles sont devenues ce qu'elles sont. Car les phases intermédiaires et les briques ou pierres de construction produisent des effets juridique immédiats bien que de manière indirecte ou par ricochet”.

⁶³ U. Beyerlin, 'Different Types of Norms in International Environmental Law, Policies, Principles and Rules', in D. Bodansky (eds.) *et al.*, *supra* note 2, p. 428.

⁶⁴ Thirlway has observed that the fact that these sources are codified in the ICJ Statute leads to the conclusion that international law is what the ICJ would rule in a given case, H. Thirlway, *International Customary Law and Codification*. However, this view has been challenged, *see e.g.* R. Higgins, *supra* note 8, p. 18.

⁶⁵ The exact formulation of these sources is: “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”(Article 38(1)(a)); “international custom, as evidence of a general practice accepted as law” (Article 38(1)(b)); and “the general principles of law recognized by civilized nations” (Article 38(1)(c)), Statute of the International Court of Justice, San Francisco, 26 June 1945, entered into force 24 October 1945.

⁶⁶ The exact formulation of these subsidiary means is: “judicial decisions and the teachings of the most highly qualified publicists of the various nations” (Article 38(1)(d)). The reference to Article 59 of the Statute makes clear that the legal effect of judicial decisions of the ICJ is restricted to *inter partes*.

⁶⁷ This is by no means a new tension. On a possible common ground from an anglo-saxon legal perspective, *see e.g.* the discussion by Howard-Ellis in 1938 on “where naturalists and positivists meet”: “[T]he positivists held that equity must not be entirely excluded in the science of international law, while naturalists admit that the body of acknowledged rules and customs is the only indication of what has been done so far to apply their imagined standards of right, and that such standards must therefore, to some extent, be conceived in terms of what already exists and the possibilities to which its existence points. The two, therefore, may often agree in practice that existing law should be, so far as possible,

beyond the sources codified in the Statute. The latter, on the other hand, would point to the fact that the enumeration of sources in the Statute is a rather old one considering that it was first codified in Article 38 of the Statute of the Permanent Court of International Justice in 1920. While not contesting that the provision contains sources of international law, progressive international law scholars may claim that this list is not exhaustive, and that, for instance, acts and regulations by international organizations may be additional sources.⁶⁸

However, we must remain somewhat cautious towards an approach that would tend to equate moral imperatives and rather personal desires with law, without any substantial *legal* evidence supporting the claim.⁶⁹ Some authors are more concerned about this alleged “enthusiastic legal literature”⁷⁰ and the “conjuring up” of new human rights⁷¹ while others see it differently. Ramcharan puts it like this:

“The breach of international law concerned with the promotion and protection of human rights must, therefore, of necessity, be in the forefront of the discipline, charting new courses, breaking new ground, and establishing new models and methods [...] His more traditionalist colleagues will invariably exaspate him by consistent assertions that “this has not yet been established” or that “that is not part of international law”. This is to be expected, but it must not deter the international human rights lawyer. For he is rooted in the most solid of bases for determining the validity of international norms: the universal conscience of the world's peoples, which is by far the best form of the “general recognition” so often reiterated as the basis of obligation in modern international law.”⁷²

I think it necessary, in this discussion, to distinguish the roles of legal practitioners having a responsibility to *apply* law in legal institutions, *e.g.* civil servants such as judges, from legal scholars. Although even the former group may have some leeway depending on the legal system and the rules and principles involved, the role of legal research must be more broad and include law-making processes and norm-emergence. What seems to be a root of some confusion is probably the special characteristic of human rights as hybrids between 'hard' legal rules and 'soft' aspirations. This makes aspirational aspects ingrained in almost every discourse on human rights.

construed in the light of whatever ethical, metaphysical or other standards may be considered the most equitable, but that it is not feasible to contend that such standards override the accepted rules where the latter are clear.”, C. Howard-Ellis, *The Origin and Working of the League of Nations*, pp. 276-277.

⁶⁸ R. Falk, 'On the Quasi-Legislative Competence of the General Assembly', 60 *American Journal of International Law* 782 (1966); and J. Castaneda, *Legal Effects of United Nations Resolutions*.

⁶⁹ A special problem is the 'making' of law through alleged logical deduction from other law or from morals, *e.g.* C. Bassiouni and E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, pp. 49-50. In this regard, although the distinction between *de lege lata* and *de lege ferenda* seems just a bit too comfortably precise, it may nonetheless provide a necessary distinction in such cases of pure deduction.

⁷⁰ I. Brownlie, 'The Rights of Peoples in Modern International Law', in J. Crawford (ed.), *The Rights of Peoples*, p. 1.

⁷¹ P. Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *American Journal of International Law* 607 (1984).

⁷² B.G. Ramcharan, 'The Concept and Dimensions of the Right to Life', in B.G. Ramcharan (ed.), *The Right to Life in International Law* (1983), p. 1.

This, of course, does not solve our problem of connecting our analysis to legal sources. But it shows that the interpretation of what is deemed relevant legal material may vary depending on your role as a legal practitioner. This permits a more flexible approach for the legal scholar vis-à-vis the interpretation of legal material than, for example a judge. This *problematique* is especially prevalent in international law where the distinctions between legislative, judicial and executive branches are vague, and where there is an obscurity in the space between the hard core of positive law, *e.g.* operative conventional international law, and international politics. This obscurity is perhaps best manifested in the concept of customary international law.

In our case the problem of sources is *a priori* rather undramatic since we base the study on already existing civil and political rights in international conventions. In this regard decisions of international courts will be used as an indication as to the development of the interpretations of these rules, “as subsidiary means for the determination of rules of law”.

What complicates matters, though, is the influence by various international environmental rules and standards on these interpretations. These rules and standards are often in the ambiguous sphere somewhere between 'black letter law' and mere recommendations. It is here that the dichotomies 'binding – non-binding' or 'law – not-law' become somewhat obscure. Questions that have not yet been objects of judicial decision-making in international fora in this ambiguous sphere between soft- and hard-law can therefore provide an open field where different interpretations by legal scholars may provide direction.

In the theory on norm emergence we have seen how important international actors can be for the development of norms on the international stage. Since international law, and in particular international human rights law, as will be seen below, are not as clear cut as domestic law due to the lack of clearly delimited legislative authority and the importance of interpretation for the clarification of international law, international actors with the task of its interpretation become important objects of examination. While, obviously, the acts and omissions of states as actors in the norm developing processes in international law are crucial for its understanding, judges in international tribunals and international legal scholars have a, perhaps, more important role for the clarification of international law than their likes in the domestic setting. They are therefore capable of developing international law and sanctioned for its clarifying in the traditional account of sources of international law in Article 38 of the ICJ Statute.

2.2.5 Dialectic of soft and hard law in law making processes

In Tuori's account of the legal system as a combination of legal norms and practices we have seen how concepts such as 'validity' in logic and in the legal discourse, have been used to attempt to delimit the legal order at the one hand, and legal practices at the other hand, at least at the surface level of law. Additionally, in the theory on valid sources of international law as the

distinguish between law and non-law, traditional scholars of international law have limited the legal field to what is perceived as relevant.⁷³

This appears to suggest that international law as a positive system can be rather clearly delimited. In reaction to this apparent positivism, in the field of international law, scholars have suggested not only that rules and principles in international law are arranged hierarchically, but also that the legal character of rules can be graded. This discussion on the relative normativity⁷⁴ of international legal rules have inspired proponents of a broader theory of international law to include, not only apparent positive law termed 'hard law', but also rules and principles of less binding force, but still relevant in a legal decision-making, called 'soft law'.⁷⁵

My claim is that human rights, in its character as both legal rules in a positivist meaning – human right *law*, and in its character as aspirations and moral imperatives in political and social discourses outside of the strict legal system, in short – human rights, gives it a rather special and dynamic potential. In this regard, human rights are not just positive law, but also “provide a basis for criticism of positive law”.⁷⁶ It is argued that this dynamic potential, which is partly due to the typical vagueness of legal rules in human rights law, allows for a broader space of possible interpretations. This spacial openness, invites not only legal practitioners, but also affected members of the society (legal practices *sensu largo*) to participate as members in discourses on human rights.⁷⁷ I hold that this interplay between

⁷³ One traditional answer to the question of the threshold criteria of international law has been the claim that a normative proposal is legal only if it is capable of being applied in an international tribunal. This answer has been rejected by the ICJ in its South-West Africa case where it held that “[i]n the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception”, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase*, 18 July 1966, ICJ, ICJ Reports 1966, 44, para. 86.

⁷⁴ For the discussion which was especially intense in the 1980s see e.g. P. Dupuy, 'Soft Law and the International Law of the Environment', 12 *Michigan Journal of International Law* 420 (1991); R.R. Baxter, 'International Law in "Her Infinite Variety"', 29 *International & Comparative Law Quarterly* 549 (1980); P. Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* 413 (1983). Gruchalla-Wesierski describes soft law as “a convenient shorthand to include vague legal norms”, T. Gruchalla-Wesierski, 'A Framework for Understanding Soft Law', 30 *McGill Law Journal* 44 (1984).

⁷⁵ 'Soft law' can take different forms, *inter alia* international conferences, declarations, resolutions, guidelines, codes of conduct, standards adopted by international organs, and potentially standards developed by NGOs and professional associations. The legal debates on soft law and hard law can be seen to reflect the increasing reliance in international affairs on other mechanisms than treaty-making as means of international cooperation. This trend is, in turn, due to the increasing difficulties to reach consensus in a world of nearly 200 states, as compared to a world of at least 72 states in 1945.

⁷⁶ T. Campbell, 'Moral Dimensions of Human Rights', in T. Campbell and S. Miller (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, p. 17.

⁷⁷ Bianchi has argued that international civil networks and NGOs might “create our understanding of human rights [...] independently of the existence of binding obligations under international law”, A. Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors', in G. Teubner (ed.), *Global Law without a State*, p. 201. In the field of environmental protection, Mason has argued that actors harming the environment assume a 'communicative burden', M. Mason, *supra* note 3, p. 29. It may be argued that such

'soft law' and 'hard law', policy and law, is a key to understanding the norm-making processes in international human rights law and international environmental law.⁷⁸

Furthermore, as pointed out above, the obscurity of the legal character of certain alleged rules provides a certain sphere between the poles hard- and soft-law, allowing for legal practitioners *sensu stricto* to engage in debate in specific cases. It is this uncertainty in the interlinkages between international human rights law, international environmental law and corporate action that is explored in this thesis.⁷⁹

In this respect one should not forget the rather unexpected type of cases international human rights courts have considered throughout their history and that few people (legal practitioners *sensu largo* and *sensu stricto*) expected some of the interpretations of rights by these courts. This can be seen as evidence of the dynamic character of international human rights law and that the development of international law, despite its slowness, is capable of incorporating norms not previously regarded as given within the legal order.

communicative burden functions as a trigger for processes of moral discourses that touch upon the sphere of uncertainty inside the hard-law – soft-law polarity.

⁷⁸ It should be noted that the character of a rule as legal or non-legal not necessarily means that a legal rule steers state behavior better than a non-legal rule. Hence, the goal of soft law instruments does not in every case have to lead to new *legal* rules. This is part of the attraction of soft law in affecting international actors, see e.g. U. Beyerlin, *supra* note 63, p. 438.

⁷⁹ This interaction, it has been noted, is a typical trait of post-modernity, “where a complex alchemy of extremely general norms of varying legal status and functions replaces a uniform hierarchy of first- and second-level rules.”, de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, p. 275.

3 Case law of international judicial bodies on human rights and the environment

3.1 Interlinkages between international environmental law and international human rights law

3.1.1 Why international human rights law?

Although international environmental law and international human rights law are two different fields of international law, this fact does not mean that the two bodies of law are entirely separated. If international law is to be understood as a coherent legal system there must be legal relationships between the two. It has been stressed that the other possibility, that of self-contained régimes, bears the risk of fragmenting the whole system of international law.⁸⁰ Hence, there is an argument for integration of the two bodies of law in order to maintain systemic coherence. This integrative approach will be further developed below.

On a more practical level one may ask the question why international human rights law should address environmental issues at all. Or, what is the added value of human rights? Without going into depth on the issue it must firstly be underlined that environmental degradation by its very nature does not respect national boundaries. As explained above, these problems, strongly connected with the industrial developments of modern society, are no longer merely of a bilateral transnational nature.⁸¹ Environmental threats of today are diverse. While global warming, naturally, is a global problem with causes and effects being dispersed around the world, local environmental problems, with cause and effect in the same state, remain.

With effects that may be as devastating as many traditional human rights violations, it is hard to argue why these should be excluded from the human rights system. Addressing environmental threats through human rights raises the issue to a higher level, providing more absolute entitlements and would therefore better attain the purposes of international environmental law.⁸²

⁸⁰ See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006 [hereinafter *Fragmentation of International Law*, Report of the Study Group ILC].

⁸¹ P. Sands, *Principles of International Environmental Law*, p. 12.

⁸² M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview', in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection*, p. 21; D. Shelton, 'Draft Paper on: Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration', p. 3, <www.unep.org/>

Furthermore, a human rights approach to environmental protection fills a gap in international environmental law as it addresses threats on human life and dignity stemming from acts or omissions of an individual's own state.⁸³ The more pragmatic response to the question would be that, falling short of other mechanisms to enforce international environmental law, those who suffer from environmental degradation are at least provided with some redress within the framework of human rights law.

Another argument for using international human rights law could be that it creates synergistic effects for political activism for environmental protection more generally, as human rights may easier attract attention than a “highly technical, bureaucratic regulation expressed in legalese.”⁸⁴

Another argument that has been expressed as an advantage of a human rights approach to environmental threats is that human rights “can provide the conceptual link to bring local, national, and international issues within the same frame of legal judgment.”⁸⁵

The character of human rights as rather vague, further, enables their interpretation to change with the developments of different issues in society. Such a dynamic approach, it has been claimed, would be an added value of international human rights law to environmental protection.⁸⁶

What would then the other side of the coin look like, now when we have seen some of the potential advantages of a human rights approach to environmental threats? I am here drawing attention to six potential disadvantages. Firstly, environmental issues are often technical and complex requiring scientific expert knowledge. For example, with multiple sources of pollution and health effects in the human body that may have been produced by other factors in addition to pollution, the determination of the causal relationship would be highly challenging. To address these issues through a vaguely formulated right and by lawyers, would then be insufficient.⁸⁷

environmentalgovernance/ Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx>, visited on 20 November 2010. Merrills has similarly argued that:

“having rights is significant in at least two ways. First, if I can show that I have a moral right to, say, a clean environment I have something which has to be taken into account in any discussion of the moral aspects of environmental policy. I am, so to speak, a player in the morality game. Secondly, and perhaps more important, such is the value that attaches to rights that if I am a rights-holder I am not just a player, but a serious, indeed a privileged player in the game. That is to say my right will tend to pre-empt not only preferences and other non-moral considerations, but other moral considerations as well. What is true of moral rights is true a fortiori of legal rights. Thus, having environmental rights incorporated in a constitution or recognised in international law cannot guarantee that the putative rights-holder will be successful in every dispute in which the right may be relevant, but certainly creates a situation in which not only must the right always be considered, but very good reasons will be needed for denying it[s] effect.”, J.G. Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects', in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection*, pp. 25-27.

⁸³ L.E. Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source', 12 *Colorado Journal of International Environmental Law and Policy* (2001), p. 9.

⁸⁴ M. Anderson, *supra* note 82, p. 22.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* See also the dissenting opinion of Judges Khasawneh and Simma in the *Pulp Mills* case in the ICJ, and the separate opinion of Judge Trindade in the same case, where the

Secondly, what we should be concerned about is the structural societal problems that cause environmental degradation. By using a rights approach through judicial means you would instead treat the symptoms. What is needed is therefore the development of a more ecologically sustainable society through political processes.⁸⁸

Thirdly, there may be a risk that procedural environmental human rights merely benefit affluent groups while the most vulnerable are left out.

Fourth, other legal remedies, such as tort law, may be better suited to environmental issues. A focus on human rights could then avert attention from these other remedies.

Fifth, environmental human rights may be counterproductive as they risk to polarize and politicize. This could exacerbate polluter and government resistance to solve environmental problems.⁸⁹

Sixth, as mentioned above, a human rights approach is inherently anthropocentric, thus leaving the protection of the vast nature irrelevant in so far as it is found lacking human impact.

I am not in this section analyzing these alleged advantages and disadvantages further. Instead, they will be touched upon in the analytical section in the light of the international cases investigated.

3.1.2 An integrative approach to international human rights law and international environmental law

There are several different ways of approaching environmental protection from a human rights perspective. (1) One approach would be to mobilize existing rights for environmental purposes. This, more modest approach, sees existing rights as sufficient, but call on a more effective enforcement. (2) Another approach prefers a “reinterpretation of existing rights to include environmental concerns”. This is sometimes also referred to as the 'greening of human rights'.⁹⁰ (3) A third approach would be for international environmental law to “incorporate and utilize those human rights guarantees deemed necessary or important to ensuring effective environmental

judges, *inter alia*, criticized the way the majority dealt with the relationship between experts and the judges, *Joint dissenting opinion of Judges Al-Khasawneh and Simma, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>>, visited on 20 November 2010; *Separate opinion of Judge Cançado Trindade, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>>, visited on 20 November 2010.

⁸⁸ M. Anderson, *supra* note 82, p. 22.

⁸⁹ *Ibid.*, p. 23. Connected to this argument is the inherent problem of individual human rights jurisprudence in restricting the relief only to individuals identified as victims, whereas the underlying problems of the specific dispute may be a societal problem affecting a larger collective, *see e.g.* P. Birnie, *et al.*, *supra* note 2, p. 301.

⁹⁰ M. Anderson, *supra* note 82, p. 4.

protection”.⁹¹ (4) Yet another approach would be to create a new human right to the environment.⁹² (5) Another perspective that has been mentioned is for international environmental law to include environmental and human rights based duties of individuals.⁹³

What is advocated here is the second alternative, an integrative approach where elements from international environmental law are integrated into human rights law through international judicial bodies. While the mobilization of existing rights may do some help in pursuing environmental protection, I would be of the opinion that there is a need for a more active reinterpretation if we are to achieve a more effective environmental protection. In any case, the distinction between these two approaches may not be watertight. At the same time, evidence of an emerging independent environmental human right⁹⁴ may as well reinforce the greening of existing human rights. Hence, while the focus of the thesis is the enforcement of international environmental law through internationally justiciable civil and political rights, there are no watertight distinctions to other human rights approaches to environmental issues.

The legal basis of such an integrative interpretation lays in its formulation in article 31(3)(c) VCLT, which provides that account should be taken of any “relevant rules of international law applicable in the relations between the parties”⁹⁵. However, the legal implications of this provision on systemic integration on international dispute settlement remains somewhat uncertain. International courts have rather seldom made explicit reference to this interpretive rule, and one author found a “general reluctance” to refer to the rule in international adjudication.⁹⁶ An early case making reference to the principle is the Arbitral Tribunal in the *George Pinson* case where the tribunal noted that “[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way.”⁹⁷ In later years the ICJ has considered that treaties are to be “interpreted and applied

⁹¹ D. Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?', 35 *Denver Journal of International Law & Policy* (2006-2007) 129, p. 130.

⁹² M. Anderson, *supra* note 82, p. 4.

⁹³ D. Shelton, *supra* note 91, p. 130.

⁹⁴ Authors disagree on the existence of an emerging, or already formed, independent and international environmental human right, *see e.g.* J. Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law', 25 *Columbia Journal of Environmental Law* 283 (2000), p. 339; L.E. Rodriguez-Rivera, *supra* note 83; D. Shelton, 'Environmental Rights', in P. Alston (ed.), *Peoples' Rights* (2001), p. 257; A. Palmer, 'An International Right to Environment: A New Generation?', 15 *Interights Bulletin* (2006), p. 142; P. Alston, 'Peoples' Rights: Their Rise and Fall' in P. Alston (ed), *Peoples' Rights* (2001), p. 281.

⁹⁵ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force 27 January 1970.

⁹⁶ P. Sands, 'Treaty, Custom and the Cross-fertilization of International Law' 1 *Yale Human Rights and Development Law Journal* 85 (1998), p. 95.

⁹⁷ *Georges Pinson* case (*France v. United Mexican States*) Award of 13 April 1928, UNRIAA, vol. V, p. 422.

within the framework of the entire legal system prevailing at the time of the interpretation”.⁹⁸

Article 31(3)(c) VCLT has to some extent re-emerged in recent international legal discourses, which is manifested *inter alia* by the interest of the ILC of the topic of fragmentation of international law⁹⁹ and the Oil Platforms case in the ICJ. In the latter case it was stated that:

“The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by [...] the 1955 Treaty.”¹⁰⁰

Nevertheless, the ICJ has limited the application of the principle to cases where such an approach find implicit or explicit support from the parties of a specific treaty, thus attesting to the understanding that only treaties of a more evolutionary character are objects of systemic integration under Article 31(3)(c) VCLT.¹⁰¹ Therefore ambitious attempts to cross-fertilize treaties and general international law have not been successful¹⁰² and it is clear that the principle is not interpreted as to rewrite treaties using general international law or other treaties. Rather, an interpretation should be made in light of relevant international law in accordance with the object and purpose of the specific treaty under examination.

A perhaps less cautious approach to the principle of systemic integration can be found in awards of international arbitral tribunals and decisions of the WTO Appellate Body. For example, in the *Southern Bluefin Tuna* cases the Arbitral Tribunal found that “it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute [...] There is frequently a parallelism of treaties [...] The universal range of

⁹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, ICJ, Advisory Opinion, ICJ Reports 1971, 16, para. 31; and *Aegean Sea Continental Shelf (Greece v. Turkey)*, 19 December 1978, ICJ, ICJ Reports 1978, 3., paras. 32-33.

⁹⁹ *Fragmentation of International Law, Report of the Study Group ILC, supra* note 80, especially Section F.

¹⁰⁰ *Oil Platforms (Iran v. United States of America)*, 12 December 1996, ICJ, 42 *International Legal Materials* 1334 (2003), para. 41. For an analysis of the Court's reference to systemic integration, see C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International & Comparative Law Quarterly* 279 (2005).

¹⁰¹ An articulation of this understanding is found in the Separate Opinion of Judge Bedjaoui in the *Gabčíkovo-Nagymaros* case: “Une interprétation d'un traité qui viendrait à substituer un tout autre droit à celui qui le régissait au moment de sa conclusion constituerait une révision détournée. 'Interprétation' n'est pas 'substitution' à un texte négocié et agréé d'un texte tout autre, ni négocié, ni convenu. Sans qu'il faille renoncer à l'interprétation évolutive' qui peut être utile et même nécessaire dans hypothèses très limitées, il convient de dire qu'elle ne peut pas être appliquée automatiquement à n'importe quelle affaire.”, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997, 7, Separate Opinion of Judge Bedjaoui, para. 12.

¹⁰² See e.g. the unsuccessful attempt by Ireland in the MOX Plant Arbitration to rewrite UNCLOS, *Memorial of Ireland in the MOX Plant Arbitration (Ireland v. the United Kingdom)*, 26 July 2002, Permanent Court of Arbitration, <www.pca-cpa.org/showpage.asp?pag_id=1148>, visited on 20 November 2010.

international legal obligations benefits from a process of accretion and accumulation”.¹⁰³ The WTO Appellate Body has similarly in the *Shrimp-Turtle* case used international environmental law to interpret the meaning of “exhaustible natural resources” in the 1947 GATT Agreement.¹⁰⁴

International human rights treaties, however, are widely understood as 'living instruments' that must be capable of change and develop as society and general law change. Otherwise, the relevance of human rights law could falter, since its fundamental underlying object is the effective protection of human dignity, disregarding the means used to violate it.¹⁰⁵ Express use of Article 31(3)(c) VCLT has, for example, been made in the ECtHR in the case of *Golder v. the United Kingdom*¹⁰⁶ where the Court found that the general principle of law on the right to access to civil courts could be used for the interpretation of Article 6 of the ECHR. Reference to the principle of systemic integration was also made in *Loizidou v. Turkey*¹⁰⁷ where the ECtHR found that the Turkish Republic of Northern Cyprus was not a state under international law since UN Security Council resolutions could be relied upon as evidence of state practice. In the cases of *Al-Adsani v. the United Kingdom*, *Fogarty v. the United Kingdom*, and *McElhinney v. Ireland*¹⁰⁸, the same Court held that international law on state immunity could be used in restricting the rights under Article 6 of the Convention. The Court stated that:

“The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account [...] The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.”¹⁰⁹

This approach also raises the question of the integration of human rights law *inter se*. This latter principle has been articulated in international declarations such as the Proclamation of Teheran¹¹⁰ and the Vienna Declaration and Programme of Action. In the latter it is stated that:

¹⁰³ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, 4 August 2000, International Tribunal for the Law of the Sea, Award on Jurisdiction and Admissibility, 39 *International Legal Materials* 1359 (2000), para. 52.

¹⁰⁴ *United States: Import Prohibition of certain Shrimp and Shrimp Products-Report of the Appellate Body*, 12 Oct 1998, WTO Appellate body, UN Doc WT/DS58/AB/R (1999), 38 *International Legal Materials* 118.

¹⁰⁵ This principle is sometimes referred to as the *effet utile* of human rights treaties, see M.K. Yasseen, 'L'Effet Utile: Le Principe Ut Res Magis Valeat Quam Pereat', in *L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, in *Collected courses of The Hague Academy of International Law: Vol. 151 (1976/III)*, pp. 71-77.

¹⁰⁶ *Golder v. the United Kingdom*, 21 February 1975, ECtHR, Application no. 4451/70.

¹⁰⁷ *Loizidou v. Turkey*, 23 March 1995, ECtHR, Application no. 15318/89.

¹⁰⁸ *Al-Adsani v. the United Kingdom*, 21 November 2001, ECtHR, Application no. 35763/9; *Fogarty v. the United Kingdom*, 21 November 2001, ECtHR, Application no. 37112/97; and *McElhinney v. Ireland*, 21 November 2001, ECtHR, Application no. 31253/96.

¹⁰⁹ *Al-Adsani v. the United Kingdom*, paras 55-6. See also: *Fogarty v. the United Kingdom*, paras 35-6; and *McElhinney v. Ireland*, paras 36-7.

¹¹⁰ Paragraph 13 of The Teheran Proclamation adopted by the International Conference on Human Rights at Teheran on 13 May 1968 contains the following: “Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights

“Human rights are [...] indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis”.¹¹¹

This integration of international civil and political rights with economic, social and cultural rights provides us with the possibility to analyze international environmental law, not only as contingent upon civil and political rights, but also as parts of ESC-rights. Nonetheless is the present study limited to the jurisdiction of international judicial bodies, of which most rights are formulated as civil and political rights. However, if all human rights are truly indivisible, interdependent and interrelated in a legal sense, there is reason to believe that not only the rights which an international court has explicit jurisdiction over would be the object of its jurisprudence, but also so called second and third generation rights.¹¹² To what extent international judicial bodies have used such an integrative approach to further environmental needs within a human rights framework will be analyzed below.

3.1.3 Conceptual interlinkages between international human rights law and international environmental law

Environmental issues have the potential of touching upon a range of specific human rights, and *vice versa*. Although their potentially mutual reinforcement is relevant for the impact of environmental law on human rights, the existence of human rights principles in environmental instruments is not the main focus of this thesis.¹¹³

without the enjoyment of economic, social and cultural rights is impossible.” It should be noted that the articulation of the indivisibility of all human rights have been made since the very beginnings of the drafting of the two international covenants, *see* General Assembly Resolution 421 (V) from 1950, *Draft International Covenant on Human Rights and the measures of implementation: future work of the Commission on Human Rights*: “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and independent”, “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man”. This was reiterated in 1952 in a General Assembly Resolution 543 (VI), *Draft Covenant on Human Rights and Draft Measures of Implementation*. The principle of indivisibility and interdependence has been reiterated in numerous General Assembly resolutions including 40/114 of 13 December 1985, 41/117 of 4 December 1986, 42/102 of 7 December 1987, 43/113 of 8 December 1988, and 60/149 of 16 December 2005.

¹¹¹ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF.157/23, Section 1, para. 5.

¹¹² For a study on the integration of social and economic rights under the ECHR *see* I.E. Koch, *Human Rights as Indivisible Rights*. On the issue of the relationship between the constituting instrument of an international tribunal and general international law, *see* J. Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*, pp. 460-463.

¹¹³ For examples *see e.g.* P. Sands, *supra* note 81, p. 294; P. Birnie *et al.*, *supra* note 2, p. 271.

While the relationship between environmental protection and specific human rights will be analyzed in greater detail below, I am here presenting some basic conceptual relationships with specific rights.

An environmental degradation that threatens human life and dignity can be perceived as a threat to the precondition for the possibility of the enjoyment of all human rights. In this regard, reference is not seldom made to the right to life.¹¹⁴ In an oft-quoted separate opinion in the *Gabčíkovo-Nagymaros* judgment of the ICJ Vice-President Weeramantry put it like this:

“[T]he protection of the environment is [...] a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”¹¹⁵

Ramacharan more directly argues that a right to environment is implicit in the right to life and that states therefore have an obligation “to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings”.¹¹⁶ The fundamental right to life, if understood in a broad meaning, illustrates the indivisibility and interrelatedness of all human rights, according to Trindade. He argues that two parts of the right can be identified, the right not to be deprived of your life (right to life), and a right to have basic means of subsistence and a decent standard of life (right of living). While the former can be said to belong to civil and political rights, the latter is rather based on ESC-rights.¹¹⁷

Since our lives are so dependent on the environment, we are even a part of the ecological system itself, the threat of degradation of the environment has the potential of affecting the very dignified existence that is the underlying purpose of human rights. Apart from the right to life, several other human rights have been mentioned as having a close link to environmental threats.

These rights include ESC-rights such as the right to health, the right to food, the right to water, the right to an adequate standard of living, the right

¹¹⁴ On the right to life, Przetacznik has noted that “the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights.”, ‘The Right to Life as a Basic Human Right’, 9 *Human Rights Journal* 589 (1976), p. 603.

¹¹⁵ *Separate Opinion of Vice-President Weeramantry, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25 September 1997, ICJ, ICJ Reports 1997, 7, para. 92.

¹¹⁶ B.G. Ramcharan, *supra* note 72, p. 13. Similarly, K. Toepfler, Executive Director of UNEP, suggests that “[t]he fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture.”, United Nations Environment Programme, *Living in a Pollution-Free World a Basic Human Right*, UNEP News Release 01/49, 27 April 2001, <www.unep.org/Documents.Multilingual/Default.asp?DocumentID=197&ArticleID=2819&l=en>, visited on 20 November 2010.

¹¹⁷ C. Trindade, ‘The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change’, in E. Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions*, p. 272.

to housing, and cultural rights. On the right to health, including “environmental and industrial hygiene”, in Article 12 of the ICESCR¹¹⁸, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 14 states that this right is:

“extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions”¹¹⁹ and “the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”¹²⁰

On the right to food, the CESCR has in its General Comment 12 included the right to be free from adverse substances and contamination.¹²¹ The Committee has also interpreted the right to housing to include freedom from habitation that threatens health and structural hazards.¹²²

Except for the right to life, civil and political rights affected¹²³ include the right to be free from cruel, inhuman or degrading treatment, the right to private and family life, property rights, the right to be free from discrimination, and freedom of expression. Relevant civil and political rights also include what traditionally is referred to as procedural rights, such as the right to a fair trial and the right to an effective remedy.

It is not uncommon among commentators to distinguish between substantive and procedural environmental rights. While attempts have been made to define a substantive environmental human right of a certain quality, such as a healthy, decent, safe, clean, secure or satisfactory environment *in abstracto*¹²⁴, this study aims at identifying elements of a substantive right

¹¹⁸ International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, entered into force on 3 January 1976.

¹¹⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)*, UN Doc E/C.12/2000/4 (2000), para. 11.

¹²⁰ *Ibid.*, para. 15. The General Comment furthermore refers to Principle 1 of the Stockholm Declaration, Principle 1 of the Rio Declaration and Article 10 of the San Salvador Protocol to the American Convention on Human Rights.

¹²¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)*, UN Doc E/C.12/1999/5 (1999), para. 10.

¹²² General Comment No 4: *The Right to Adequate Housing (Art 4)*, Committee on Economic, Social and Cultural Rights, 6th sess, UN Doc E/1992/23 (1991), para. 8(d).

¹²³ However, it is important to maintain the distinction between, at the one hand, the fact that environmental issues may have direct and indirect implications for the *enjoyment* of human rights, and at the other hand, environmental degradation as a violation of human rights, as a statement of international law. This point was made by the United States in its submission to the OHCHR pursuant to Human Rights Council resolution 7/23 on the relationship between climate change and human rights, *Observations by the United States of America on the relationship between climate change and human rights*, para. 14, <www2.ohchr.org/english/issues/climatechange/submissions.htm>, visited on 20 November 2010. Despite the seemingly obvious statement that facts and law are separated, this issue is far from clear cut. This is not the place however to analyze the theoretical aspects of this relationship.

¹²⁴ See e.g. M. Thorne, 'Establishing Environment As a Human Right', 19 *Denver Journal of International Law & Policy* 301 (1990-1991). See also D. Shelton, *supra* note 82, p. 3 *et seq.*

that international tribunals are in the process of articulating. While we in this study search for a substantive right, that does not mean the total exclusion of procedural rights. As will be seen below, there is a strong interrelatedness between the two and they may be mutually reinforcing.¹²⁵ Therefore, procedural aspects of rights of a more substantive character will be taken into account.

Apart from the international covenants, other global human rights treaties have recognized the link between environmental concerns and human rights. The Convention on the Rights of the Child in Article 24 on the right to health, includes an obligation:

“(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”¹²⁶

The Committee on the Elimination of Discrimination against Women has also included environmental concerns in its interpretation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹²⁷

Furthermore, what has been called the third generation of human rights¹²⁸, may as well be relevant. Apart from the possibility of a right to a healthy environment itself being such a right, the right to sustainable development,

¹²⁵ In their joint dissenting opinion in the *Pulp Mills* case, Judges Al-Khasawneh and Simma elaborate on this interrelatedness: “[I]n matters related to the use of shared natural resources and the possibility of transboundary harm, the most notable feature that one observes is the extreme elasticity and generality of the substantive principles involved. Permanent sovereignty over natural resources, equitable and rational utilization of these resources, the duty not to cause significant or appreciable harm, the principle of sustainable development, etc., all reflect this generality. The problem is further compounded by the fact that these principles are frequently, where there is a dispute, in a state of tension with each other. Clearly in such situations, respect for procedural obligations assumes considerable importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached. Thus, the conclusion whereby non-compliance with the pertinent procedural obligations has eventually had no effect on compliance with the substantive obligations is a proposition that cannot be easily accepted.”, *Joint dissenting opinion of Judges Al-Khasawneh and Simma, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *supra* note. 87. See also D. Shelton, *supra* note 82, pp. 6,16.

¹²⁶ Convention on the Rights of the Child, New York, 20 November 1989, entered into force 2 September 1990. The Committee on the Rights of the Child has emphasized this obligation in respect of air pollution and water contamination in its *Concluding Observations of the Committee on the Rights of the Child, South Africa*, UN Doc. CRC/C/15/Add.122 (2000); and *Concluding Observations of the Committee on the Rights of the Child, Jordan*, UN Doc. CRC/C/15/Add.125 (2000).

¹²⁷ Committee on the Elimination of Discrimination against Women, *Combined Fourth and Fifth Periodic Reports of Romania under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/ROM/4-5 (2000).

¹²⁸ K. Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11, Paris, United Nations Educational, Scientific, and Cultural Organization.

self-determination¹²⁹, indigenous rights, and the right to inter-generational equity are often mentioned as having a clear environmental bearing. It should be noted, however, that the binding character of these rights as legal international human rights is contested.¹³⁰

In addition to these three generations of human rights, there are other international rights and obligations that comes within the purview of a human rights approach to environmental threats. Concepts such as climate refugees and human security have made us aware that the problem of environmental threats reaches into institutions not earlier associated with it, such as refugee law, and the Security Council dealing with environmental threats to international peace and security.

The fact that this environmental *problematique* has spread over fields of law and politics not traditionally perceived as having anything to do with it evidences its borderless character. On the specific level of human rights, this process is visible through the somewhat unexpected greening of rights, such as the right to self-determination and the right to private life, previously seen as irrelevant for the issue.

3.1.4 Articulation of interlinkages between environmental rights and human rights in the United Nations

It was not until 1968 that environmental threats in a human rights perspective was articulated in an international political body when the UN General Assembly recognized a link between man's environment and the enjoyment of basic rights.¹³¹ The major breakthrough, however, came with the United Nations Conference on the Human Environment held in Stockholm 1972. The resulting declaration held that “Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.”¹³², and in Principle 1 stated that:

”Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

¹²⁹ The right to self-determination has been claimed by small island states risking disappearance due to higher sea levels as a result of global warming, *see e.g. Submission of the Maldives to the Office of the UN High Commissioner for Human Rights* pursuant to Human Rights Council Resolution 7/23 'Human Rights and Climate Change', 25th September 2008, <www2.ohchr.org/english/issues/climatechange/submissions.htm>, visited on 20 November 2010.

¹³⁰ *See e.g.* G. Handl, 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View', in C. Trindade (ed.), *Human Rights, Sustainable Development and Environmental Protection*, pp. 121-122; and P. Alston, *supra* note 94.

¹³¹ United Nations General Assembly resolution 2398 (XXIII) of 3 December 1968, *Problems of the human environment*.

¹³² *Declaration of Principles for the Preservation and Enhancement of the Human Environment (Stockholm Declaration)*, adopted at the United Nations Conference on the Human Environment in Stockholm on 16 June 1972, Preamble, para. 1.

It should be noted that more explicit references to a right to a "healthful and safe environment", and a "safe, healthy and wholesome environment" were proposed by some states but opposed by various states.¹³³ The resulting formulation therefore represents the basic level of compromise among states at the time.

In 1983, the UN General Assembly established the World Commission on Environment and Development, and suggested the Commission to study, *inter alia*, the interrelationship between society and the environment¹³⁴, with the overarching objective of "achieving sustainable development to the year 2000 and beyond".¹³⁵ The resulting report, *Our Common Future*, also called the Brundtland Report from its chair Gro Harlem Brundtland, explored rights and obligations relating to environmental protection and in an annex proposed several legal principles. The first principle, resembling Principle 1 of the Stockholm Declaration, stated that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being".¹³⁶

At the UN Conference on Environment and Development in Rio de Janeiro in 1992, a number of states once again proposed an inclusion of the right to environment in the final declaration.¹³⁷ As 20 years earlier, however, there were no unanimity on this issue and the resulting Rio Declaration contains even vaguer formulations on the interlinkage between human rights and the environment than the Stockholm Declaration.¹³⁸ Principle 1 of the Rio Declaration states that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Nevertheless, the Declaration indicated some steps forward, especially concerning procedural environmental rights. In this regard Principle 10 of the Declaration proclaims that

¹³³ Reproduced in L. B. Sohn, 'The Stockholm Declaration on the Human Environment', 14 *Harvard International Law Journal* 423 (1973), pp. 452-453.

¹³⁴ United Nations General Assembly resolution A/RES/38/161 of 19 December 1983, *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*.

¹³⁵ *Ibid.*, para. 8(a).

¹³⁶ Annex to United Nations General Assembly resolution 42/187 of 11 December 1987, *Report of the World Commission on Environment and Development*.

¹³⁷ See *Preparatory Committee for the United Nations Conference on Environment and Development, Principles on General Rights and Obligations*, U.N. Doc A/CONF. 151/PC/WG.III/L.8/Rev. 1 (1991) at paras. 8-10. Peru and Canada proposed an *Earth Charter*. The proposal by Peru included "the right of every individual to enjoy a healthy and balanced environment." Preparatory Committee for the United Nations Conference on Environment and Development, *Principles on General Rights and Obligations. Letter Dated 17 July 1991 from the Permanent Representative of Peru to the United Nations Office at Geneva, Addressed to the Secretary General of the United Nations Conference on Environment and Development, Annex, Suggestions and Points for the Development of the Earth Charter*, U.N. Doc A/CONF. 151/PC/83 (1991). In the Canadian proposal the preamble declared "that everyone has the right to live in an environment capable of assuring his health and well-being." See *Preparatory Committee for the United Nations Conference on Environment and Development*, UN Doc A/CONF. 151/PC/WG.III/L.5 (1991).

¹³⁸ For an analysis see e.g. D. Shelton, 'What Happened in Rio to Human Rights?', 3 *Yearbook of International Environmental Law* 75 (1992).

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹³⁹

In 1989 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities¹⁴⁰ initiated a work on a study on the relationship between human rights and the environment, led by Special Rapporteur Fatma Zohra Ksentini. This process included three reports by the Special Rapporteur¹⁴¹ and a resolution in 1990 of the Commission on Human Rights recognizing the link between human rights and environmental protection.¹⁴² In her final report, Mrs. Ksentini asserted that formulations of a human right to environment in international instruments such as the Stockholm Declaration, the African Charter, the Protocol of San Salvador and national constitutions “revealed universal acceptance of the environmental rights recognised at the national, regional and international levels”.¹⁴³ In an annex to the final report, the Special Rapporteur proclaimed a number of *Draft Principles on Human Rights and the Environment*. Principle 2 stated that “All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.” Despite these assertions, neither the *Draft Principles* nor the recommendations in the final report were adopted by the Human Rights Commission.¹⁴⁴

¹³⁹ Principle 10, *Declaration on Environment and Development (Rio Declaration)*, adopted at the United Nations Conference on Environment and Development, in Rio de Janeiro on 14 June 1992, UN Doc.A/CONF.151/26/Rev.1.

¹⁴⁰ The Sub-Commission on Prevention of Discrimination and Protection of Minorities was a body of the Commission on Human Rights, which in turn was an organ under the Economic and Social Council of the UN.

¹⁴¹ Sub-Commission on Prevention of Discrimination and Protection of Minorities, F.Z. Ksentini, Special Rapporteur, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment First Progress Report*, UN Doc E/CN.4/Sub.2/1992/7 and Add.1 (1992); Sub-Commission on Prevention of Discrimination and Protection of Minorities, F.Z. Ksentini, Special Rapporteur, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment Second Progress Report*, UN Doc E/CN.4/Sub.2/1993/7 (1993); Sub-Commission on Prevention of Discrimination and Protection of Minorities, F.Z. Ksentini, Special Rapporteur, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment Final Report*, UN Doc E/CN.4/Sub.2/1994/9 (1994).

¹⁴² UN Human Rights Commission Resolution 1990/41 of 6 March 1990, “*Human rights and the environment*”.

¹⁴³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, F.Z. Ksentini, Special Rapporteur, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned: Human Rights and the Environment Final Report*, UN Doc E/CN.4/Sub.2/1994/9 (1994), para 240.

¹⁴⁴ The Commission merely *took note* of the reports, Commission on Human Rights resolution 1995/14 of 24 February 1995, *Human rights and the environment*, UN Doc

The inclusion of procedural rights in the Rio Declaration and the opposition to substantive environmental rights, such as the cool response to the Ksentini final report, suggest that the international community was increasingly willing to accept the application of procedural rights vis-à-vis environmental problems, while yet reluctant to formulate an environmental standard in human rights terms. This interpretation is further strengthened by the adoption of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, by the members of the UN Economic Commission for Europe in 1999.¹⁴⁵ While in the preamble recognizing that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself” and “that every person has the right to live in an environment adequate to his or her health and well-being”, there is no such substantive right in the articles of the convention. Instead, it is concerned with procedural environmental rights such as access to information, public participation in decision-making and access to justice.

In 1999, UNESCO and OHCHR organized an International Seminar on the Right to Environment, with participants of expert institutions from Europe, Africa and Latin America, and representatives of the UN, UNESCO, international organizations and NGOs. The seminar adopted the *Declaration of Bizkaia on the Right to Environment* which states that “Everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment”. Furthermore it called upon the UN and other international organizations to “adopt suitable measures for the recognition of this right”.¹⁴⁶

In 2002 another international conference which dealt with the relationship between human rights and the environment was held in Johannesburg – the World Summit on Sustainable Development. This conference reiterated the commitments expressed in the Stockholm and Rio Declarations and furthermore emphasized the relationship between sustainable development, economic development, social development and environmental protection.¹⁴⁷ No mention of human rights are made in the final political declaration, although references are made to human dignity.¹⁴⁸

E/CN.4/RES/1995/14. Instead, the Commission appointed another Special Rapporteur with the more limited mandate to investigate “the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, recognising the importance of these issues for life and health”: United Nations Commission on Human Rights resolution 1995/81 of 8 March 1995, *Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights*, UN Doc E/CN.4/RES/1995/81 (1995).

¹⁴⁵ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, entered into force 30 October 2001.

¹⁴⁶ United Nations Economic, Scientific, and Cultural Organisation, *Information document*, UNESCO General Conference, 30th sess., UN Doc 30 C/INF.11 (1994).

¹⁴⁷ Johannesburg Declaration on Sustainable Development, adopted at the World Summit on Sustainable Development, September 2002, UN Doc A/CONF.199/20, para. 5.

¹⁴⁸ *Ibid.*, paras. 2,18.

A series of high-level meetings on human rights and the environment were also held at the UN, including two joint expert meetings organized by UNEP and OHCHR in 2002¹⁴⁹ and 2009¹⁵⁰.

In 2008 the UN Human Rights Council adopted resolution 7/23 *Human rights and climate change* in which it requested the OHCHR to conduct a study on the relationship between human rights and climate change and encouraged states to contribute to the study.¹⁵¹ In the resulting study, the OHCHR recognized that “global warming will potentially have implications for the full range of human rights” but described the impact of a limited number of rights “which seem to relate most directly to climate change-related impacts”.¹⁵² These rights are the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing and the right to self-determination. Furthermore, the study identified women, children and indigenous people as especially vulnerable.¹⁵³ The process in the Council continued in 2009 when it adopted resolution 10/4 on *Human rights and climate change*.¹⁵⁴ In this resolution the Council reiterated the interrelationship of human rights and climate change. In the same resolution it was decided to arrange a panel discussion on the issue. Experts and delegates from states were invited to participate.¹⁵⁵ The discussion on the issue within the UN framework continues and provides important information on the perception of different actors on the international level on the *problematique* of human rights and climate change, while it at the same time raises awareness on the issue.¹⁵⁶

¹⁴⁹ Commission on Human Rights, *Promotion and Protection of Human Rights, Science and Environment, Report of the Joint OHCHR-UNEP Seminar on Human Rights and the Environment*, 22 March 2002, UN Doc E/CN.4/2002/WP.7.

¹⁵⁰ The topic of the meeting was “*The New Future of Human Rights and Environment: Moving the Global Agenda Forward*”, see <www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx>, visited on 20 November 2010.

¹⁵¹ Human Rights Council resolution 7/23 of 28 March 2008, *Human Rights and Climate Change*. The Council also took note of a call in a report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, to the General Assembly for the Council to study the impact of climate change on human rights.

¹⁵² Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, UN Doc A/HRC/10/61, para. 20. See also submissions from states, international organizations and NGOs at <<http://www2.ohchr.org/english/issues/climatechange/submissions.htm>>, visited on 20 November 2010.

¹⁵³ *Ibid.*, pp. 15-17.

¹⁵⁴ Human Rights Council resolution 10/4 of 25 March 2009, *Human Rights and Climate Change*.

¹⁵⁵ A summary of the discussions is available on <<http://www2.ohchr.org/english/issues/climatechange/index.htm>>, visited on 20 November 2010.

¹⁵⁶ The most recent discussions was held in October 2010 at the HRC Social Forum, see <<http://www2.ohchr.org/english/issues/poverty/sfsession2010.htm>>, visited on 20 November 2010. .

3.2 Case law of international judicial bodies on human rights and the environment

This part presents cases in international judicial institutions that has a bearing on the relationship between human rights and the environment. The more specific issues of accountability of companies for the human rights violations found in these cases and the question of the causation assessment are addressed in sections 4 and 5. It should also be noted that regions lacking regional human rights jurisdictions and states in these regions that have not accepted the jurisdiction of any of the global judicial bodies are outside the scope of the study due to this fact.¹⁵⁷ Environmental case-law of the ICJ¹⁵⁸ and international arbitration has also been left outside of this part, since there has been no direct application of human rights law in these cases.¹⁵⁹ Furthermore, since we here are concerned with a substantive environmental right, provisions aiming 'merely' at procedural protection are excluded.

3.2.1 The European Human Rights System

There have been multiple proposals within the Council of Europe to draft an additional protocol on environmental rights to the European Convention on Human Rights, due to the lack of an express environmental right in the latter. In the 1970s the first of these draft protocols failed to gain sufficient support by states.¹⁶⁰ In recent years the Parliamentary Assembly of the

¹⁵⁷ See *supra* note 5.

¹⁵⁸ Environmental case-law of the ICJ includes *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 26 June 1992, ICJ, Preliminary Objections, ICJ Reports 1992, 240; the *Gabčíkovo-Nagymaros* case and the *Pulp Mills* case. In 2010 Ecuador lodged an application to the ICJ instituting proceedings against Colombia for its alleged aerial spraying of toxic herbicides near, at and across the border thereby causing severe damage to human health and the environment. It was in the application claimed that residents in the area “developed serious adverse health reactions including fevers, diarrhoea, intestinal bleeding, nausea and a variety of skin and eye problems. Children were affected particularly badly. At least two deaths occurred in the days immediately following these initial sprayings”, *Aerial Herbicide Spraying (Ecuador v. Colombia)*, 1 April 2008, Application lodged by Ecuador, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ecol&case=138&k=ee>>, visited on 20 November 2010, para. 14. Ecuador invoked Article 11 (the right to an adequate standard of living) and Article 12 (the right to health) of the ICESCR, and comparable provisions in the Inter-American Convention on Human Rights. Hence, this application gives the ICJ the opportunity to pronounce on its understanding on the relationship between environmental concerns and international human rights law.

¹⁵⁹ Nevertheless, it should be noted that these cases could have an indirect effect on the relationship between international environmental law and international human rights law. It should also be noted that the ICJ in 1993 set up a permanent Chamber for Environmental Matters. However, this Chamber has up until now never been used.

¹⁶⁰ The draft Protocol stated that “[n]o one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life.” but with the qualification however that “[a]n impairment of well-being may, however, be deemed to be tolerable if it is necessary for the

Council of Europe has on several occasions proposed the drafting of an additional protocol.¹⁶¹ These proposals have been rejected by the Committee of Ministers, with the main argument that the ECHR¹⁶² already indirectly through other rights contributes to the protection of the environment, and that the case law in this field is likely to expand.¹⁶³ Instead the Committee of Ministers proposed the preparation and later update of a Manual on Human Rights and the Environment – Principles Emerging from the Case-Law of the European Court of Human Rights.¹⁶⁴

Accordingly, without an explicit right to the environment this leaves us with existing rights in the ECHR. As noted above, the following presentation excludes the exclusive procedural provision, that is Article 6, that has been used in environmental cases.¹⁶⁵ Article 13, the right to an

maintenance and development of the economic conditions of the community and if there is no alternative way of making it possible to avoid this impairment.” Moreover, the draft Protocol stated that “[i]f adverse changes in the natural conditions are likely to occur in his vital sphere as a result of the actions of other parties, any individual is entitled to demand that the competent agencies examine the situation in all cases where Article 1 applies.” “Any individual acting under paragraph 1 shall, within a reasonable time, receive detailed information stating what measures – if any – have been taken to prevent those adverse changes.”, reprinted in A. Rosas *et al.* (eds.), *Human Rights in a Changing East – West Perspective*.

¹⁶¹ *Parliamentary Assembly of the Council of Europe recommendation 1614 (2003), Environment and human rights*, 27 June 2003; *Parliamentary Assembly of the Council of Europe recommendation 1885 (2009) Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment*, 30 September 2009.

¹⁶² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, entered into force 3 September 1953.

¹⁶³ *Committee of Ministers of the Council of Europe, Joint reply adopted by the Committee of Ministers on 16 June 2010 at the 1088th meeting of the Minister's Deputies*, CM/AS(2010)Rec1883-1885, paras. 9; and Appendix 1, *Comments by the Steering Committee for Human Rights (CDDH)* paras. 3-4; *Committee of Ministers of the Council of Europe, Reply from the Committee of Ministers adopted at the 869th meeting of the Minister's Deputies*, Doc. 1004, 21 January 2004, para. 4; and Appendix I, *Opinion of the CDDH on Recommendation of the Parliamentary Assembly 1614 (2003) "Environment and human rights"*, para. 5. *See also* *Committee on Legal Affairs and Human Rights Opinion, Preparation of an additional protocol to the European Convention on Human Rights, on the right to a healthy environment*, Doc. 12043, 29 September 2009.

¹⁶⁴ *Committee of Ministers of the Council of Europe, Joint reply adopted by the Committee of Ministers on 16 June 2010 at the 1088th meeting of the Minister's Deputies*, CM/AS(2010)Rec1883-1885; *Committee of Ministers of the Council of Europe, Reply from the Committee of Ministers adopted at the 869th meeting of the Minister's Deputies*, Doc. 1004, 21 January 2004, para. 5; *Manual on Human Rights and the Environment – Principles Emerging from the Case-Law of the European Court of Human Rights*. It should be noted that a process of studying the issue of the relationship between climate change and the ECHR has been initiated, *see Parliamentary Assembly of the Council of Europe recommendation 1883 (2009) The challenges posed by climate change*, 29 September 2009; *Committee of Ministers of the Council of Europe, Joint reply adopted by the Committee of Ministers on 16 June 2010 at the 1088th meeting of the Minister's Deputies*, CM/AS(2010)Rec1883-1885.; and *Council of Europe, Steering Committee for Human Rights (CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), Exploring the relationship between human rights and climate change in Europe, Discussion paper prepared by the Secretariat*, DH-DEV(2010)04, Strasbourg, 12 April 2010.

¹⁶⁵ *See Manual on Human Rights and the Environment – Principles Emerging from the Case-Law of the European Court of Human Rights*, p. 47 *et seq.*

effective remedy, is analyzed since it connects with a substantive right for its application. However, in line with the concept of interrelatedness between substantive and procedural elements of human rights, rights that are characterized as substantive have been interpreted as containing procedural aspects. Hence, such aspects are not entirely excluded from the following presentation.

Firstly, it should be noted that the ECtHR has recognized protection of the environment as a legitimate aim under the Convention. In the case-law of the Court and Commission it has been established that protection of the environment is capable of restricting the rights in the Convention.¹⁶⁶

The first case connected to environmental threats in the European Human Rights System was *X. and Y. v. the Federal Republic of Germany* in 1976. The applicants complained that marshlands adjacent to lands owned by an environmental organization of which they were members had been environmentally degraded due to military activities. The application was rejected by the Commission as incompatible *ratione materiae* with the ECHR because “no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention and in particular by Articles 2, 3 or 5 as invoked by the applicant”.¹⁶⁷

In 1980 in *Arrondelle v. the United Kingdom*, the applicant complained about nuisance from the development of Gatwick airport and the construction of a highway by the applicant's home on the basis of the right to private and family life in Article 8 of the ECHR and the right to property in Article 1 of the First Protocol to the ECHR. The parties reached a friendly settlement, indicating that these provisions could have relevance for issues of nuisance.¹⁶⁸

There have been several cases in the Commission and the Court regarding nuisances from Heathrow Airport in the United Kingdom. The first of these was the case of *Powell and Rayner v. the United Kingdom*, in 1990 in the Court, in which the applicants were complaining about disturbance due to flight routes over their homes nearby the airport. They claimed that this excessive nuisance from the airport amounted to an unjustified interference with their right to respect for private life and home under Article 8 of the Convention. They furthermore claimed violations of the right of access to the courts in civil matters in Article 6 § 1, the right to an effective remedy under Article 13 and the right to property in Article 1 of Protocol No. 1.¹⁶⁹

¹⁶⁶ In three cases decided in 1991, *Fredin v. Sweden*, 18 February 1991, ECtHR, Application no. 12033/86; *Oerlemans v. Netherlands*, 27 November 1991, ECtHR, Application no. 12565/86; and *Pine Valley Development v. Ireland*, 29 November 1991, ECtHR, Application no. 12742/87, it was held that environmental protection is a legitimate aim that can restrict property rights. In *Chapman v. the United Kingdom*, 18 January 2001, ECtHR Grand Chamber, Application no. 27238/95, the Grand Chamber of the Court found that environmental protection is a legitimate aim capable of restricting the right to private and family life.

¹⁶⁷ *X. and Y. v. the Federal Republic of Germany*, 13 May 1976, EComHR, Admissibility decision, Application no. 7407/76, para. 161.

¹⁶⁸ *Arrondelle v. the United Kingdom*, 15 July 1980, EComHR, Admissibility decision, Application no. 7889/77.

¹⁶⁹ *Powell and Rayner v. United Kingdom*, 21 February 1990, ECtHR, Application no. 9310/81, para. 28.

The Court found that it did not have jurisdiction on Article 8, Article 6 § 1 in the ECHR and Article 1 of Protocol 1¹⁷⁰ and that its analysis would be restricted to Article 13 in connection with Article 8 and 6 § 1 respectively.¹⁷¹ In its appraisal of the the alleged violation of Article 13 in conjunction with Article 8, the Court firstly pointed out that “[w]hether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under paragraph 1 of Article 8 (art. 8-1) or in terms of an “interference by a public authority” to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention”.¹⁷²

The Court recognized that the quality of the private lives of the applicants had been adversely affected.¹⁷³ But the Court at the same time acknowledged that large international airports were necessary for the economic well-being of the community as a whole, even in densely populated areas.¹⁷⁴ The Court furthermore recognized that the state had taken measures to combat the problems of nuisance near Heathrow and that international standards had been taken into account in this process. The state had also compensated nearby inhabitants.¹⁷⁵ In the light of all this, the Court concluded that it could not “substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation.”¹⁷⁶ It followed that there had been no violation of Article 13 in conjunction with Article 8 of the Convention.

It can be observed, however, that the Court took note of the fact that one of the applicants, living one and a third miles from the airport¹⁷⁷, was to a much greater extent affected than the other applicant¹⁷⁸, who lived several miles from the airport.¹⁷⁹ Therefore it can be asked if the case had had another resolution if the Court had only dealt with the more affected applicant.

In 1994 the Court judged the case *López Ostra v. Spain*, a case that the Court itself describes as a leading case on environmental rights under the Convention. In this case the applicant lived with her daughter only twelve metres from a tannery waste plant, which was owned by the company SACURSA and which had been built with state subsidies on municipal land.

¹⁷⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, entered into force 18 May 1954.

¹⁷¹ *Powell and Rayner v. United Kingdom*, *supra* note 169, para. 29.

¹⁷² *Ibid.*, para. 41.

¹⁷³ *Ibid.*, para. 40.

¹⁷⁴ *Ibid.*, para. 42.

¹⁷⁵ *Ibid.*, para. 43.

¹⁷⁶ *Ibid.*, para. 44.

¹⁷⁷ *Ibid.*, para. 9.

¹⁷⁸ *Ibid.*, para. 40.

¹⁷⁹ *Ibid.*, para. 8.

The activities on the plant caused gas fumes, smells and contamination that affected the health of nearby residents. The authorities therefore evacuated the residents for a few months, but the applicant thereafter moved back to her home. The plant had never required a license for its activities and despite the effects on the local residents the plant continued to operate, although only partially after the evacuation.¹⁸⁰

The applicant sought, with no success, a solution before local authorities and different courts to the continuing nuisance from the plant. The national authorities argued, *inter alia*, that the nuisance was not of such a serious character as to constitute a grave health risk and it did not reach the threshold for fundamental rights to be breached.¹⁸¹

Mrs. López Ostra applied to the European Commission claiming violations of Articles 8 and 3. She submitted that her and her daughter's living situation had been unbearable, that the plant had caused serious health problems and that the authorities had adopted a passive attitude.¹⁸²

The Court firstly noted that evidence had been presented pointing out that hydrogen sulphide emissions exceeded permitted levels and that these emissions could be the cause of the applicant's daughter's ailments.¹⁸³ Nevertheless, the ECtHR found that, for a violation of Article 8, there was no need to establish that the emissions had caused great risk to the health of the applicant and her daughter:

“Naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”¹⁸⁴

The Court further noted, in accordance with the doctrine established in its case-law and repeated in the *Powell and Rayner* case, that in the assessment of whether the state had a positive obligation to protect the rights in Article 8, or an interference with that right was justified under that Article, a fair balance had to be struck between the interests of the individual and the community as a whole (hereinafter, for the sake of simplification, this will be called the “balancing of interests test”). The Court also pointed out that the state in this regard retained a certain margin of appreciation.

The Court then asserted that, even though the Spanish authorities were “theoretically not directly responsible for the emissions”, the State had subsidized the plant and it had been built on municipal land.¹⁸⁵ Furthermore, the authorities could not have been unaware that the environmental problems continued after the partial shutdown.¹⁸⁶ The Court found that “the family had to bear the nuisance caused by the plant for over three years before moving [...] They moved only when it became apparent that the

¹⁸⁰ The details on this partial shutdown remained unclear as it was disputed what the effects on the residents of this change were, *López-Ostra v. Spain*, 23 November 1994, ECtHR, Application no. 41/1993/436/515, para. 9.

¹⁸¹ *Ibid.*, para. 15.

¹⁸² *Ibid.*, paras. 34,47.

¹⁸³ *Ibid.*, para. 49.

¹⁸⁴ *Ibid.*, para. 51.

¹⁸⁵ *Ibid.*, para. 52.

¹⁸⁶ *Ibid.*, para. 53.

situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so".¹⁸⁷

In the light of all this, the ECtHR found that "despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life. There has accordingly been a violation of Article 8."¹⁸⁸

In 1998, the ECtHR decided a case concerning atmospheric tests of nuclear weapons in the Pacific Ocean. In the case, *L.C.B. v. the United Kingdom*, the father of the applicant had in the 1950s been exposed to radiation from these tests while serving in the army. The applicant was born in 1966 and had later developed leukemia. She claimed that the United Kingdom was responsible under Articles 2, 3, 8 and 13 of the ECHR for failing to warn her parents about the dangers of the tests to any children they might have and for having failed to monitor her own health.¹⁸⁹

Noting that it had not been claimed that the state had sought intentionally to deprive the life of the applicant, the Court opined that its task was to determine whether "the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk."¹⁹⁰ This meant that the State, if it would have appeared likely that her father's exposure to radiation might have caused a real risk to the applicant's health, given the information available to the State at that time, would have been required to act to protect her health on its own motion.¹⁹¹ However, the Court found that it had not been "established that there is a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived."¹⁹² Therefore, the State had not been required to act on its own motion given this "unsubstantiated link".¹⁹³ Hence, there had been no violation of the Convention.

In *Guerra and Others v. Italy* 1998 the applicants were residents of a town approximately one kilometre from a factory producing fertilizers and caprolactam. The factory, which was owned by the Enichem agricoltura company, had in accordance with EC law been classified as a high-risk industry. There was a risk in the chemical processes in the factory that could lead to explosions releasing toxic emissions. Several major accidents had occurred in the past, and the most devastating of these were an accident 1976 when 150 people had to be hospitalized due to an explosion releasing several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide. A committee of technical experts had in 1988 established that the emissions from the factory often were channelled towards the town where the applicants lived.

¹⁸⁷ *Ibid.*, para. 57.

¹⁸⁸ *Ibid.*, para. 58.

¹⁸⁹ *L.C.B. v. the United Kingdom*, 9 June 1998, ECtHR, Application no. 14/1997/798/1001, paras. 23-24.

¹⁹⁰ *Ibid.*, para. 36.

¹⁹¹ *Ibid.*, para. 38.

¹⁹² *Ibid.*, para. 39.

¹⁹³ *Ibid.*

The applicants tried in vain to obtain information on the activities of the plant and to get redress through criminal law. They therefore ultimately turned to the European human rights system. In their complaint they alleged violations of Articles 8 and 10, on the basis of the failure of the state to inform them of the risks from the factory.¹⁹⁴ They also claimed a violation of Article 2 since workers from the factory had died of cancer and that the authorities had failed to inform the applicants of these lethal risks connected to the activities of the factory.¹⁹⁵

The Court firstly held that Article 10 was not applicable since the freedom to receive information “cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.”¹⁹⁶ However, the Court found that Article 8 was applicable in the light of the circumstances presented above because of the “direct effect of the toxic emissions on the applicants’ right to respect for their private and family life”.¹⁹⁷ It remained to be asserted whether that right, in the form of a positive obligation, had been violated by the state. The Court stated, citing the *López Ostra* case, that Article 8 could be breached even though no severe health effects had been recorded. The Court concluded that “[i]n the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.” Hence, Article 8 had been breached.¹⁹⁸

The majority did not see it necessary to consider whether the passivity of the state also amounted to a violation of the applicant's right to life under Article 2.¹⁹⁹ However, there were two concurring opinions by Judge Walsh and Judge Jambrek respectively. The former clearly stated that he was of the opinion that the right to life had been violated since Article 2 “also guarantees the protection of the bodily integrity of the applicants”.²⁰⁰ The latter was of the view that the protection of health and physical integrity was as closely associated with the Article 2 as with Article 8. Therefore, by an analogy to the Court's case-law on Article 3, Judge Jambrek opined that “[i]f information is withheld by a government about circumstances which foreseeably, and on substantial grounds, present a real risk of danger to health and physical integrity, then such a situation may also be protected by Article 2 of the Convention [...] It may therefore be time for the Court’s case-law on Article 2 (the right to life) to start evolving, to develop the

¹⁹⁴ *Guerra and Others v. Italy*, 19 February 1998, ECtHR, Application no. 116/1996/735/932, para. 47,56.

¹⁹⁵ *Ibid.*, para. 61.

¹⁹⁶ *Ibid.*, para. 53.

¹⁹⁷ *Ibid.*, para. 56.

¹⁹⁸ *Ibid.*, para. 60.

¹⁹⁹ *Ibid.*, para. 62.

²⁰⁰ *Concurring Opinion of Judge Walsh, Guerra and Others v. Italy*, 19 February 1998, ECtHR, Application no. 116/1996/735/932, page 22.

respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life.”²⁰¹

In *Hatton and Others v. the United Kingdom*, the issue was again disturbances from the Heathrow Airport. The applicants lived nearby the airport and claimed that the night flights between 4 am and 7 am permitted by a government policy violated their private and family life under Article 8 of the Convention. The state had taken measures to minimize the nuisance *inter alia* through a regulatory scheme for flights. In the Chamber the Court distinguished the case from earlier ones regarding disturbance from airports since this one dealt with night flights.²⁰² The Court furthermore invoked the doctrine of positive obligations and reiterated that the state retains a certain margin of appreciation in cases under Article 8. In striking the fair balance in the “balancing of interests test” the Court noted that

“States must have regard to the whole range of material considerations. Further, in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others [...] It considers that States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.”²⁰³

The Chamber Court opined that, in the process that led to the new scheme for flights, the state had not carried out sufficient research neither on the economic effects of increasing night flights nor health effects on sleep disturbance.²⁰⁴ Therefore, the Court concluded that the state had not struck a fair balance between the interests concerned, and consequently Article 8 had been breached.²⁰⁵

However, this Chamber judgment was appealed and the Grand Chamber subsequently delivered its judgment. The Grand Chamber considered that Article 8 was applicable in the case since the state had a positive obligation to regulate private industry to avoid or reduce noise pollution. Contrary to the Chamber judgment, however, the Grand Chamber found that the

²⁰¹ *Concurring Opinion of Judge Jambrek, Guerra and Others v. Italy*, 19 February 1998, ECtHR, Application no. 116/1996/735/932, page 24.

²⁰² *Hatton and Others v. the United Kingdom*, 2 October 2001, ECtHR, Application no. 36022/97, para 94.

²⁰³ *Ibid.*, para. 97.

²⁰⁴ *Ibid.*, paras. 98-103.

²⁰⁵ *Ibid.*, para. 106. The Court also found a violation of Article 13 in conjunction with Article 8. *See also the Separate Opinion of Judge Costa, Hatton and Others v. the United Kingdom*, 2 October 2001, ECtHR, Application no. 36022/97: “having regard to the Court’s case-law on the right to a healthy environment [...] maintaining night flights at that level meant that the applicants had to pay too high a price for an economic well-being, of which the real benefit, moreover, is not apparent from the facts of the case. Unless, of course, it is felt that the case-law goes too far and overprotects a person’s right to a sound environment. I do not think so. Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people’s lives. Our Court’s case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment. I would find it regrettable if the constructive efforts made by our Court were to suffer a setback.”

government had struck a fair balance of interests. In its reasoning on the issue, the Court considered that night flights at the airport contributed at least to a certain extent to the general economy of the country.²⁰⁶ Furthermore, the Court considered that the fact that the applicants could move permanently without being adversely affected economically, since house-prices were unaffected by flight noise, also could be taken into account.²⁰⁷ Concerning the role of research and statistics in the “balancing test” the Court considered that

“a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The position concerning research into sleep disturbance and night flights is far from static, and it was the government’s policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The 1993 Scheme had thus been preceded by a series of investigations and studies carried out over a long period of time.”²⁰⁸

On the basis of the foregoing the Grand Chamber ruled that the state had struck a fair balance between the individual interest and the interest of the community as a whole, consequently Article 8 had not been breached.²⁰⁹ However, the Grand Chamber held that Article 13 had been violated since the applicants had had an arguable claim²¹⁰ of a violation of their right to private and family life, and this claim had not been possible to pursue by domestic procedures.²¹¹

In the case of *Kyrtatos v. Greece* in 2003, the applicants complained about the urban development in lands adjacent to their own. These lands had been changed from a swamp-area being a natural habitat for wildlife, to a tourist development with a car park, a road and buildings. This, the applicants claimed, had caused a great deal of environmental pollution, noises and lights amounting to a breach of Article 8. They also invoked Article 6 § 1, since the state allegedly had failed to comply with court orders denying building permits.

The Court rejected the argument that this led to a violation of the private and family life of the applicants, since in the present case

“even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of

²⁰⁶ *Hatton and Others v. the United Kingdom*, 8 July 2003, ECtHR Grand Chamber, Application no. 36022/97, para. 126.

²⁰⁷ *Ibid.*, para. 127.

²⁰⁸ *Ibid.*, para. 128.

²⁰⁹ *Ibid.*, paras. 129-130.

²¹⁰ It is in this regard interesting to note that the qualification of the claim as “arguable” *inter alia* was reached on the basis of the fact that the Chamber judgment had found a violation of Article 8, *Ibid.*, para. 137.

²¹¹ *Ibid.*, paras. 141-142.

such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants."²¹²

In contrast, the Court held that Article 6 § 1 had been breached since the authorities had failed for more than seven years to comply with court orders quashing building permits due to detrimental consequences for the environment.²¹³

In a partly dissenting opinion, Judge Zagrebelsky found a violation of Article 8. He did not see a major difference between the destruction of the swamp and a forest and emphasized the "growing importance of environmental deterioration on people's lives". He found that this approach was in line with the "evolutionary updating of the Convention" applied by the Court.²¹⁴

In *Moreno Gómez v. Spain* the following year, the applicant complained of noise disturbance from bars and discoteques in the vicinity of her home, making it impossible to sleep. The city council had decided not to permit any more nightclubs to open in the area. Nevertheless, it continued to grant licenses. The applicant claimed that the authorities granting of licenses for these activities amounted to a violation of Article 8 of the Convention.

In an expert report it was found that the noise levels were unacceptable and exceeded permitted levels. The Court, contrary to the claim of the government that the applicant had not proven that the noise level inside her own apartment had exceeded permitted levels, established that it would be "unduly formalistic to require such evidence in the instant case", since the authorities already in a bylaw had designated the area as an acoustically saturated zone.²¹⁵ Therefore the authorities had "tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established during the period concerned".²¹⁶ Consequently, the Court held that Article 8 had been violated.

In *Öneryıldiz v. Turkey* in 2004, the ECtHR for the first time had before it an environmental case involving loss of life. The applicant was living with twelve close relatives in a slum quarter adjacent to a rubbish tip which was under the authority of the city council and, ultimately, the ministerial authorities.²¹⁷ In a report, experts alerted the authorities of the major health-risks from the waste-site for nearby residents and the risks of a methane explosion. In this report, it was pointed out that the inhabitants of the slum dwellings were especially exposed. The Environment Office alerted local authorities of these risks and urged them, in vain, to take measures. In an accident due to a methane explosion, waste from the tip engulfed some ten

²¹² *Kyrtatos v. Greece*, 22 May 2003, ECtHR, Application no. 41666/98, para. 53.

²¹³ *Ibid.*, paras. 32-33.

²¹⁴ *Partly Dissenting Opinion of Judge Zagrebelsky, Kyrtatos v. Greece*, 22 May 2003, ECtHR, Application no. 41666/98

²¹⁵ *Moreno Gómez v. Spain*, 16 November 2004, ECtHR, Application no. 4143/02, para. 59.

²¹⁶ *Ibid.*, para. 61.

²¹⁷ *Öneryıldiz v. Turkey*, 30 November 2004, ECtHR Grand Chamber, Application no. 48939/99, paras. 9-10.

dwellings in the slum, in one of which the applicant lived, causing the death of thirty-nine people, including nine of the applicant's relatives.²¹⁸ After having had limited success in domestic fora, the applicant turned to the European human rights system. He claimed violations of the right to life, the right to private and family life, the right to property, the right to a remedy, and the right to fair proceedings.

The Grand Chamber, to which the case had been transferred at the request of Turkey, reiterated that the right to life not only contained negative obligations, but also positive obligations on states to take appropriate steps to safeguard the lives of those within their jurisdiction.²¹⁹ Furthermore, “[t]he Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites”²²⁰ In this regard, the Court identified several factors as relevant in the determination of state responsibility:

“the harmfulness of the phenomena inherent in the activity in question, the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances, the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are merely factors among others that must be taken into account in the examination of the merits of a particular case”²²¹

The Court acknowledged that state obligations from Article 2 involved both substantive and procedural aspects. It observed that the substantive aspects contained positive obligations, “above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”²²², and that this obligation applies to dangerous activities, where special regard must be had to the specificity of the activities and the potential risk to human lives. These regulations “must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks”, and special emphasis should be placed on the public's right to information.²²³ Outlining the procedural obligations of the right to life, the Court reiterated the duty to properly investigate a potential violation of Article 2, where lives had been lost, in order for breaches of the right to be repressed and punished.

In the instant case, the Court found that the regulatory framework had proven defective since the rubbish tip had opened and operated despite not complying with the relevant standards. Furthermore, the absence of a coherent supervisory system aggravated the risks. Therefore, the state had breached the substantive obligations derived from Article 2.²²⁴

²¹⁸ *Ibid.*, para. 18

²¹⁹ *Ibid.*, para. 71.

²²⁰ *Ibid.*, para. 71.

²²¹ *Ibid.*, para. 73.

²²² *Ibid.*, para. 89.

²²³ *Ibid.*, para. 90.

²²⁴ *Ibid.*, para. 109.

Turning to the procedural aspects, the Court ascertained that the issue in the case was whether the authorities had been determined to sanction those responsible for the accident.²²⁵ The Court in this regard noted that the criminal processes pursued after the accident against the two majors in question did not concern life-endangering acts having a connection to the right to life. Rather the majors had been held responsible for negligent omissions in the performance of their duties and their prison sentences had been commuted and the remaining fines of 9.70 euros were suspended.²²⁶ Accordingly, the Court found a violation of the right to life in its procedural aspects, considering that the state had failed to secure the “full accountability of State officials or authorities for their role in it [the accident] and the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of the criminal law.”²²⁷

As regards the alleged violation of property rights, the Court found that the authorities had breached their positive obligations, because they failed to do “everything within their power to protect the applicant’s proprietary interests.”²²⁸ In response to the government submission that the provision of subsidized housing to the applicant by the state constituted sufficient compensation, the Court considered that this could not be seen as proper compensation for the violations, not having the effect of reversing the status of the applicant as a “victim”. This was particularly so since “there is nothing in the deed of sale and the other related documents in the file to indicate any acknowledgment by the authorities of a violation of his right to the peaceful enjoyment of his possessions “.”²²⁹

The Grand Chamber also found a violation of Article 13 in conjunction with Article 2 as the applicant had never received the damage awarded to him in civil proceedings.²³⁰

Hence, the Court ruled that the state, by negligence, had violated the right to life in both its substantive and procedural aspects, the right to property, and the right to a remedy. It did not examine the claims under Articles 6 or 8 since they were based on the same facts as the other violations.²³¹

In *Taşkın and Others v. Turkey*, the applicants challenged the development and operation of a gold mine in the vicinity of the applicants' homes. They claimed that this activity caused them to suffer the effects of environmental damage, including noise pollution from machinery and explosives, and the movement of people. This, they alleged, had given rise to a violation of Article 8 of the ECHR.²³² Furthermore they claimed a violation of Article 6 § 1 since the authorities had failed to comply with court decisions concluding that the operating permits did not serve the public interest and

²²⁵ *Ibid.*, para. 115.

²²⁶ *Ibid.*, para. 116.

²²⁷ *Ibid.*, para. 117-118.

²²⁸ *Ibid.*, para. 135.

²²⁹ *Ibid.*, para. 137.

²³⁰ *Ibid.*, paras. 152,155.

²³¹ *Ibid.*, para. 160.

²³² *Taşkın and Others v. Turkey*, 10 November 2004, ECtHR, Application no. 46117/99, para. 13.

that the safety measures taken were insufficient.²³³ They also invoked Articles 2 and 13 based on the same facts.

In establishing the applicable legal framework the Court made references to “[r]elevant international texts on the right to a healthy environment”²³⁴. Concerning the procedural aspects it referred to Principle 10 of the Rio Declaration and the Aarhus Convention.²³⁵ Furthermore it cited a resolution of the Parliamentary Assembly of the Council of Europe on human rights and the environment that recommended member states to:

- i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;
- ii. recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;
- iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention²³⁶

The Court reiterated that Article 8 contains both substantive and procedural aspects.²³⁷ Concerning the substantive aspect it noted that states retain a wide margin of appreciation in cases raising environmental issues. In the instant case, the Court found it unnecessary to make an assessment of the substantive aspect of Article 8 given that the Turkish Supreme Administrative Court already had annulled the decision of the authorities to issue an operation permit for the mine since the applicants’ effective enjoyment of the right to life and the right to a healthy environment outweighed any contrary interest.²³⁸

Turning to the procedural aspect of Article 8, the Court found that the procedural guarantees enjoyed by the applicants in law were devoid of any purpose when the authorities authorized the continuation of operations of the mine in non-compliance with said decision of the Supreme Administrative Court. Therefore, there had been a violation of Article 8.²³⁹

The Court also found a breach of Article 6 § 1 based on the same facts, but did not see it necessary to examine the claims as to Articles 2 and 13.²⁴⁰

In 2005, in the case of *Fadeyeva v. Russia*, the applicant lived approximately 450 metres from a steel plant in a sanitary security zone which was supposed to separate the plant from residential areas. The plant had been built during the Soviet era and had been bought by a private

²³³ *Ibid.*, para. 127.

²³⁴ *Ibid.*, para. 98.

²³⁵ *Ibid.*, paras. 98-99.

²³⁶ *Ibid.*, para. 100 citing Parliamentary Assembly of the Council of Europe recommendation 1614 (2003), *Environment and human rights*, 27 June 2003, para. 9.

²³⁷ *Ibid.*, para. 115.

²³⁸ *Ibid.*, paras. 116-117.

²³⁹ *Ibid.*, paras. 124-126.

²⁴⁰ *Ibid.*, paras. 135-140.

company, Severstal PLC, in 1993.²⁴¹ The applicant alleged a violation of Article 8 due to the state's failure to protect her private life from the severe industrial pollution from the plant.²⁴²

The Court observed that data produced by the government evidenced that the pollution levels in the town and in the air near the applicant's home were up to 6.3 times higher than permitted levels.²⁴³ Of the total emissions in the town, the Severstal plant contributed almost 95 per cent.²⁴⁴

On the assessment of evidence the Court noted that

“the general principle has been to apply the standard of proof “beyond reasonable doubt”. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* [the burden of proof lies upon him who affirms, not upon him who denies] is impossible”²⁴⁵

The Court considered that a report from a clinic on the health of the applicant did not succeed in establishing “any causal link between environmental pollution and the applicant's illnesses”.²⁴⁶ Turning instead to the evidence on the general impacts of the plant on the population in the town, the Court noted that the government had failed to produce certain requested documents, giving rise to the conclusion that the environmental situation could have been even worse than described in available data.²⁴⁷ The ECtHR went on explaining that on many occasions had the state recognized that the pollution had caused an increase in the morbidity rate in the town. Furthermore the Court relied on a medical report on the general health situation in the town stating that the pollution had adverse effects on the inhabitants, with higher risks of cancer in the nasal passages, headaches, and chronic irritation of the eyes, nose, and throat. The report alerted that the population residing near the plant was especially affected. In addition to this, the Court observed that the state had itself recognized that the applicant had to be relocated due to the pollution.²⁴⁸ For these reasons the Court held that:

“the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home.”²⁴⁹

²⁴¹ *Fadeyeva v. Russia*, 9 June 2005, ECtHR, Application no. 55723/00, paras. 10-14.

²⁴² *Ibid.*, para. 64.

²⁴³ *Ibid.*, para. 83.

²⁴⁴ *Ibid.*, para. 91.

²⁴⁵ *Ibid.*, para. 79.

²⁴⁶ *Ibid.*, para. 80.

²⁴⁷ *Ibid.*, para. 84.

²⁴⁸ *Ibid.*, paras. 85-86.

²⁴⁹ *Ibid.*, para. 88.

The Court concluded that Article 8 had been violated because of the state's failure to regulate private industry:

“The State authorised the operation of a polluting plant in the middle of a densely populated town. Since the toxic emissions from this plant exceeded the safe limits established by the domestic legislation and might endanger the health of those living nearby, the State established through legislation that a certain area around the plant should be free of any dwelling. However, these legislative measures were not implemented in practice.”²⁵⁰

“although the situation around the plant called for a special treatment of those living within the zone, the State did not offer the applicant any effective solution to help her move away from the dangerous area. Furthermore, although the polluting plant in issue operated in breach of domestic environmental standards, there is no indication that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels.”²⁵¹

In *Giacomelli v. Italy* the applicant lived 30 metres from a plant for special waste, owned by the company Ecoservizi.²⁵² Because of soil erosion, there was a significant risk that toxic chemicals from the plant would contaminate the ground water, which was a source of drinking water for nearby inhabitants. Despite these facts, which led the Ministry of the Environment to consider the activities of the plant incompatible with environmental regulations, the company was granted an operating license by the authorities.²⁵³ The applicant alleged that the noise and emissions from the plant entailed severe disturbance to her environment and a permanent risk to her health and home, in violation of Article 8.²⁵⁴

In the ruling, the Court focused on the procedural aspect of the right to private and family life. In line with its reasoning in earlier cases the Court found that the failure of Italy to comply with domestic regulation and the refusal to enforce judicial decisions amounted to a breach of Article 8.²⁵⁵

In *Budayeva and Others v. Russia*, decided in 2008, the applicants were residents of a town in the Caucasus, where mudslides were a known problem to the inhabitants. In 1999, a mud and debris flow hit a dam, seriously damaging it, without however causing human harm. Subsequent to this, several local authorities called on other authorities for measures avoiding any future human harm, but to no avail. In 2000 a mud and debris flow hit the town flooding some of the residential quarters. The applicants alleged that at least one person was killed in this mudslide, whereas the government claimed that it caused no casualties.²⁵⁶ According to the applicants there was no advance warning of the slide.

On the following day the residents returned to their homes. The government claimed that this was in breach of an evacuation order, while

²⁵⁰ *Ibid.*, para. 132.

²⁵¹ *Ibid.*, para. 133.

²⁵² *Giacomelli v. Italy*, 2 November 2006, ECtHR, Application no. 59909/00, para. 11.

²⁵³ *Ibid.*, para. 38.

²⁵⁴ *Ibid.*, para. 68.

²⁵⁵ *Ibid.*, paras. 93-96.

²⁵⁶ *Budayeva and Others v. Russia*, 20 March 2008, ECtHR, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, paras. 26-27.

the applicants allegedly were not aware that the mudslide alert was still active. In this regard they argued that there had been no barriers or warnings preventing residents from returning, and no police or emergency officers present. Furthermore, they could see that all of their neighbors were at home and gas and electricity supplies had been resumed.²⁵⁷ Later the same day, a new more powerful mudslide hit the town, causing severe destruction. Eight people were officially killed while the applicants contended that another 19 persons were missing.²⁵⁸ Several of the applicants' close relatives were killed and seriously injured. Domestic courts had found that the mudslides could not have been foreseen and that the authorities took all necessary measures to mitigate the risk.²⁵⁹

In the ECtHR the applicants claimed violations of the right to life, the right to private and family life, the right to a remedy and the right to property. They alleged that the state had “failed to comply with its positive obligations to take appropriate steps to mitigate the risks to their lives against the natural hazards.” More specifically, they claimed that the state had failed to maintain defence and warning infrastructure, giving rise to a breach of its substantive obligations under Article 2. Secondly, they claimed that the state had failed to provide a judicial response inquiring the alleged infringement of the right to life, thus amounting to a violation of its procedural obligation.²⁶⁰ They also complained about not have had any redress.²⁶¹

The Court reiterated that Article 2 contains both a substantive and procedural aspect, and that it entailed positive obligations on the state.²⁶² Concerning the substantive aspect, the Court found that the authorities were well aware of the devastating damage a mudslide could entail. It was furthermore evident which work that needed to be performed to mitigate these risks. The government had not given any reasons why such work had not been conducted. Further, the authorities did not carry out any other activities for defence infrastructure against mudslides.²⁶³ Regarding warning of an accident, the Court found that the government had not substantiated its claim as to the alleged continuation of the evacuation order. Considering also the witness statements attesting to the total absence of any evidence of this continuation, the Court concluded that the population was not made sufficiently aware of the order. The state had also omitted to set up an early warning system, despite having been called on by a specialized agency to do so.²⁶⁴ Therefore the state had failed to comply with its positive obligations under the substantive aspect of the right to life.²⁶⁵

Turning to the procedural aspect, the Court found that the judicial investigations into the accident were insufficient since the courts did not make use of its full powers, *inter alia* to call witnesses or seeking an expert

²⁵⁷ *Ibid.*, para. 30.

²⁵⁸ *Ibid.*, paras. 31-33.

²⁵⁹ *Ibid.*, paras. 49-51.

²⁶⁰ *Ibid.*, para. 146.

²⁶¹ *Ibid.*, para. 116.

²⁶² *Ibid.*, paras. 128-145.

²⁶³ *Ibid.*, paras. 149-150.

²⁶⁴ *Ibid.*, para. 154.

²⁶⁵ *Ibid.*, paras. 159-160.

opinion. In civil actions the applicants failed to obtain compensation because of “a burden of proof in respect of facts that were beyond the reach of private individuals”, since this would have required the applicants to provide evidence such as “a complex expert investigation involving the assessment of technical and administrative aspects, as well as by obtaining factual information available to the authorities alone”.²⁶⁶ Moreover, a criminal investigation into the death of the husband of one of the applicants did not cover the issue of omission in setting up a warning system or the inadequate maintenance of the mud-defence infrastructure.²⁶⁷ For these reasons there had been a violation of the right to life also in its procedural aspect.²⁶⁸

On the alleged violation of the right to property the Court considered that the state retained a wider margin of appreciation concerning the positive obligations stemming from this right than the right to life, since the right to property, contrary to the right to life, was not absolute. This was especially so in the case of disaster relief, where the state had a positive obligation to do everything within its power to prevent the loss of life.²⁶⁹ In the instant case, the Court noted that the mudslide had been unusually powerful and that damage to property was not foreseeable. Furthermore, the authorities had conducted emergency repairs of apartments, and the applicants had received housing compensation. Therefore the right to property had not been breached.²⁷⁰

The Court furthermore found no violation of Article 13. In connection with the right to life, it concluded that it was unnecessary for it to examine the merits because it had already found a violation of the procedural aspect of said right.²⁷¹ In connection with the right to property the Court held that Article 13 had not been breached since the applicants had had the possibility to lodge a claim for damages, and this claim had been examined by courts.²⁷²

Regarding the claims of violations of the right to private and family life and the right to a remedy in connection with that right, the Court did not find it necessary to examine these claims since they were based on the same facts as the claims above.²⁷³

In *Tătar v. Romania* in 2009 the applicants were a father and a son living 100 metres from a gold mine and a plant with a decantation dam owned by the company Aurul Baia Mare.²⁷⁴ In 2000 an ecological accident occurred when a large quantity of polluted water, containing sodium cyanide and heavy metals, leaked from the dam and spread in local freshwaters. The contaminated water passed into the Tisza river spreading not only within

²⁶⁶ *Ibid.*, paras. 163-164.

²⁶⁷ *Ibid.*, para. 162.

²⁶⁸ *Ibid.*, para. 165.

²⁶⁹ *Ibid.*, para. 175.

²⁷⁰ *Ibid.*, paras. 177,179,185.

²⁷¹ *Ibid.*, para. 195.

²⁷² *Ibid.*, paras. 197-198

²⁷³ *Ibid.*, para. 201.

²⁷⁴ *Tătar v. Romania*, 27 January 2009, ECtHR, Application no. 67021/01, para. 6.

Romania but also into Hungary, Serbia-Montenegro and the Black Sea.²⁷⁵

The applicants complained about the risks of the pollution from the plant and the asthma allegedly caused by these activities. After having, in vain, tried to obtain redress in domestic fora, the applicants turned to the European human rights system. They initially claimed a violation of Article 2 alleging that the technology used by the company entailed a risk to their lives and that the state had been passive in response to this risk. However, the Court in its admissibility decision had indicated that the claim rather would be examined under Article 8.²⁷⁶

Several reports, both commissioned by the government and others, was conducted. One of these reports, *Task Force Baia Mare* commissioned by the EU Commissioner for the Environment, found three causes of the accident. Firstly, the use of a technology for gold extraction based on an inadequate design. Secondly, the authorization of inadequate construction plans. Thirdly, the inadequate monitoring of the management of the dams, the technology used, and the maintenance of the facilities.²⁷⁷ However, the report did not find any direct evidence of consequences for the health of the population.²⁷⁸ In an environmental impact assessment requested by Aurul Baia Mare²⁷⁹, the authors recognized that sodium cyanide in general affected human health negatively.²⁸⁰ According to the study, however, the exposure of the population to cyanide in the ground could not affect the prevalence of respiratory illnesses.²⁸¹ The study furthermore referred to an investigation of the health standards of the population in the industrial sector of Baia Mare, which attested to an increase in the prevalence of respiratory illnesses during the period from 1995 to 1999. Nevertheless, the EIA concluded that no research had evidenced any significant effect on the health of the population residing in vicinity of the mines.²⁸² The Court moreover made references to several studies on the toxicity of sodium cyanide.²⁸³

Turning to the applicable legal framework, the Court made extensive reference to the Stockholm and Rio Declarations, the Aarhus Convention, the *Gabčíkovo-Nagymaros* case in the ICJ, resolution 1430/2005 of the Council of Europe Parliamentary Assembly on industrial hazards, EU instruments on the extractive industry, and the precautionary principle. On the latter the Court considered that, on the basis of legal material from the

²⁷⁵ *Ibid.*, para. 24.

²⁷⁶ *Ibid.*, paras. 70-71.

²⁷⁷ *Ibid.*, paras. 26,31.

²⁷⁸ *Ibid.*, para. 27.

²⁷⁹ This environmental impact assessment had been drafted by the Center for environment and health of Cluj, the Institute for public health in Bucarest, the Institute for research and development of industrial ecology in Bucarest and the Institute for medicine and environment in Cluj-Napoca.

²⁸⁰ The authors of this study indicated *inter alia* that the substance could negatively affect the cardiovascular and the central nervous system.

²⁸¹ *Tătar v. Romania*, *supra* note 274, paras. 53,55.

²⁸² *Ibid.*, paras. 57,59.

²⁸³ *Ibid.*, 65-68.

EU such as the Maastricht Treaty, the principle had, on the European level, evolved from a philosophic concept towards a legal norm.²⁸⁴

In its outline of general principles the Court reiterated the doctrine of the margin of appreciation, the balancing of interests test, and the doctrine of positive obligations, including the primary obligation on the state to put in place a legislative and administrative framework to provide effective deterrence against threats and damages to the environment and the human health.²⁸⁵

In the instant case, the Court found that Article 8 was applicable on the basis of the various reports that supported the conclusion that the pollution from the Săsar factory could cause a deterioration of the quality of life of the population and affect the well-being of the applicants.²⁸⁶ Concerning the asthma suffered by one of the applicants, the Court investigated if the activities of Aurul could have aggravated his asthma. Firstly, the Court established that the asthma as such had been properly attested in medical certificates. Secondly, it found that it was indisputable that sodium cyanide could negatively affect human health. Thirdly, it found it proven that the level of pollution in the vicinities of the home of the applicants had increased as a result of the accident.

Furthermore, the Court emphasized the evidentiary problems in issue. It noted that a report of the WHO had stated that even experts had difficulties in establishing the effects of sodium cyanide in the human body.²⁸⁷ The Court thereafter noted that:

“105. En l’absence d’éléments de preuve à cet égard, la Cour pourrait éventuellement se livrer à un raisonnement probabiliste, les pathologies modernes se caractérisant par la pluralité de leurs causes. Cela serait possible dans le cas d’une incertitude scientifique accompagnée d’éléments statistiques suffisants et convaincants.

106. La Cour considère cependant qu’en l’espèce l’incertitude scientifique n’est pas accompagnée d’éléments statistiques suffisants et convaincants. Le document réalisé par un hôpital de Baia Mare et attestant un certain accroissement du nombre des maladies des voies respiratoires ne suffit pas, à lui seul, à créer une probabilité causale. La Cour constate donc que les requérants n’ont pas réussi à prouver l’existence d’un lien de causalité suffisamment établi entre l’exposition à certaines doses de cyanure de sodium et l’aggravation de l’asthme.

107. Elle estime toutefois que malgré l’absence d’une probabilité causale en l’espèce, l’existence d’un risque sérieux et substantiel pour la santé et pour le bien-être des requérants faisait peser sur l’État l’obligation positive d’adopter des mesures raisonnables et adéquates capables à protéger les droits des intéressés au respect de leur vie privée et leur domicile et, plus généralement, à la jouissance d’un environnement sain et protégé. En l’espèce, cette obligation subsistait à la charge des autorités tant avant la mise en fonctionnement de l’usine Sasar qu’après l’accident de janvier 2000. A cet égard, la Cour observe qu’en 1992 l’État roumain invita l’Institut de recherche du ministère de l’Environnement à mener une étude d’impact sur l’environnement. Sept ans plus tard, l’État

²⁸⁴ *Ibid.*, B. Relevant international law and practice. Under sub-heading h): “Cette étape marque, au niveau européen, l’évolution du principe d’une conception philosophique vers une norme juridique.”

²⁸⁵ *Ibid.*, para. 88.

²⁸⁶ *Ibid.*, para. 97.

²⁸⁷ *Ibid.*, paras. 102-104.

défendeur, actionnaire de la société Aurul, décida d'autoriser la mise en fonctionnement de celle-ci, en se basant principalement sur les conclusions de cette étude, réalisée en 1993.”²⁸⁸

On to the positive obligation of the state under the right to private and family life, the Court found that the danger to the environment and the well-being of the population actualized by the accident, which had effects, not only in Romania but also in Hungary and Serbia-Montenegro, had been foreseeable. The Court in this regard pointed to the fact that a study already in 1993 had warned of the ecological effects of the activities in question.²⁸⁹ Therefore the Court concluded that the authorities had failed in their obligation to make a satisfactory evaluation in advance on the eventual risks of the activity and to take adequate measures for the protection of the private and family life of the applicants, and more generally, to “the enjoyment of a healthy and safe environment”.²⁹⁰

Furthermore, the Court underlined the importance of the right of information to the public under Article 8.²⁹¹ In the instant case the study on the basis of which the authorization of the activities of the company had not been made public, and no other information on the subject had been presented.²⁹² Invoking the Aarhus Convention, the resolution of the Parliamentary Assembly of the Council of Europe and the precautionary principle in the Rio Declaration, the Court concluded that the applicants had to live in a state of anguish and uncertainty which was exacerbated by the passivity of the authorities in their failure to provide information to the population.²⁹³ For these reasons the Court held that Article 8 had been violated. However, having failed to evidence causation between the

²⁸⁸ My translation: “105. In the absence of evidence in this regard, the Court could engage in a probabilistic reasoning, given that modern diseases are characterized by their multiple causes. This would be possible in the case of scientific uncertainty accompanied by sufficient and convincing statistical evidence.

106. In the instant case, however, the Court considers that scientific uncertainty is not accompanied by sufficient and convincing statistical evidence. The document produced by a hospital in Baia Mare and showing some increase in the number of respiratory diseases is not sufficient alone to establish a causal probability. The Court therefore finds that the applicants has failed to sufficiently establish a causal link between the exposure to certain doses of sodium cyanide and the aggravation of the asthma.

107. The Court considers, however, that despite the absence of causal probability in the instant case, the existence of a serious and substantial risk to the health and well-being of the applicants engaged the positive obligation of the State to adopt reasonable and appropriate measures capable of protecting the rights of the applicants to private life and their home, and more generally, to the enjoyment of a healthy and safe environment. This responsibility is engaged both before the start of the operations of the Săsar plant and after the accident in January 2010. In this regard the Court observes that the Romanian Government commissioned the Research Institute of the Ministry of the Environment to conduct an environmental impact assessment in 1992. Seven years later, the defendant State, a shareholder of the company Aurul, decided to authorize the operation of said company, based mainly on the findings of this study, conducted in 1993.”

²⁸⁹ *Ibid.*, para. 111.

²⁹⁰ *Ibid.*, para. 112. My translation.

²⁹¹ *Ibid.*, para. 113.

²⁹² *Ibid.*, para. 116.

²⁹³ *Ibid.*, paras. 118,120,122.

violation and the pecuniary damage, the Court decided in a five to two vote not to award the applicants any compensatory damage.²⁹⁴

A partially dissenting opinion of Judge Zupančič, joined by Judge Gyulumyan, disagreed with the majority finding that the applicant had not succeeded in establishing a chain of causation between the exposure to certain doses of sodium cyanide and the aggravation of the illness of one of one of the applicants.²⁹⁵

The same year the case *Brândușe v. Romania* was decided by the Court. The applicant in the case lived in a detention center twenty metres from a former waste tip owned by the company S.²⁹⁶ He complained *inter alia*²⁹⁷ about having to breath stale air and pestilence facing a real risk of catching diseases.²⁹⁸

The Court found that the strong odors complained of was evidenced but that it had not been established that these had negatively affected the health of the applicant. However, the nuisance which he had to suffer for several years amounted to an interference of Article 8 of the Convention.²⁹⁹ Given that the state had controlled the company in charge of the waste tip and that it had been passive in responding to the environmental nuisance and to inform the public on the risks, the Court found that the state had failed to observe its positive obligations under Article 8.³⁰⁰

In another case of noise disturbance from a bar, *Oluić v. Croatia*, a bar was located in another part of the house in which the applicant lived with her family.³⁰¹ The daughter had a hearing impairment and a medical report stated that this condition required her not to be exposed to noise.³⁰² The Court found that “[i]n view of the volume of the noise – at night and beyond the permitted levels – and the fact that it continued over a number of years and nightly, the Court finds that the level of disturbance reached the minimum level of severity which required the relevant State authorities to implement measures in order to protect the applicant from such noise.”³⁰³ The Court noted in this regard that the nuisance had been tolerated by the authorities for eight years while the processes that the applicant had pursued to redress the situation had been pending, thus rendering these processes ineffective.³⁰⁴ This engaged the positive obligation of Article 8 on the state.

However, the Court rejected the applicant's claim that her life had become unbearable and therefore violated her right to life, and the claim that she had

²⁹⁴ *Ibid.*, para. 131.

²⁹⁵ *Partly Dissenting Opinion of Judge Zupančič, joined by Judge Gyulumyan, Tătar v. Romania*, 27 January 2009, ECtHR, Application no. 67021/01. This dissenting opinion is analyzed in part 5.3.2 below.

²⁹⁶ *Brândușe v. Romania*, 7 April 2009, ECtHR, Application no. 6586/03, para. 9.

²⁹⁷ He also claimed that overcrowding amounted to the breach of Article 3 and in the context of Article 8 also invoked the lack of confidentiality in external communications.

²⁹⁸ *Brândușe v. Romania*, *supra* note 296, para. 52.

²⁹⁹ *Ibid.*, para. 67.

³⁰⁰ *Ibid.*, paras. 70-76.

³⁰¹ *Oluić v. Croatia*, 20 May 2010, ECtHR, Application no. 61260/08, para. 5.

³⁰² *Ibid.*, para. 61.

³⁰³ *Ibid.*, para. 62.

³⁰⁴ *Ibid.*, para. 65.

had no access to courts under Article 6 § 1, as non-admissible. There was no appearance of violations of these provisions according to the Court.³⁰⁵

In the case of *Băcilă v. Romania* from 2010 the applicant had moved from her home in 1973 because of the pollution from a nearby a factory specialized in the production of nonferrous metals affecting the health of her children. In 1996 she moved back in the hope that the pollution would have decreased, after the closing down of some of the factories in the town.³⁰⁶ The factory had been founded in 1939 as the company Sometra. It was nationalized in 1948 and bought by the Greek company Mytilineos Holdings in 1998.³⁰⁷ The factory emitted large quantities of sulfur dioxide and dust containing heavy metals, mainly lead and cadmium. In an analysis conducted in 1998 by the Regional Agency for Environmental Protection, it was established that in streams in the city, the concentration of heavy metals exceeded permitted levels and that metals found in the air, ground and vegetation were almost seven times higher than permitted.³⁰⁸

In 1999 the Departmental Directorate of Health stated that the prevalence of respiratory illnesses in the town was seven times higher than in the rest of the country. In analyzes from 2005, when the applicant was hospitalized, it was established that the concentration of lead and byproducts in her blood exceeded permitted levels. The applicant had frequent and irritating cough, voice alteration, fatigue and digestive problems. A doctor attested that she lived in a toxic environment and that she suffered from problems with her larynx, which could have been caused by the exposure to toxic fumes.³⁰⁹

In the attempts to redress the situation the applicant had had no success, the authorities having admitted that the company caused heavy pollution but that said company had taken measures to deal with the problem.³¹⁰ After several controls by the Regional Agency for Environmental Protection in 2007, the Agency fined the company (EUR 180.000) for its excessive pollution.³¹¹

Before the ECtHR the applicant claimed violations of Articles 6 § 1 and 8 arguing that the environmental pollution by the company had severely affected her health and her home.³¹² She alleged that the state had been passive in responding to these threats.³¹³

Having established that the case was to be examined under Article 8 solely, the Court found that it was evidenced in the medical documentation that the pollution had had an impact on the health of the applicant and that this pollution had caused the degradation of her health, especially the intoxication from lead and sulfur dioxide. The ECtHR acknowledged that the state had required the company to take mitigating measures, but that

³⁰⁵ *Ibid.*, paras. 71-72.

³⁰⁶ *Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04, paras. 5-6.

³⁰⁷ *Ibid.*, para. 9.

³⁰⁸ *Ibid.*, paras. 12-13.

³⁰⁹ *Ibid.*, paras. 36-38.

³¹⁰ *Ibid.*, paras. 14-20.

³¹¹ *Ibid.*, para. 21.

³¹² The French original use the word *habitat* which can be said to have more environmental connotations than *home*.

³¹³ *Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04, *supra* note 306, para. 44.

these measures had not been adequately enforced.³¹⁴ The Court found that this passivity was due to the economic importance of the company as a major employer in the region. In the instant case, the Court found that this interest, although legitimate, could not trump the rights of individuals relating to the enjoyment of a sustainable environment respecting health. The existence of grave and established consequences for the health of the applicant and other inhabitants of the town entailed the positive obligation of the state to put in place proper and adequate measures capable of protecting their well-being.³¹⁵ Therefore there had been a violation of Article 8.³¹⁶

The concurring opinion of Judge Zupančič should be noted. The Judge observed that the issue in the case, as well as in the *Tătar* case was the one of causation. In this opinion Judge Zupančič discussed the problems of a traditional and general notion of causality in law applied to contemporary environmental problems. As will be further analyzed in part 5.3.2 this discussion involved the effects of complex causation in environmental cases on the burden of proof and which role the precautionary principle could play in this regard.³¹⁷

3.2.2 The Inter-American System of Human Rights

A right to the environment has explicitly been recognized in the Inter-American system of human rights protection. Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereinafter Protocol of San Salvador) states that “Everyone shall have the right to live in a healthy environment and to have access to basic public services”³¹⁸. Nonetheless, this right is not directly enforceable in the Inter-American Commission and Court of Human Rights.³¹⁹ In jurisprudence, however, the Commission and Court have interpreted other civil- and political, and ESC-rights to include environmental protection.

In a case from 1985 brought on behalf of the *Yanomani Indians in Brazil* the Inter-American Commission had to examine whether a massive invasion of the lands of the Indians in the Amazonas by highway construction workers, geologists, mining prospectors, and farm workers had violated the

³¹⁴ *Ibid.*, paras. 66-67.

³¹⁵ *Ibid.*, paras. 69-71.

³¹⁶ *Ibid.*, para. 73.

³¹⁷ *Concurring Opinion of Judge Zupančič, Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04.

³¹⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", San Salvador, 17 November 1988, entered into force 16 November 1999.

³¹⁹ Article 19.6 of the Protocol of San Salvador provides a limited competence clause allowing organs of the Inter-American system to render judgments on individual petitions related to the rights enshrined in Articles 8.a and 13. It can be noted that the interrelationship between the environment and international human rights law also has been the subject of the Organization of American States General Assembly, *see Human Rights and the Environment*, OEA/Ser.G, AG/RES.1819 (XXXI-O/01) (2001).

human rights laid down in the American Declaration on the Rights and Duties of Man (hereinafter American Declaration)³²⁰. This invasion was due to the discovery of vast natural resources on their lands. Especially the subsequent construction of a highway passing through the territory of the Yanomani had forced them to leave their homelands, having serious consequences for their indigenous culture.

The allegations of human rights violations made towards Brazil were, *inter alia*, that this occupation and development in the Amazonas “has resulted in the destruction of encampments and the disappearance and death of hundreds of Yanomami Indians and threatens to make them extinct”³²¹, that this had “devastating physical and psychological consequences for the Indians; it has caused the break-up of their age-old social organization; it has introduced prostitution among the women, something that was unknown; and it has resulted in many deaths, caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others”³²². The petitioners in this regard invoked the following articles of the American Declaration: Article I (Right to Life, Liberty, and Personal Security); Article II (Right to Equality before the Law); Article III (Right to Religious Freedom and Worship); Article XI (Right to the Preservation of Health and to Well-being); Article XII (Right to Education); Article XVII (Right to Recognition of Juridical Personality and of Civil Rights); and Article XXIII (Right to Property).

The Commission found that

“That the reported violations have their origin in the construction of the trans-Amazonian highway BR-210 that goes through the territory where the Indians live; in the failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group; in the authorization to exploit the resources of the subsoil of the Indian territories; in permitting the massive penetration into the Indians' territory of outsiders carrying various contagious diseases that have caused many victims within the Indian community and in not providing the essential medical care to the persons affected; and finally, in proceeding to displace the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes.”³²³

The Commission held that these invasions were made without adequate protection of the Yanomani and that this “resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others”.³²⁴ Furthermore, the Commission found that the state had failed to prevent the residents nearby the highway from being “changed into beggars or prostitutes”³²⁵, and that the discovery of metal ores on the land had caused serious conflicts which led to violence between prospectors

³²⁰ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

³²¹ Case 7615 (*Petitioners on behalf of the Yanomani Indians v. Brazil*), 5 March 1985, Inter-American Commission on Human Rights, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), para. 3(e).

³²² *Ibid.*, para. 3(a).

³²³ *Ibid.*, para. 2 of the Considerations of the Commission.

³²⁴ *Ibid.*, para. 10(b) of the Considerations of the Commission.

³²⁵ *Ibid.*, para. 10(c) of the Considerations of the Commission.

and miners on the one hand and the Indians on the other hand. This “affected the lives, security, health, and cultural integrity of the Yanomamis.”³²⁶

For these reasons the Commission concluded that “ by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians” there had been violations of the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).³²⁷

In 1997 the Inter-American Commission published a *report on the situation of human rights in Ecuador*.³²⁸ Although this was not a contentious judicial procedure, the parts of the report that we are here interested in originated from a petition filed on behalf of the indigenous Huaorani people in 1990. Since the Commission found the problem more widespread it decided to rather include it in the country report. Similarly to the *Yanomani* case, the lands of the indigenous Huaorani Indians had been invaded by settlers after the discovery of oil deposits.

The inhabitants of the area complained that the oil extraction had caused severe environmental damage, thereby negatively affecting their lives and health. Crude oil and toxic waste had contaminated the drinking water and the water they used for cooking and bathing. Emissions had also affected the air and soil. Representatives of communities claimed that the pollution had caused skin diseases, rashes, chronic infections and fevers, gastrointestinal problems and diarrhea. They alleged that the government had failed to regulate and supervise these activities, thereby giving rise to its responsibility in breach of the right to life and the right to live in an environment free from contamination.

In establishing the relevant Inter-American law, the Commission noted that:

”[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”³²⁹

The Commission went on to establish that the right to life, liberty and personal security in Article I of the American Declaration was interrelated with the right to health and well-being in Article XI. Article 4, the right to life, and Article 5, the right to physical, mental and moral integrity, of the American Convention³³⁰ were also applicable. In this regard the Commission observed that the right to life was nonderogable and

³²⁶ *Ibid.*, para. 10(d) of the Considerations of the Commission.

³²⁷ *Ibid.*, para. 1 under Inter-American Commission on Human Rights resolves.

³²⁸ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. No. OEA/Ser.L/V/II.96 Doc. 10 rev. I, 24 April 1997, Chapter VIII, ‘The Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities’.

³²⁹ *Ibid.*, at Part 2: Relevant Inter-American Law.

³³⁰ American Convention on Human Rights, San José, 22 November 1969, entered into force 18 July 1978.

constituted the “basis for the realization of all other rights”³³¹ and that it contained not only a the obligation to refrain from taking life, but also positive obligations.

In its analysis the IAmCom firstly stated that the adverse effects on health from human exposure to oil and oil-related chemicals were widely documented. Concerning the instant case, it found that several reports and investigations had established the prevalence of negative health effects, such as spontaneous abortion, headache, nausea, anemia, dermatitis, fungal infection, body aches, fevers, skin problems, gastro-intestinal problems. There had also been an increase in the risk of infant mortality, birth defects, cancer and other grave illnesses. Furthermore, it was pointed out that the problem of malnutrition was particularly grave in the area and that this problem was related to the contamination of fishing waters. In this regard, the Commission cited the preamble of the World Charter for Nature, adopted by the UN General Assembly in 1982, which provides that "Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients."

The IAmCom concluded that:

“The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.”

It emphasized the right to access to information, participation in relevant decision making and judicial recourse when there is a risk to human health from environmental damage.

The Commission furthermore concluded that “[b]oth the State and the companies conducting oil exploitation activities are responsible for such anomalies [contamination], and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.”

It recommended, *inter alia*, that the state take preventive and remedial action and address the risks of extractive industries in the area, and that the state implement the rights of the inhabitants to information, participation in relevant decision-making and the right to effective judicial recourse.

The Inter-American Court of Human Rights further developed the interrelationship of the rights in the Inter-American human rights system and environmental protection in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* in 2001. The case had been transferred to the Court from the IAmCom which had filed a lawsuit with the Court on Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention in view of the fact that Nicaragua had not demarcated the communal lands of the Awas Tingni Community, nor had the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, and also because it granted a

³³¹ *Report on the Situation of Human Rights in Ecuador, supra* note 328.

concession on community lands without the assent of the Community, and the State did not ensure an effective remedy in response to the Community's protests regarding its property rights.³³²

The case originated in attempts to stop the logging of timber on the native lands of the indigenous Awas Tingni people by the company Sol del Caribe S.A (SOLCARSA), which was a subsidiary of the Korean company Kumkyung Co. Ltd. The government had granted concessions to the company without consulting the Awas Tingni.

The Court firstly found that the state had not taken adequate domestic legal measures to ensure that indigenous lands were delimited, demarcated, and titled. The state had furthermore delayed the processing of the complaint by the community. Therefore Article 25 had been violated.³³³

In its analysis of the alleged violation of the right to property, the Court used an evolutionary approach to the American Convention, stating that it was a living instrument³³⁴, and interpreted the term property as to include communal property as construed by indigenous communities. In this regard the Court held that:

“Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”³³⁵

The fact that the state had not clearly delimited this communal property had “created a climate of constant uncertainty among the members of the Awas Tingni Community”.³³⁶ For these reasons the Court held that these members had the right that the state

“a) carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and
b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.”³³⁷

Hence, Article 21 of the American Convention had been violated.³³⁸ The IAmCom had also claimed that the state had breached a combination of

³³² *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Inter-American Court of Human Rights, Series C No. 79, para. 2.

³³³ *Ibid.*, paras 137-139.

³³⁴ *Ibid.*, paras. 146-148.

³³⁵ *Ibid.*, para. 149.

³³⁶ *Ibid.*, para. 153.

³³⁷ *Ibid.*, para. 153.

³³⁸ *Ibid.*, paras. 154-155.

Articles 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family); 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government), but the Court dismissed these claims since the Commission had not provided any grounds for it.³³⁹

In 2004, in the case of *Maya Indigenous Community of the Toledo District v. Belize*, the petitioners claimed violations of Articles I (right to life), II (right to equality before the law), III (right to religious freedom and worship), VI (right to a family and to protection thereof), XVIII (right to a fair trial), XX (right to vote and to participate in government) and XXIII (right to property) of the American Declaration on the ground that the state had granted logging and oil concessions on lands traditionally used and occupied by the Maya people.³⁴⁰ They claimed that this had “caused substantial environmental harm and threatens long term and irreversible damage to the natural environment upon which the Maya depend”.³⁴¹ The Maya cultural and physical survival were at risk since the logging activities had affected water, plant and animal life upon which the Maya depended.³⁴² The petitioners furthermore stated that the state had approved an application by the company AB Energy Inc. to start oil exploration activities on the land.³⁴³

On the alleged violation of the right to property the Commission reiterated the principles from the case law of the IAmCourt construing property in an evolutionary way as to include communal land rights as perceived in an indigenous traditional perspective.³⁴⁴ After having established that the Maya people had a communal right to property over the lands in question, the Commission found that “the logging concessions granted by the State in respect of lands in the Toledo District have caused environmental damage, and that this damage impacted negatively upon some lands wholly or partly within the limits of the territory in which the Maya people have a communal property right.”³⁴⁵ The failure of the state to adequately protect this right by granting concessions which exacerbated the environmental damage amounted to a breach of the right to property.³⁴⁶

In addition to this violation, the Commission found that the state had breached the right to equality before the law³⁴⁷, as the state had not recognized the Maya people's special system of land and resource use in law, and the right to judicial protection, since there had been an unwarranted delay in the domestic proceedings.³⁴⁸

³³⁹ *Ibid.*, paras. 156-157.

³⁴⁰ *Maya Indigenous Community of the Toledo District v. Belize*, 12 October 2004, Inter-American Court of Human Rights, Report N° 40/04 Case 12.053, para. 2.

³⁴¹ *Ibid.*, para. 19.

³⁴² *Ibid.*, para. 31.

³⁴³ *Ibid.*, para. 30.

³⁴⁴ *ibid.*, paras. 112-118.

³⁴⁵ *Ibid.*, para. 147.

³⁴⁶ *Ibid.*, para. 148.

³⁴⁷ *Ibid.*, para. 171.

³⁴⁸ *Ibid.*, para. 186.

The Commission did not find it necessary to examine the alleged violations of the other Articles claimed, since these were “subsumed within the broad violations of Article XXIII of the American Declaration”.³⁴⁹

In an unprecedented action in 2005, an *alliance of Inuit from Canada and the United States* petitioned the IAmCom alleging that “the effects of global warming constitute violations of Inuit human rights for which the United States is responsible.”³⁵⁰ The petitioners claimed *inter alia* violations of the right to enjoy the benefits of their culture, the right to use and enjoy the lands they have traditionally occupied and their personal property, the right to health, right to life, physical integrity and security, the right to their own means of subsistence and the right to residence and movement and inviolability of the home. In trying to hold one state, the US, responsible for the effects of greenhouse gas emissions with sources in different states, the petitioners referred to the UNFCCC principle of common but differentiated responsibilities and that the US was a major polluter and Annex I country, thereby claiming that the United States bore a special responsibility to those affected.

However, the Commission found the case inadmissible due to the non-exhaustion of domestic remedies. Nevertheless, it invited the petitioners to request a public hearing on the issue, indicating that the Commission attaches importance to the question of the interrelationship of human rights and climate change.³⁵¹

In an admissibility decision from 2009, the case of *Community of La Oroya v. Peru* in the IAmCom, the petitioners complained of environmental contamination of the area La Oroya. This pollution had allegedly been caused by the a metallurgical complex bought by the US company Doe Run from the state in 1997.³⁵² They claimed that the emissions of excessive levels of lead, sulfur, cadmium, and arsenic, above permitted levels had led to “abnormal degrees and frequency of illness, which is caused or at least aggravated by environmental pollution. According to the petitioners, this causal relationship is demonstrated in patterns of illness throughout the population, correlated with the most common effects of the elements found in La Oroya.”³⁵³

Based on this approach, the petitioners presented evidence, firstly, of the general effects of the toxic in question, and, secondly, the specific effects on health on the inhabitants of La Oroya. On the general effects of the various toxic in question, the petitioners stated that lead could be carcinogenic, and

³⁴⁹ *Ibid.*, para. 156.

³⁵⁰ *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada, 7 December 2005, para. 70.

³⁵¹ For information from this hearing, which took place the 1 March 2007, see <<http://www.earthjustice.org/news/press/2007/nobel-prize-nominee-testifies-about-global-warming>>, visited on 20 November 2010.

³⁵² *Community of La Oroya v. Peru*, August 5, 2009, Inter-American Commission on Human Rights, Admissibility decision, Report no. 76/09, Petition 1473-06, para. 2.

³⁵³ *Ibid.*, para. 15.

that it could cause anemia, severe brain damage, coma, and even death.³⁵⁴ Furthermore, sulfur dioxide could damage the circulatory and respiratory systems, and aggravate bronchitis and asthma.³⁵⁵ On cadmium, they alleged that it probably was carcinogenic and was associated with decline in lung function. It could cause bronchitis, alveolitis and emphysema and aggravated heart disease, anemia, and immune disorders. On arsenic the petitioners said that it was established that it caused cancer in the lungs, skin, bladder, and liver, and caused gastrointestinal and nervous-system problems.³⁵⁶

Turning, then, to the specific health problems of the inhabitants of La Oroya, the petitioners pointed out that gastritis, vomiting, diarrhea, abdominal pain, calcium deficiency, dental problems, irreversible respiratory damage, skin problems, cancer, reproductive system damage, anemia, cardiovascular disease and neurological problems were among the most prevalent ailments.³⁵⁷ Furthermore, concerning the alleged victims in the case, the petitioners said that almost all of them had severe respiratory problems, and gave examples of specific effects, such as a child who had deceased from skin cancer.³⁵⁸ To amplify their argument the petitioners pointed out that La Oroya by institutions and universities had been listed as one of the ten most polluted cities in the world.³⁵⁹

They claimed that the failure of the state to control, supervise and mitigate the effects from the complex entailed a positive obligation on the state, and that the state had been aware of this serious situation.³⁶⁰

This, it was alleged by the petitioners, had given rise to violations of Articles 4 (right to life), 5 (right to humane treatment), 11 (right to privacy), 13 (freedom of thought and expression), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention, with reference to Articles 1.1 and 2 of that instrument and to Articles 10 and 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights. They furthermore claimed violations of Article 19 of the American Convention (rights of the child) with reference to the Convention on the Rights of the Child.³⁶¹

To support their legal claims, the petitioners emphasized that “the right to life includes the right to a decent life, and that health is directly linked to that right”.³⁶² On the right to humane treatment they said that “in addition to the manifest physical harm to the health of the alleged victims, their psychological and emotional well-being is also affected by continual anxiety and fear of the dangers they face every day”.³⁶³ They also claimed that the right to privacy had been breached since the excessive environmental

³⁵⁴ *Ibid.*, para. 16.

³⁵⁵ *Ibid.*, para. 17.

³⁵⁶ *Ibid.*, para. 18.

³⁵⁷ *Ibid.*, para. 19.

³⁵⁸ *Ibid.*, para. 20.

³⁵⁹ *Ibid.*, para. 12.

³⁶⁰ *Ibid.*, para. 21.

³⁶¹ *Ibid.*, para. 1.

³⁶² *Ibid.*, para. 26.

³⁶³ *Ibid.*, para. 27.

pollution represented an intrusion into private and family life which affected every aspect of daily life.³⁶⁴

The Commission accepted the petition as admissible and found that the alleged deaths and/or health problems in the petition could, if proven, represent violations of Articles 4 and 5 of the American Convention caused by the passivity of the state vis-à-vis the environmental pollution from the metallurgical complex.³⁶⁵ It furthermore found that delays in domestic processes could give rise to violations of Articles 8 and 25 of the Convention, and that the lack or manipulation of information on the pollution could amount to a breach of Article 13.³⁶⁶

3.2.3 The African Commission on Human and Peoples Rights

In the Inter-African human rights system, the African Charter³⁶⁷ to Promote and Protect Human and Peoples Rights in Article 24 proclaims that “All peoples shall have the right to a general satisfactory favourable to their development”. This, and other rights in the Charter have been used in the jurisprudence of the African Commission.

In 2001 the African Commission decided the *Ogoniland* case³⁶⁸ on the activities of the Nigerian state and the Shell oil company having devastating effects on humans and the environment in the Niger Delta. The communication, which was lodged by two NGOs³⁶⁹, claimed a number of human rights violations of the Ogoni people living in the Niger Delta. The communication alleged that the joint venture of the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC) had caused contamination of soil, water and air; the destruction of homes; the burning of crops; and thereby had created a climate of terror.³⁷⁰ The petitioners alleged violations of the rights of the Ogoni's to health, a healthy environment, housing and food within Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment) of the Charter.³⁷¹ The petitioners argued that the state, not only had omitted to take measures to protect the inhabitants and the environment, but also were complicit in harmful activities of the oil

³⁶⁴ *Ibid.*, para. 28.

³⁶⁵ *Ibid.*, para. 74.

³⁶⁶ *Ibid.*, para. 75.

³⁶⁷ African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, entered into force 21 October 1986.

³⁶⁸ Communication 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*. For a case comment see D. Shelton, 'Decision Regarding case 155/96', 96 *American Journal of International Law* 937 (2002).

³⁶⁹ The Social and Economic Rights Action Center (SERAC), based in Nigeria and the Center for Economic and Social Rights (CESR) in New York. It should be noted that the African human rights system accepts *actio popularis*.

³⁷⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *supra* note 368, paras. 1,7,9.

³⁷¹ *Ibid.*, para. 10.

companies by placing the legal and military forces of the state at their disposal.³⁷²

The Commission firstly gave its understanding of the general nature of the rights in the Charter. It explained that the rights contained obligations to respect, protect, promote and fulfill. It held that "[t]hese obligations universally apply to all rights and entail a combination of negative and positive duties"³⁷³ On the alleged violations of Articles 16 (the right to health) and 24 (the right of peoples to a satisfactory environment), the Commission found that the latter right "is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual".³⁷⁴ Therefore, the right to a satisfying environment was subsumed also under the right to health.

The Commission elaborated on the obligations in Article 24. It stated that it included the obligation of the state "to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources."³⁷⁵ More specifically, Articles 16 and 24 included "ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."³⁷⁶ It further held that "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health".³⁷⁷

Applying these principles to the case at hand, the Commission, rather shortly, held that the state had not taken the care that was required.³⁷⁸

³⁷² *Ibid.*, para. 3. The Communication also alleged various violations based on more direct harassment by Nigerian security forces in response to the protests by the Movement of the Survival of Ogoni People (MOSOP) to the degradation of the environment by oil companies, para. 7.

³⁷³ *Ibid.*, para. 44 (citing A. Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook*, p. 21). Turning to the alleged violation of right to housing, the Commission, in line with its integrative approach, stated that "[a]lthough the right to housing or shelter is not explicitly provided for in the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.", para. 60.

³⁷⁴ *Ibid.*, para. 51.

³⁷⁵ *Ibid.*, paras. 52-53.

³⁷⁶ *Ibid.*, para. 54.

³⁷⁷ *Ibid.*, para. 51. Citing A. Kiss, 'Concept and Possible Implications of the Right to Environment' in K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty first Century: A Global Challenge*, p. 553.

³⁷⁸ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, *supra* note 368, para. 54.

There is no explicit right to food in the African Charter. Nevertheless, the petitioners alleged a violation of this right due to contamination and, the Commission accepted the claim of the petitioners that this right is implicit in the African Charter in provisions such as the right to life (Article 4), the right to health (Article 16), and the right to economic, social and cultural development (Article 22). It stated that “[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.” It further held that “the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.”³⁷⁹ The Commission found that the state had violated the right to food.³⁸⁰

Turning to the right to life and integrity (Article 4) the Court furthermore, as concerns the pollution aspect of the case, concluded that “pollution and environmental degradation to a level humanely unacceptable has made it living in the Ogoni land a nightmare.”³⁸¹

The final order of the Commission is probably the most far-reaching of any case on environment and human rights. It appealed to the state to conduct a “comprehensive cleanup of lands and rivers damaged by oil operations”, to conduct environmental and social impact assessments, to provide information on health and environmental risks and provide “meaningful access to regulatory and decision-making bodies”.³⁸²

3.2.4 United Nations Human Rights Committee

Apart from regional human rights mechanisms, environmental cases have also been examined by bodies of a global reach. In the UN system, the two covenants on civil and political rights³⁸³, and ESC-rights are the most comprehensive instruments for the protection of human rights through global monitoring. Although both systems provide for monitoring through the Human Rights Committee and the International Committee on ESC-rights, only the former have, up until now³⁸⁴, jurisdiction to hear individual petitions on violations of rights.

While the majority of the environmental cases presented to the Committee has been declared inadmissible since the applicants have had difficulties

³⁷⁹ *Ibid.*, para. 65.

³⁸⁰ *Ibid.*, para. 66.

³⁸¹ *Ibid.*, para. 67.

³⁸² *Ibid.*, para. 69.

³⁸³ International Covenant on Civil and Political Rights, New York, 6 December 1966, entered into force on 23 March 1976.

³⁸⁴ The Optional Protocol providing the CESCR with competence to receive and consider communications was adopted 2008 (Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008) has yet to enter into force lacking the required ten ratifications. As of 20 November 2010 three states had ratified the Protocol.

proving they were *victims* within the meaning of the Optional Protocol³⁸⁵, the HRC has recognized the connection between the environment and the rights in the ICCPR on a number of occasions.

In the case of *EHP v. Canada*³⁸⁶ in 1982 the Committee heard a complaint from an applicant who claimed that the storage of nuclear waste that had caused pollution of a nearby residency, entailed a violation of the right to life, since the exposure to radioactive waste was known to cause cancer and genetic defects. While the Committee found the case inadmissible due to the non-exhaustion of domestic remedies, it stated in its decision that “the present communication raises serious issues, with regard to the obligation of States parties to protect human life (article 6(1))”.³⁸⁷

In the cases of *EW v. The Netherlands*³⁸⁸ and *Aalbersberg v. The Netherlands*³⁸⁹ the applicants complained of the risks from nuclear weapons on the right to life. While the former was concerned with the deployment of such weapons the latter dealt with the recognition by the government of the lawfulness of its potential use. The HRC declared that the applicants did not face an imminent threat to their lives, hence the cases were inadmissible.

In *Lubicon Lake Band v. Canada*³⁹⁰, the state had allowed the provincial government to expropriate the territory of the indigenous Lubicon Lake Band people so that the territory could be used for the exploration of gas and oil reserves by private companies. This had allegedly led to environmental degradation of the lands.³⁹¹ The Committee found a violation of article 27 (right to minority culture) since the group had been prevented from following cultural practices according to their traditional way of life.

In the case of *Bordes and Temeharo v. France*³⁹² from 1996, the applicants complained about radiation and radioactive contamination affecting human health from nuclear tests that had already occurred. The applicant invoked the right to life. The Committee found the case inadmissible, but stated that:

³⁸⁵ The HRC has specified that “[f]or a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.” This language is used in Human Rights Committee, 87th sess, Communication No 1440/2005, *Aalbersberg v. the Netherlands*, Admissibility Decision of 12 July 2006, UN Doc. CCPR/C/87/D/1440/2005 (2006), para. 6.3; and Human Rights Committee, 47th sess., Communication No 429/1990, *EW v. the Netherlands*, Admissibility Decision of 8 April 1993, UN Doc. CCPR/C/47/D/429/1990 (1993), para. 6.4.

³⁸⁶ Human Rights Committee, 17th sess., Communication No. 67/1980, *EHP v. Canada*, Admissibility Decision of 27 October 1982, UN Doc. CCPR/C/17/D/67/1980 (1980).

³⁸⁷ *Ibid.*, para. 8.

³⁸⁸ *W v. the Netherlands*, *supra* note 384.

³⁸⁹ *Aalbersberg v. the Netherlands*, *supra* note 384.

³⁹⁰ Human Rights Committee, 38th sess., Communication No 167/1984, *Lubicon Lake Band v. Canada*, Decision of 26 March 1990, UN Doc. CCPR/C/38/D/167 (1984).

³⁹¹ *Ibid.*, para. 2.3.

³⁹² Human Rights Committee, 57th sess, Communication No 645/1995, *Bordes and Temeharo v. France*, Admissibility Decision of 22 July 1996, UN Doc. CCPR/C/47/D/645/1995 (1996).

“Although the authors have not shown that they are ‘victims’ within the meaning of article 1 of the Optional Protocol, the committee wishes to reiterate, as it observed in its General Comment 14, that ‘it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.’³⁹³

In *Brun v. France*³⁹⁴ decided in 2006, the applicant claimed a violation of the right to life on the basis of the long-term effects on health and the environment from open-field trials of genetically modified organisms. The application was declared inadmissible since the applicant had failed to show that he was a “victim” and that an applicant cannot pursue a claim under the ICCPR in theoretical terms.³⁹⁵

³⁹³ *Ibid.*, para. 5.9.

³⁹⁴ Human Rights Committee, 88th sess, Communication No. 1453/2006, *Brun v. France*, Admissibility Decision of 18 October 2006, UN Doc. CCPR/C/88/D/1453/2006 (2006).

³⁹⁵ *Ibid.*, para. 6.3.

4 Legal accountability of companies in environmental international human rights jurisprudence

4.1 Is there a need for corporate legal accountability in international human rights law?

This chapter examines the issue of legal accountability of companies in the cases presented above. Before turning to the analysis of these cases, we will briefly look at the following questions: Is there a need for corporate legal accountability in international human rights law?; What is the rationale for holding companies accountable?; and the question of direct legal accountability. An overview of the development of the corporate social responsibility-discourse is also provided.

Is there, then, a need to address corporate (mis-)conduct in the framework of international human rights law? This is not a question of *de lege lata*, but rather an issue of policy. From the outset it should be noted that the very basis of my understanding of international law as a meaningful social system is that it is capable of addressing the relevant questions of international affairs, *i.e.* to *environmentally fit* into the surrounding society.³⁹⁶ If this system is seen as increasingly irrelevant in addressing current concerns, then this might lead to a situation where its legitimacy becomes questioned. Or put differently, international law must be capable of accommodating present day reality.

There is a fundamental tension in this regard between at the one hand law as a dynamic system capable of change with societal change, and at the other hand law as an autonomous and stabilizing system. We shall not here dwell on these theoretical questions further, suffice it to say that they are closely linked to the issues of the relationships of law with politics and society. Nevertheless, these are just the fundamental issues that underpin the question asked in this part.

The discourse on human rights obligations of companies gained a new momentum with the processes of liberal economic and political globalization that were intensified from the 1960s and onward. Although powerful corporations were not a new phenomenon³⁹⁷, their capabilities to

³⁹⁶ See *supra* p. 18.

³⁹⁷ In this regard the East Indian companies of the 17th and 18th centuries were in many aspects more powerful than present day corporations. It is also noteworthy that, concerning the slave trade, abolitionists eschewed sole reliance upon state responsibility, both because traders operated on the high seas and because many states tolerated the practice. Instead, they convinced governments to conclude a series of treaties that allowed states to seize

establish and expand in multiple countries meant that they could exert an unprecedented influence not only on the national, but also on the international level. On a global market, companies have increasing possibilities to direct their activities to states where it is most economically profitable to operate. A risk in this process is that the competition between companies could lead to a 'race to the bottom', the lowering of standards, and thereby affecting the enjoyment of human rights. A country might similarly lower the standards itself to be more competitive in the pursuit of foreign direct investment.³⁹⁸

Reference is in this regard not seldom made to the economic power of companies as compared to states. For example, a study by the Institute for Policy Studies in 2000 found that the 51 per cent of the world's concentration of wealth were owned by companies while 49 per cent by states.³⁹⁹ Furthermore, it has been reported that the 15 largest companies have a budget that each exceeds the GDP of more than 120 countries.⁴⁰⁰

At the same time as corporate economic power is expanding, states are increasingly privatizing functions of government.⁴⁰¹ For example, concerning the state monopoly on violence it can be noted that private security companies now are exceeding public police departments in manpower.⁴⁰²

Globalization and the increasing economic power make the impact by companies on the enjoyment of human rights and environmental protection significant. Hence, at the same time as the state power against which human rights originally were aimed at, is reducing, the power and influence of corporations are increasing.

But this increase in power does not necessarily mean that international human rights is the answer. Are not traditional mechanisms such as state responsibility and domestic law sufficient in this regard? As will be further developed below, in my approach to corporate accountability the interrelationship between state responsibility, domestic law and corporate conduct is for present purposes focused on the results for the victim. Therefore, what is explored here is rather the reinterpretation of this

vessels and required them to punish slave traders. Thus, the first true example of international human rights law was a response to commercially oriented violations of human rights.", S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* 443 (2001-2002), p. 465.

³⁹⁸ N. Jägers, *Corporate Human Rights Obligations: In Search Of Accountability*, pp. 8-9.

³⁹⁹ S. Anderson and J. Cavanagh, 'Top 200: The Rise of Global Corporate Power', Institute for Policy Studies, 4 December 2000, <www.ips-dc.org/files/2452/top200.pdf>, visited on 20 November 2010. The results were based on a comparison between the GDP of states from the World Bank Development Report of 2000 and the sales figures of corporations found in Fortune magazine. See also UNCTAD, *Are Transnationals Bigger than Countries?*, 12 August 2002, Un Doc TAD/INF/PR/47.

⁴⁰⁰ Ecumenical Team for the WSSD, 'Corporate Accountability – A Matter of Sustainable Justice', Fact sheet, Johannesburg, 2002, <<http://www.wcc-coe.org/wcc/what/jpc/corp-account.pdf>>, visited on 20 November 2010.

⁴⁰¹ A. Reinisch, 'The Changing International Legal Framework', in P. Alston (ed.), *Non-State Actors and Human Rights*, pp. 74-78.

⁴⁰² D. Greenwood, 'Markets and Democracy, The Illigitemacy of Corporate law', 74:1 *University of Missouri-Kansas City Law Review* 41 (2005), pp. 58-59.

interrelationship than “pure” international human rights law obligations for companies.

This begs an explanation on the use of the terms responsibility and accountability. The term responsibility denotes a more positivist understanding of international law where a relevant and accepted actor has explicit obligations from prescriptive norms. It has furthermore been argued that the term international responsibility is too ingrained in the concept of state responsibility making it unsuitable to describe corporate conduct.⁴⁰³ Accountability can be seen as a more flexible concept, more closely tied to the discourses on corporate governance. It denotes a more active role for corporations in the international processes of environmental protection and human rights. It furthermore indicates the acknowledgment of the need for transparency for stakeholders and the public at large to critically investigate corporate conduct.⁴⁰⁴ Hence, it is more attached to the 'answerability' of a company and the multiple ways, including non-legal methods, that this can be achieved.⁴⁰⁵ Moreover, the term accountability is increasingly used in international negotiations on corporate conduct and environmental protection, thus attesting to its rising international significance.⁴⁰⁶

However, in this thesis we are exploring *legal* accountability. The concept of accountability is here used, rather than responsibility, to emphasize the interrelationship between state responsibility, domestic law and corporate conduct and the interpretation of substantive and procedural environmental rights in an interdependent manner as to achieve corporate accountability. A more traditional view based upon the more legalistic concept of responsibility would be disinterested in exploring the relationship between state responsibility for human rights violations from failure to act against corporate conduct in greater detail.

To be able to adequately answer the question on the need for international human rights for corporate conduct we have to briefly address the issue of the philosophy of human rights. Firstly, it might be useful to remind of the distinction between human rights and private rights. While the former traditionally have been aimed at providing redress against the otherwise absolute power of the government, the latter concern the relationship between individuals.⁴⁰⁷ Regarding human rights, at least civil and political

⁴⁰³ A. Boyle, 'Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development, Past Achievements and Future Challenges*.

⁴⁰⁴ E. Morgera, 'From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment?', 13:2 *Review of European Community and International Environmental Law* 214 (2004), pp. 220-221.

⁴⁰⁵ R.O. Keohane, 'The Concept of Accountability in World Politics and the Use of Force', 24 *Michigan Journal of International Law* 1121 (2003). Keohane emphasizes being exposed to sanctions as well as answering for one's own actions.

⁴⁰⁶ E. Morgera, *supra* note 404. In the article Morgera analyzes the use of the terms responsibility and accountability in international environmental conferences from Stockholm 1972 to Johannesburg 2002. She found that there is a tendency to an increased use of 'accountability' instead of 'responsibility', and explores the French and Spanish translations to these in order to clarify the meaning of the terms.

⁴⁰⁷ A. Sinden, 'Addressing Corporate Environmental Wrongs', in D. McBarnet *et al.* (eds.), *The New Corporate Accountability*, pp. 506-507.

rights, two theories provide philosophical reasons for these rights: (1) the individual autonomy theory and (2) the power imbalance theory. For the first of these theories, the individual sphere around the person is inviolable and hence the state cannot intrude into this sphere. According to the second theory, based on previous experience there must be means to counter the risk of the abuse of power by state authorities. This tradition of thought views the imbalance of power between the individual and the state as the central problem in this regard.⁴⁰⁸ Thus, the power here referred to implies the possibilities to alter the condition of a person's life in one way or the other through the actual use of coercion or the threat of coercion.⁴⁰⁹ But it may be objected that also private entities can exercise power over each other, without involving violations of human rights. It can be argued that a fundamental difference in this regard is the absence of a higher authority to appeal to in the case of state abuse of power.⁴¹⁰ Hence, the question of the relevance of international human rights law for holding enterprises accountable is to some extent dependent upon the understanding of the private-public divide and the issue of power.

On the first of these issues, it has been argued that the perception of the public sphere has to be changed so as to include new centers of power such as multinationals that are perceived as sources of authority, repression, and alienation.⁴¹¹ If the strict private-public divide is maintained and seen in the light of the theory on the inviolable personal sphere as the underlying rationale for human rights, companies are not easily categorized as rights holders, since it obviously does not share the demands on bodily integrity of a human being. Neither does it adequately fit into the private side analyzed in the power-imbalance-perspective.⁴¹² As seen above, companies wield considerable power, not only vis-à-vis states, but also on individuals. But, to what extent is this power of the same kind as the one from which civil and political rights were aimed at protecting? With the increasing independence of companies, and especially MNCs (multinational corporations, hereinafter MNCs), they have in many cases, particularly in the developing world, the power to influence the host state. In these instances, the state would usually be reluctant to act against alleged harm from corporate activity, not the least if the host state is dependent on foreign direct investment. This harm often amount to the same gravity as human rights violations committed by the state directly.⁴¹³

⁴⁰⁸ *Ibid.*, p. 508.

⁴⁰⁹ R.A. Dahl, 'The Concept of Power', 2 *Behavioral Science* 201 (1957), p. 202 *et seq.*

⁴¹⁰ A. Sinden, *supra* note 407, p. 513.

⁴¹¹ A. Clapham, *supra* note 10, p. 137.

⁴¹² It has been noted that the categorization of the company in the private sphere, as opposed to the public sphere is a result of an economic world view according to which "they are analogised to and categorised with individuals rather than states. Accordingly, with respect to human rights, they are treated as rights holders rather than duty holders.", A. Sinden, *supra* note 407, p. 514. An analogy can here be made to the description of other entities than states as non-state actors in international law, which reflects the view of international law as a purely state-centered system. For this issue *see* P. Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in P. Alston (ed.), *Non-State Actors and Human Rights*, pp. 3,19.

⁴¹³ A. Sinden, *supra* note 407, pp. 518-519.

To sum up, if the rationale of (civil and political) human rights is based on the non-interference in the personal sphere and/or the countering of imbalances of public power, then companies should, on a conceptual level, be able to have human rights obligations. This is so because (1) the interference into the personal sphere can be exerted by corporate conduct as well as by the state, and these (2) abuses of considerable corporate power are often committed without the capability of redress to a higher authority.

4.2 The rationale for holding companies accountable in international human rights law – rights preceding duties

A fundamental legal-philosophical rationale for holding companies accountable is the understanding of rights preceding duties. According to this theory, as developed by Raz, rights of individuals entail not only various duties but also various dutyholders. Raz argues that “there is no close list of duties which correspond to the right [...] A change of circumstances may lead to the creation of new duties based on the old right.”⁴¹⁴ Furthermore, “one may know of the existence of a right [...] without knowing who is bound by duties based on it or what precisely are these duties.”⁴¹⁵ This view is particularly relevant for human rights, which obviously are concerned with the dignity of the individual first and foremost.

The more legal rationale for holding corporations accountable under international law usually begins with reference to the phrase in the preamble to the Universal Declaration of Human Rights (UDHR) stating that

“every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal recognition and observance.”⁴¹⁶

Commentators have had differing opinion on the legal impact of this passage.⁴¹⁷ Furthermore, Article 29 of the UDHR according to which “[e]veryone has duties to the community in which alone the free and full development of his personality is possible”, and Article 30, which provides

⁴¹⁴ J. Raz, *The Morality of Freedom*, p. 171.

⁴¹⁵ *Ibid.*, p. 184.

⁴¹⁶ United Nations General Assembly resolution A/RES/217(III) A of 10 December 1948, *Universal Declaration of Human Rights*

⁴¹⁷ For example, Henkin claims that “[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, and no cyberspace. The Universal Declaration applies to them all.”, L. Henkin, ‘The Universal Declaration at 50 and the Challenge of Global Markets’, *25 Brooklyn Journal of International Law* 17 (1999), p. 25. Jägers concludes that “[h]ence, according to the preamble, besides States, individuals and other organs of society have duties under the UDHR.”, N. Jägers, *supra* note 398, p. 41. Zerk is more cautious, stating that “the wording of this particular passage (to ‘strive’) is not particularly strong.”, J.A. Zerk, *Multinationals and Corporate Social Responsibility, Limitations and Opportunities in International Law*, p. 77.

that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”, are sometimes also seen as indicating the application of the UDHR to non-state actors.⁴¹⁸

Another, connected, line of argumentation is the question of whether companies have international legal personality. The traditional starting point for the examination of this issue is the division of participants in the international legal system into subjects and objects. While subjects, the typical one being the state, would mean that they have rights and obligations, and the capacity of maintaining their rights, objects lack these characteristics and remain regulated by the system without any capabilities.⁴¹⁹ Instead of the all-or-nothing approach of the subject-object dichotomy, theories on degrees of participation in the international legal system have been increasingly accepted in literature.⁴²⁰ Higgins notes in this regard that the subject-object dichotomy is “an intellectual prison” and that “the whole notion of subjects and objects has no credible reality and [...] no functional purpose.”⁴²¹ Furthermore she argues that “there are no 'subjects' and 'objects', but only *participants*. Individuals *are* participants along with states, international organizations [...], multinational corporations, and indeed private non-governmental groups.”⁴²²

The rationale presented above is in line with the holistic legal theory on the international legal system as a system with two components, a legal order and legal practices. It is also coherent with the view of international law as a system with societal relevance and the recognition of a wide range of actors as relevant in this system. In this approach, the establishment of legal personality of companies is as such not the unique test for their relevance for international law. Rather, if it is acknowledged that companies activities can give rise to human rights violations and that the obligation (of primarily the state) to redress that violation must lead to a change of that corporate activity, then the issue of legal personality as such is not *the* definer of corporate accountability.

4.3 The development of CSR

What has then been done in the practices of companies and international institutions and NGOs to further the respect of human rights by companies? I am here providing a short account of the corporate social responsibility-movement (CSR).

⁴¹⁸ N. Jägers, *supra* note 398, p. 41.

⁴¹⁹ *Reparations for Injuries Suffered in the Service of the United Nations case*, 11 April 1949, ICJ, Advisory Opinion, ICJ Reports 1949, 174, at p. 179. For more detailed discussions on the legal personality of enterprises in international law, see e.g. N. Jägers, *supra* note 398, pp. 20-35.

⁴²⁰ R. Higgins, *supra* note 8, pp. 49-50; N. Jägers, *supra* note 398, pp. 22-23; J.A. Zerk, *supra* note 417, p. 74.

⁴²¹ R. Higgins, *supra* note 8, pp. 49-50.

⁴²² *Ibid.*, p. 50.

While traces of CSR can be found already in the first half of the 20th century⁴²³, recent years have seen a mounting pressure on companies to act responsibly in the surrounding society and this pressure has resulted in increasing practices within corporate governance. No large companies who want to be respected members of the corporate and international societies lack strategies for human rights and environmental concerns. These companies have devoted considerable resources to the formulation of human rights strategies and codes of conducts. Although these initiatives largely remain outside of the legal sphere, instances of their legal impact have been noted.⁴²⁴

This pressure has also raised the issue to the international level and a variety of international organizations have been engaged in the formulation of principles and guidelines for the social responsibility of corporations. OECD adopted Guidelines for Multinational Enterprises in 1976, which were updated in 2000. These are perhaps the most comprehensive international guidelines by an international organ. On environmental protection, the instrument states that

“Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.”⁴²⁵

The Guidelines further specify this statement in 63 principles. These principles include consultation, environmental impact assessment and environmental information, monitoring of environmental health and the prevention and mitigation of environmental harm.

In 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. While this Declaration is focused on the relationship between employer and employee, it nonetheless calls on MNEs in general terms to “respect the Universal Declaration of Human Rights and the corresponding International Covenants” and the principles on safety and health touches upon working conditions that due to environmental degradation may be hazardous to the health of the workers.⁴²⁶

⁴²³ See J.A. Zerk, *supra* note 417, pp. 15-22.

⁴²⁴ For instance, corporate codes of conduct have sometimes in domestic jurisprudence been found to imply legal obligations, *see e.g.* H.W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', in N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*; V. Bessmer, 'The Legal Character of Private Codes of Conduct: More than Just a Pseudo-Formal Gloss on Corporate Social Responsibility', 2:1 *Hastings Business Law Journal* 279 (2006); E. Decaux, 'La forme et la force obligatoire des codes de bonne conduite', *Annuaire Français de Droit International*, 1983, p. 81-97; J.A. Thôle, *Les Codes De Conduite: Vers une Responsabilité des Multinationales en Droit International de l'Environnement?*, Mémoire présenté en vue de l'obtention du diplôme d'études approfondies en relations internationales, Lausanne Août 2007.

⁴²⁵ Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises*, adopted in 1976, updated in 2000, Part V.

⁴²⁶ International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at

In the United Nations, an expert body under the UN Sub-Commission on the Promotion and Protection of Human Rights⁴²⁷ drafted Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in 2003.⁴²⁸ While adopted by the Sub-Commission⁴²⁹, the Commission on Human Rights simply *took note* of the draft Norms and recommended the ECOSOC to request the OHCHR to study the issue further and draft a report.⁴³⁰ Nevertheless, no further action was taken on the norms, reflecting the cool response of states. Obligations relating to environmental protection were included in the Norms. Under section G - "Obligations with regard to environmental protection", the Norms state that:

"14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development."

Even if the Norms were not adopted as positive law, they provided formulations of tendencies in soft law and gave indications to further work on the topic.

A less legalistic initiative is the UN Global Compact which was launched in 2000. The Global Compact is a governance project which promotes CSR through partnership and dialogue. It is based on ten principles, of which three are directly related to the environment⁴³¹, and two broad statements on adherence to human rights.⁴³² The two objectives of the Global Compact are to "[m]ainstream the ten principles in business activities around the world" and "[c]atalyse actions in support of broader UN goals, such as the Millennium Development Goals (MDGs)".⁴³³

its 279th (November 2000) and 295th Session (March 2006), Publications of the International Labour Office, Geneva (2006), paras. 37-40.

⁴²⁷ The Sub-Commission on the Promotion and Protection of Human Rights was a body under the UN Commission on HR, in turn an organ under the ECOSOC. With a reform of the UN human rights system the Commission was abolished and the Human Rights Council established as a subsidiary body directly under the General Assembly.

⁴²⁸ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 23 August 2003, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

⁴²⁹ Adopted at its 22nd meeting, on 13 August 2003.

⁴³⁰ Commission on Human Rights, Decision 2004/116 'Responsibilities of transnational corporations and related business enterprises with regard to human rights', in *Report to the Economic and Social Council on the Sixtieth Session of the Commission, Draft Report of the Commission*, UN doc E/CN.4/2004/L.11/Add.7, p. 82.

⁴³¹ "Businesses should: Principle 7: support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies."

⁴³² "Businesses should: Principle 1: Support and respect the protection of internationally proclaimed human rights; and Principle 2: Make sure that they are not complicit in human rights abuses."

⁴³³ <www.unglobalcompact.org/AboutTheGC/index.html>, visited on 20 November 2010.

In 2005 UN Secretary General Kofi Annan appointed John Ruggie as Special Representative on human rights and transnational corporations and other business enterprises.⁴³⁴ The Special Representative has focused on communication and consultation in a process to formulate principles that companies can adhere to rather than trying to draft a comprehensive legal instrument on the responsibilities of businesses.⁴³⁵ He has developed a “protect, respect and remedy” policy framework as the basis of corporate social responsibilities, which basically means that the state has “a duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”⁴³⁶ The Special Representative has also used the “sphere of influence”-approach and the concept of complicity as useful tools for the analyzing of corporate duties.⁴³⁷

4.4 Direct legal accountability

If the preceding discussion has focused on policy, the capabilities of the international legal system accommodating corporate duties and the development of a CSR-discourse, the following part is concerned with legal obligations of companies *de lege lata*.

Starting at the global level there are several tendencies in the UN human rights treaty bodies to address business under their respective conventions.

⁴³⁴ The mandate of the Special Representative was established in Commission on Human Rights resolution 2005/69 of 20 April 2005, *Human rights and transnational corporations and other business enterprises*, UN Doc E/CN.4/RES/2005/69: “(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation; (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”; (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.”

⁴³⁵ The Special Representative has described this approach as 'principled pragmatism'. This approach means “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people”, Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Mr. John Ruggie)*, 22 February 2006, UN Doc E/CN.4/2006/97, para. 81.

⁴³⁶ Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, 7 April 2008, UN Doc A/HRC/8/5, para. 9.

⁴³⁷ See Human Rights Council, *Clarifying the Concepts of “Sphere of influence” and “Complicity” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie*, 15 May 2008, UN Doc A/HRC/8/16. All reports of the Special Representative can be found on <www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx>, visited on 20 November 2010.

Examples are the CESCR which in its General Comment No. 11 on the right to food states that:

“While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities in the realization of the right to adequate food.”⁴³⁸

Similarly, in its General Comment No. 14 on the right to health the Committee held that states would be responsible for

“omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others”⁴³⁹

Despite these statements, which address the role of corporations in relation to state obligations, their legal character remains unclear since the general comments are non-binding as a matter of positive law.

In international environmental law, civil liability conventions provide examples of direct obligations for polluting companies.⁴⁴⁰ Examples include the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy which in Article 3 establishes that the “operator of a nuclear installation shall be liable” for damage to or loss of life or property.⁴⁴¹ Furthermore the International Convention on Civil Liability for Oil Pollution Damage in Article III reads:

“The owner of a ship at the time of an accident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.”⁴⁴²

Turning now to the environmental cases examined in chapter 3, none of the these jurisdictions have explicitly found violations of obligations applying directly to companies. This is obviously not surprising since the mandate of

⁴³⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art 11)*, UN Doc E/C.12/1999/5 (1999), para. 20.

⁴³⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)*, UN Doc E/C.12/2000/4 (2000), para. 51.

⁴⁴⁰ However, it appears somewhat obscure if the conventions were deemed to include obligations in international law or a more limited *private* liability stemming from international law but incorporated into domestic law. For a critique of the apparent distinction between responsibility in public international law and liability in private international law see S.R. Ratner, 'Business', in D. Bodansky, *et al.* (eds.), *The Oxford Handbook of International Environmental Law*, pp. 811-812; and A. Boyle, *supra* note 403

⁴⁴¹ Convention on Third Party Liability in the Field of Nuclear Energy, Paris, 29 July 1960, entered into force 1 April 1968.

⁴⁴² See also Convention on the Liability of Operators of Nuclear Ships, Brussels, 25 May 1962, has not yet entered into force; Convention on Civil Liability for Nuclear Damage, Vienna, 21 May 1963, entered into force 12 November 1977; Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971, entered into force 15 July 1975; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, London, 1 May 1977, has not yet entered into force; and Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, entered into force 5 May 1992.

these courts and commissions are confined to state violations. However, in two of the cases, the *Ogoniland* case in the African Commission and the IAmCom report on *Ecuador*, can one find formulations that may be interpreted as direct human rights obligations for companies. The African Commission stated, in response to the allegation of a violation of the right to life and the right to integrity that “[g]iven the wide spread violations perpetuated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated.”⁴⁴³ However, it is uncertain if the Commission by this formulation intended to apply the Charter directly to private actors. Also, considering the finding of violations exclusively by the state in its conclusions, no far-reaching conclusions can be drawn on the direct applicability of human rights law in the case.

In the Inter-American case which concerned oil extraction in an area inhabited by an indigenous group, the IAmCom held that “[b]oth the State and the companies conducting oil exploitation activities are responsible for such anomalies [contamination], and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.” However, it is not certain that this passage could be understood as placing a direct *legal* obligation on the companies. It should be remembered that the Commission concludes by stating that it is the duty of the state to remedy the problems, the statement is made in a country report and not a contentious case, and the recommendations are only directed towards the state.

However, international human rights law has been applied to companies at the domestic level, the most well-known is probably the Alien Tort Claims Act (ATCA) in the United States. According to this statute, which dates from 1789, federal district courts “shall also have cognizance [...] of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”.⁴⁴⁴ Having been largely forgotten since the 18th century it was realized that the ATCA could be used for the protection of human rights through civil liability after the landmark case *Filártiga v. Peña-Irala* in 1980 where the United States Court of Appeals for the Second Circuit held that the statute addressed, present day international law, including international human rights law.⁴⁴⁵

Since the case of *Kadic v. Karadzic*, where it was found that non-state actors could be held liable for human rights violations of the “handful of crimes” category, *i.e.* offences against international law such as piracy, war crimes and genocide, or other violations of international law when committed under the 'color of law', a number of cases have been pursued under the ATCA alleging human rights violations committed extraterritorially by corporations based in the United States. Although no company has yet been found liable under the ATCA, several processes have

⁴⁴³ Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 67.

⁴⁴⁴ Alien Tort Statute (Alien Tort Claims Act, ATCA), 28 U.S.C. § 1350.

⁴⁴⁵ *Filártiga v. Peña-Irala*, 30 June 1980, *United States Court of Appeals for the Second Circuit*, 630 F.2d 876.

led to out of court-settlements⁴⁴⁶, thus evidencing its potential steering effect.

Several environmental cases have been brought under the ATCA by litigants. However, these cases have had limited success since courts have repeatedly held that “allegations of environmental harm do not state a claim under the law of nations.”⁴⁴⁷ Moreover, a number of jurisdictional restrictions have been found to apply limiting the courses of action under the ATCA, significantly restricting its scope.⁴⁴⁸

In 2004, the US Supreme Court for the first time considered the scope of the ATCA in the *Sosa v. Alvarez-Machain* case. The court held that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations”, especially offences against ambassadors, violations of safe conduct and piracy.⁴⁴⁹ It was furthermore explained that present day claims under the ATCA therefore could be made resting “on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of” these original violations of the law of nations.⁴⁵⁰ The court called on “great caution in adapting the law of nations to private rights” but concluded that “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today”⁴⁵¹

It follows that the scope of the statute has been somewhat limited, although the specific effect of this limitation is uncertain. However, the possibility of pursuing an environmental claim based on severe human rights violations under the ATCA seems to remain.

It can be concluded that, whereas there are clearly examples of limited direct obligations of companies in international law, these examples remain highly exceptional. Therefore, a perhaps more useful approach is the indirect accountability through state responsibility.

4.5 Indirect legal accountability through positive state obligations

The most common presentation of state responsibility for private acts would perhaps make detailed inquiries into the law on state responsibility as

⁴⁴⁶ See e.g. *Iwanowa v. Ford Motor Co.*, 28 October 1999, United States District Court for the District of New Jersey, 67 F. Supp. 2d 424; *Doe I v. Unocal Corp.*, 7 June 2002, California Supreme Court, Appellate Department, nos. BC 237 980, BC 237 679; *Doe II v. Unocal Corp.*, 18 September 2002, United States Court of Appeals for the Ninth Circuit, 395 F. 3d 932.

⁴⁴⁷ *Sarei v. Rio Tinto*, 7 August 2006, United States Court of Appeals for the Ninth Circuit, 221 F.Supp.2d, at 1158. Citing *Beanal v. Freeport-McMoran Inc.*, 29 November 1999, United States Court of Appeals for the Fifth Circuit, 197 F.3d.

⁴⁴⁸ These discretionary grounds are *forum non conveniens*, international comity, the political question doctrine and the act of state doctrine.

⁴⁴⁹ *Sosa v. Alvarez-Machain*, 29 June 2004, Supreme Court of the United States, 542 U.S. 692, p. 25.

⁴⁵⁰ *Ibid.*, pp. 30-31.

⁴⁵¹ *Ibid.*, p. 35.

codified in the ILC Draft Articles on State Responsibility⁴⁵². In this inquiry, the issue of attribution would be the main focus. However, it has been argued that human rights law must be considered *lex specialis* according to article 55 of the Draft Articles, and therefore apply instead of the general principles in those Articles.⁴⁵³ Whether one adheres to that view or the view that international human rights bodies rather have specified the obligations in the Draft Articles⁴⁵⁴, jurisprudence evidence the development of its own specific approach through the positive obligation doctrine. For these reasons this study is focused on that doctrine.

The doctrine on positive obligations holds that the state has an obligation to, not only refrain from violating human rights through its own acts, but also the obligation to take measures against third parties causing human harm amounting to a human right violation. In other words the state may in certain situations be responsible for the omission to act against corporations harming individuals.

As early as 1947, in the preparations for the drafting of the UDHR, the UNESCO Committee on the *Theoretical Bases of Human Rights* interpreted *liberty* not only negatively, *i.e.* non-interference by the state, but “also the positive organization of the social and economic conditions within which men can participate to a maximum as active members of the community and contribute to the welfare of the community at the highest level permitted by the material development of the society.”⁴⁵⁵

The direct legal basis for the doctrine is formulations of the scope of the rights in the respective conventions. In the ICCPR state parties are under the obligation to “*ensure* to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”⁴⁵⁶. In the CESCRC state parties “undertakes to take steps [...] with a view to achieving progressively the full realisation of the rights recognised in the present Covenant”.⁴⁵⁷ The ECHR states that “[t]he High Contracting Parties Shall

⁴⁵² International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, adopted by the Commission at its fifty-third session, in 2001, UN Doc A/CN.4/L.602/Rev.1.

⁴⁵³ Clapham has in respect of the ECHR argued that “[t]he public international law framework, on its own, is considered insufficient for the following reasons: the Convention does not primarily operate as an inter-State treaty as it grants remedies to individuals; *effective* protection demands that the Convention controls private actors; the Convention takes effect in the national order of the Contracting Parties and constitutes a kind of European *ordre public*; a public/private dichotomy is arbitrary, unreasonably discriminatory and perpetrates the exclusion of certain kinds of violations of rights which are then “forgotten” (domestic violence, child abuse, discrimination against women in employment).”, A. Clapham, ‘The “Drittwirkung” of the Convention’, in R.St.J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights*, p. 170.

⁴⁵⁴ The latter view seems to be the understanding of Jägers, *see* N. Jägers, *supra* note 398, p. 146.

⁴⁵⁵ United Nations Educational, Scientific, and Cultural Organization, ‘The Ground of an International Declaration of Human Rights’, in UNESCO, *Human Rights: Comments and Interpretations*, 93-95 (1949), App. II, at 263.

⁴⁵⁶ Article 2 para. 1 ICCPR (emphasis added).

⁴⁵⁷ Article 2 para. 1 ICESCR. Of course, it is a much more uncontroversial conclusion that ESC-rights contain positive obligations than regarding civil and political rights. However, with the integrative approach here adhered to, the extent to which ESC-rights provides positive obligations can influence the positive obligations of civil and political rights.

ensure to everyone within their jurisdiction the right and freedoms” in the Convention.⁴⁵⁸ The formulation in the American Convention is: “The State Parties to this Convention undertake to respect the rights and freedoms recognised herein and to *ensure* to all person subject to their jurisdiction the free and full exercise of those rights and freedoms”.⁴⁵⁹ The relevant provision of the African Charter holds that the state parties to the “Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall *undertake to adopt legislative or other measures* to give effect to them.”⁴⁶⁰

The HRC and the CESCR have both included positive obligations in some of their respective rights. In its General Comment No. 31 on the general legal obligations of states parties the Human Rights Committee stated that

“the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities [...] There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”⁴⁶¹

In its General Comment No. 6 on the right to life the HRC considered that

“the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”⁴⁶²

Article 2 paragraph 3 of the ICCPR furthermore places a duty on states parties to provide remedies for violations of the rights in the Covenant. This obligation, it was explained in General Comment No. 31, is triggered

Concerning the right to health, which in this approach is closely linked to the right to life and environmental harm, it should be noted that the CESCR has considered that “State parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”, *General Comment No. 14, supra* note 439, para. 39. *See also* Committee on the Elimination of Discrimination against Women, *General Comment No. 19: Violence against women, 29 January 1992* and paragraph 18 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted at a meeting of experts, Maastricht, 22-26 January 1997, <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html>, visited on 20 November 2010.

⁴⁵⁸ Article 1 ECHR (emphasis added).

⁴⁵⁹ Article 1 AmCHR (emphasis added).

⁴⁶⁰ Article 1 African Charter (emphasis added).

⁴⁶¹ Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

⁴⁶² Human Rights Committee, *General Comment No. 6: The Right to Life (Article 6)*, UN Doc HRI/GEN/1/Rev.6 at 127 (1982), para. 5.

“as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.”⁴⁶³

4.5.1 Indirect legal accountability in the examined jurisprudence

The international judicial bodies examined in section 3.2 above have further developed these principles on positive obligations. In line with the broader notion of accountability (as opposed to responsibility which denotes a strictly legal positivism), what is relevant is not so much the issues of attribution of a company's conduct to the state, but rather the effects that established violations by states have on corporate conduct. Put differently, what is important is that the harmful activities of a company giving rise to a violation of a human right by the state are changed so as to relieve the state of its international responsibility. The bottom line of this approach is that the company in question must be held accountable (in one way or another according to the margin of appreciation doctrine) by state authorities in order to stop a human rights violation. The fact that the state in this regard retains a certain leeway as to how to implement the specific right *in casu* does not mean that it has absolute discretion. Rather, the implementation must be consistent with the rule of law, which the state has recognized as a party to the relevant human rights treaty in question. Hence, the intervention by state authorities to enforce the specific judgment must have a legal basis, and it takes place in the legal framework surrounding the activities of the company. This is why we can characterize the accountability of the company as a *legal* one, considering that, firstly, the activities of the company has given rise to a violation of a human right of the state, secondly, that the implementation of this international responsibility takes place in a domestic legal framework in which the activities of the company is regulated.

Furthermore, it is rather irrelevant for the individual or group harmed whether the company is directly or indirectly accountable for its actions in so far as the results, *i.e.* the harmful activity is ceased. This is also in line with the understanding of human rights as *rights preceding duties* since the question of which actor that is having the corresponding obligation is unimportant for the victim, as a matter of fact.

4.5.1.1 The European human rights system

In the European human rights system, out of the 18 cases examined above, 14 cases concerned positive obligations by the state vis-à-vis business.⁴⁶⁴ In

⁴⁶³ Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

⁴⁶⁴ These 14 are: *Arrondelle v. the United Kingdom*, *Powell and Rayner v. the United Kingdom*, *López Ostra v. Spain*, *Guerra and Others v. Italy*, *Hatton and Others v. the*

10 of these 14 cases the court found a violation. What were the consequences for the companies that have caused the harmful activities in these cases?

Since the court rules on the responsibility of states, it focuses on *their* activities, not so much on the ones of the company. Regarding Article 8, the court tends to examine the harmful conduct of companies as a question of *infringement* of a right. Thus, corporate conduct is examined as an applicability question, while the toleration or passivity of the state of this conduct gives rise to a *violation*.⁴⁶⁵ As noted above, however, this does not mean that the responsibility of a state devoid a company of legal accountability. In fact, if the source of the violation of a right is the activities of the company, these activities must change if the state are to be absolved from its international responsibility. Since the court is primarily concerned with the responsibility of states, however, this process is deemed to be a matter for the state in its domestic setting. This, in accordance with the understanding of the court as a subsidiary organ and in line with the margin of appreciation doctrine, leaves the state with considerable discretion as to *how* this change in corporate conduct are to be made.

Some direction on these measures may also be provided in the judgments, but only through derivation from what the court has said.⁴⁶⁶ Since the court has often been silent on the details of corporate activity causing violations, this derivation is made highly speculative. In one instance, however, the Tătar case, the Court found that Article 8 was applicable on the basis of the various reports that supported the conclusion that the pollution from the Sasar factory could cause a deterioration of the quality of life of the population and affect the well-being of the applicants. One of these reports had found three specific causes of the accident from the activity of the company, thus implicitly suggesting that these aspects be changed for the state to avoid further responsibility.⁴⁶⁷

It should also be noted that the Court has tended to strengthen the positive obligations of the state when adding the requirement that the state must ensure *effective* protection against harmful activities of companies.⁴⁶⁸

We should be cautious to draw too far conclusions from these developments. However, the case-law of the Court has evolved as to increasingly accommodate cases of activities of third parties giving rise to violations. Described in the terms of the theoretical framework used, one could say that the cognitive input to the norm on the doctrine of positive obligations has been internalized by the jurisprudence of the Court, however

United Kingdom, Moreno Gómez v. Spain, Taşkın and Others v. Turkey, Fadeyeva v. Russia, Giacomelli v. Italy, Tătar v. Romania, Brândușe v. Romania, Oluic v. Croatia, and Băcilă v. Romania.

⁴⁶⁵ See e.g. *Fadeyeva v. Russia, Giacomelli v. Italy, Tătar v. Romania, Brândușe v. Romania, Oluic v. Croatia, and Băcilă v. Romania.*

⁴⁶⁶ The Court has in recent years showed an increasing willingness to pronounce on the means of enforcement of its judgments, see e.g. *Iacob v. Romania*, 3 February 2005, ECtHR, Application no. 39410/98, and *Fatullayev v. Azerbaijan*, 22 April 2010, ECtHR, Application no. 40984/07.

⁴⁶⁷ See *supra* p. 58.

⁴⁶⁸ It was in *Guerra and Others v. Italy* that the Court added this requirement to the formulation used in *López Ostra v. Spain*. See *Guerra and Others v. Italy*, para. 58.

without losing sight of the role of the state to ensure the effective protection of the rights in the Convention.

4.5.1.2 The Inter-American human rights system

In the Inter-American system, all six cases concerned activities of third parties, with the involvement of companies. It should be noted that in five of these cases the persons harmed were members of indigenous communities.⁴⁶⁹ In four of the cases one of the issues giving rise to violations was concessions given by the state to companies to exploit natural resources on indigenous lands.⁴⁷⁰ However, the Inter-American cases examined tend to be less detailed on the specific relations between corporate conduct and violations. For instance, in the *Yanomani* case, the Commission found merely that the invasion of outsiders, including companies, had given rise to the violations of the Yanomani as a group.

Despite these broad statements, the Commission and Court have in their recommendations and orders provided some guidance as to how the company are to be held accountable. In the Commission *report on the situation for human rights in Ecuador*, it stated that “[b]oth the State and the companies conducting oil exploitation activities are responsible for such anomalies [contamination], and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected.” It recommended, *inter alia*, that the state take preventive and remedial action and address the risks of extractive industries in the area, and that the state implement the rights of the inhabitants to information, participation in relevant decision-making and the right to effective judicial recourse. Hence, the Commission emphasized the procedural aspect of the rights which would be provided by the state to hold the company accountable. In the *Awás Tingni Community* case, the Court ordered the state to “b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that *might* lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to *affect the existence, value, use or enjoyment* of the property located in the geographical area where the members of the Community live and carry out their activities”⁴⁷¹ By using this language the Court seems to have put a far-reaching obligation on the state to ensure that no corporate exploitation that might give rise to a violation would be permitted, thus providing for a broad corporate

⁴⁶⁹ The Court and Commission have in its jurisprudence established that indigenous communities are vulnerable groups requiring the state to take special measures for their protection. For a critique of this doctrine from a psycho-analytical legal perspective, see P. León Gutiérrez, *The never-ending search of equality's logic: Ideology and its affairs with legal research and the Inter-American Court of Human Rights*, Master thesis, Master's Programme in International Human Rights Law, Lund University, 2010.

⁴⁷⁰ Although raising interesting questions on corporate indirect accountability, the *Inuit* case and the *Community of La Oroya* case are not examined here, since the Commission and Court have not pronounced on these cases on the merits.

⁴⁷¹ *The Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, 31 August 2001, Inter-American Court of Human Rights, Series C No. 79, para. 153 (emphasis added).

accountability. However, the Court did not provide any guidance as to *how* this accountability should be implemented.

4.5.1.3 The African human rights system

In the one case examined in the African human rights system, the *Ogoniland* case, the violations were the result of the activities of the company Shell and the Nigerian Government. In the case, the Commission clearly stated that all human rights contained “a combination of negative and positive duties” and that this was so because of the four aspects of human rights obligations – respect, protect, promote and fulfill.⁴⁷² It has been noted above that the final order of the Commission in the case was unique in its reach, including comprehensive enforcement.⁴⁷³ Since the state and Shell were closely connected in a joint venture, this order had also far-reaching consequences for Shell.

4.5.1.4 United Nations Human Rights Committee

Two of the five cases examined concern corporate activities. Only one of these cases, however, led to the responsibility of the state for a human rights violation.⁴⁷⁴ This case, the *Lubicon Lake Band v. Canada*, the state had allowed oil and gas exploitation on indigenous lands. However, the case is silent on the details of these activities, although it seems that the HRC has accepted the petitioner's argument that the corporate conduct had caused environmental degradation which gave rise to a violation of the right to minority culture. However, the HRC focused on the negotiations and other procedures that had led to the permits to exploit the natural resources. Therefore, the HRC deemed the proposal by the state to negotiate in good faith with the Lake Band an appropriate remedy.⁴⁷⁵ Hence, it must be said that the implications for the companies in this case are rather vague.

⁴⁷² Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 44.

⁴⁷³ *Ibid.*, para. 69.

⁴⁷⁴ The other case on alleged corporate activities causing violations was the admissibility decision *Brun v. France*. In that case, the petitioner alleged that the authorization by the state of the company Biogemma to engage in an open-field trial of genetically modified organisms had given rise to a violation of the right to life. However, the Committee found the case inadmissible due to the failure of the applicant to evidence that he was a 'victim' and that an applicant cannot pursue a claim under the ICCPR in theoretical terms.

⁴⁷⁵ It can be noted that these negotiations broke down and that the issue again has been considered in other UN bodies, see *Lubicon Lake Indian Nation, Submission to the 70th Session of the UN Committee on the Elimination of Racial Discrimination with Regard to Lack of Canadian Compliance with UN Human Rights Decisions and General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination, February 19-March 9, 2007 Geneva*, <<http://www2.ohchr.org/english/bodies/cerd/docs/ngos/LLIN.pdf>>, visited on 20 November 2010; *Information provided by the Government Canada on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination*, 6 August 2009 UN Doc CERD/C/CAN/CO/18, paras. 68-75.

5 Causation in environmental cases in international human rights jurisprudence

5.1 Theories on causation

The *problematique* of causation⁴⁷⁶ is often recognized in discussions on the relationship between human rights and the environment.⁴⁷⁷ However, while acknowledging the delicate problems in this regard⁴⁷⁸, elaboration on the issue is seldom made.⁴⁷⁹ The purpose of this thesis is partly to make such an elaboration asking questions like: What standard of causation, if any, do the judicial bodies examined apply concerning environmental cases?; and is this standard a problem for the effective protection of human rights in these cases? If there is a standard, to what extent is it an obstacle for the emergence of a norm for the accountability of companies?

To be able to answer these questions, we firstly have to look closer at the concept of causation. At the outset it should be noted that the very focus on causation as a metaphysical concept has been described as an obsession with the causal link resembling a strong mental characteristic among pre-logical and mystic civilizations. This would then be opposed to the contemporary

⁴⁷⁶ 'Causation' and 'causality' seem to be largely interchangeable, However, Hellner has noted that 'causality' denotes causal relations in natural science and philosophy whereas 'causation' denotes a less strict causal relation used in *inter alia* law, J. Hellner, 'Causality and Causation in the Law', 40 *Scandinavian Studies in Law*, 111 (2000), p. 110.

⁴⁷⁷ E.g. Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, UN Doc A/HRC/10/61, para. 70; International Law Commission, *Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)*, Prepared by the Secretariat, 23 June 1995, UN Doc A/CN.4/471, paras. 16-28; and Recital 13 of the preamble to the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

⁴⁷⁸ Multiple sources, geographically spread effects, and the nature of toxic effects are some of these problems.

⁴⁷⁹ "There is little judicial recognition of how indeterminacy and uncertainty pervade causal argument, as evidenced by judicial resistance to explicitly probabilistic methods of proof. While there are good practical reasons to be cautious about these methods of proof, I think that the uneasiness of the legal system concerning probabilistic proof goes deeper than practical caution and reflects an intellectual uneasiness about probabilistic concepts themselves. That uneasiness may well be reinforced because causal determinations are made *ex post* where the retrospective investigation of events tends to induce a belief in their inevitability – a belief that Baruch Fischhoff has aptly labeled "creeping determinism.", G.O Robinson, 'Probabilistic Causation and Compensation for Tortious Risk, 14 *Journal of Legal Studies* 779 (1985), p. 780.

probabilistic methods used in natural science.⁴⁸⁰ This obsession, however, can to some extent be said to have influenced the deterministic Newtonian natural science paradigm of the mechanic world-view so prevalent from the beginning of the 18th century to the end of the 19th century.⁴⁸¹

What then is causation as a metaphysical and scientific concept respectively? The discussion in philosophy often involves the terms *sufficient* and *necessary*, and begins with the account of these two traditional causal explanations. According to the first one, C is a cause of E if and only if C and E are actual and C is, all else being equal, sufficient for E.⁴⁸² The second one claims that C is a cause of E if and only if C and E are actual and C is, all else being equal, necessary for E.⁴⁸³ However, these theories have been rejected, the former because of its “undeterminative sufficiency”⁴⁸⁴ and the latter because it is over-determinate.⁴⁸⁵ An elaboration that to some extent⁴⁸⁶ mitigates these problems is the theory developed by Mackie. According to this theory, a cause is an insufficient but necessary part of a condition which is itself unnecessary but sufficient for the result. Mackie explains his theory with an example of a fire allegedly caused by a short-circuit:

“At least part of the answer is that there is a set of conditions (of which some are positive and some are negative), including the presence of inflammable material, the absence of a suitably placed sprinkler, and no doubt quite a number of others, which combined with the short-circuit constituted a complex condition that was sufficient for the house 's catching fire – sufficient, but not necessary, for the fire could have started in other ways. Also, of *this* complex condition, the short-circuit was an indispensable part: the other parts of this condition, conjoined with one another in the absence of the short-circuit, would not have produced the fire. The short-circuit which is said to have caused the fire is thus an indispensable part of a complex sufficient (but not necessary) condition of the fire.”⁴⁸⁷

Hence, there seems to be different degrees of factors affecting the causal process. In this regard, we should also keep in mind the mechanisms that affect causation, such as the presence of oxygen without which the causation would not had occurred. Factors such as these are in philosophy referred to as the normal background or causal field, and are usually taken as a given fact which does not affect the causation studied.

⁴⁸⁰ P. Peretti-Watel, *Sociologie du risque*, Paris, A. Colin, 2000, referred to in the partially dissenting opinion of Judge Zupančič in the *Tatar* case.

⁴⁸¹ P. Suppes, *A Probabilistic Theory of Causality*, p. 6.

⁴⁸² E. Sosa (ed.), *Causation and Conditionals*, p. 1.

⁴⁸³ *Ibid.*

⁴⁸⁴ R. Taylor, 'The Metaphysics of Causation', in E. Sosa (ed.), *Causation and Conditionals*, pp. 35-37. Sosa provides the following example: “[T]he position of a table relative to the floor is caused by the length of the legs to support that top [...] For the length of the legs is *ceteris paribus* [all else being equal] sufficient for the position of the top relative to the floor. Unfortunately, the position of the top is also *ceteris paribus* sufficient for the length of the legs.”, E. Sosa, *supra* note 482, p. 3.

⁴⁸⁵ Sosa gives the following example: “If two bullets pierce a man's heart simultaneously, it is reasonable to suppose that each is an essential part of a distinct sufficient condition of the death, and that neither bullet is *ceteris paribus* necessary for the death, since in each case the other bullet is sufficient. Hence neither bullet is a cause of the death”.

⁴⁸⁶ Sosa highlights the closeness of the theory by Mackie to the *sufficiency* stance, thereby posing problems of indeterminacy, E. Sosa, *supra* note 482, p. 4.

⁴⁸⁷ J.L. Mackie, 'Causes and Conditions', in E. Sosa (ed.), *supra* note 482, p. 16.

But these weaker causes⁴⁸⁸ may be relevant if causation is understood as probabilities rather than unique and absolute causes.⁴⁸⁹

Despite these philosophical theories on causation, it has been forcefully argued by Russel that the relevance of metaphysical explanations is low concerning what has been called the impossibility to objectively delimit the concept of cause and effect, given the complex reality. In natural science, according to Russel, only differential equations are capable of adequately describing actual relations, at the same time as the psychological attachment to the causal link is a “relic of a bygone age”.⁴⁹⁰ It has therefore been argued that scientific methods to explore reality are better suited, as an epistemology, than metaphysical theories, to analyze causal relations, and that we thus can distinguish between metaphysical causation and causal concepts we can use for practical purposes.⁴⁹¹

5.2 Legal and actual causation

To be able to answer the questions above, we firstly have to clarify whether the notion of causation in law is entirely detached from the notion of actual causation. This is an area of theoretical discussion into which we are not to make any detailed attempt to participate. Therefore, I am here merely providing an overview of a few different stances. If one thing is certain than it is that there is disagreement whether the law has its own concept of causation independent from natural science. Some scholars contend that this is the case. Their main argument is that legal causation rather is a question of the interpretation of a given rule than any general concept extrapolated from natural science.⁴⁹² Peczenik has argued that

“[t]he causal criteria of relevance are also epistemologically different from the juristic ones. The first ones answer the factual questions whether there is a causal relation. The second ones answer the normative question whether the causal relation ought to lead to liability.”⁴⁹³

Other scholars seem to allow for a greater influence of natural science causal explanations on the assessment of the legal causation. As has been explained by Wahlberg, in legal causation lay two causal relations, at least conceptually: one between act and damage (1) the other between (1) and liability (2). While causal relation (1) is factual, the causal relation between (1) and (2) contains both normative and factual elements. The normativity of the latter causal relation depends *inter alia* on the role of the actor making the observation/adjudication. If a court has limited possibilities to

⁴⁸⁸ Peczenik has in legal causation theory distinguished between weak causes, strong causes and redundant causes, A. Peczenik, *Causes and damages*, p. 6.

⁴⁸⁹ In this regard it can be noted that Judge Zupančič referred to the fetichism of *the* causal link in his partly dissenting opinion in the *Tatar* case in the ECHR.

⁴⁹⁰ Reproduced in P. Suppes, *A Probabilistic Theory of Causality*, p. 5.

⁴⁹¹ L. Wahlberg, *Kausalitet och juridik*, Master thesis in law, Lund University, 2001, p. 15. Hart and Honoré seem to use a social concept – *the plain man's notions of causation* – rather than a metaphysical one, H.L.A. Hart and T. Honoré, *Causation in the Law*, p. 1.

⁴⁹² I. Strahl, 'Orsaksrekvisitet i straffrätten', *Festskrift till Ivar Agge*, p. 271.

⁴⁹³ A. Peczenik, *supra* note 488, p. 5.

actively interpret and develop law, its role being *merely* to apply law⁴⁹⁴, the normativity of the relation would decrease.⁴⁹⁵

However, the very scope of the examination is limited and decided by the rule in question. Therefore the approach of analyzing actual causation and legal causation differ. Science is concerned with finding out more about reality (in a broad sense). Differentiation in science has led to specialized expert disciplines. In contrast, law is general in the sense that it touches upon an array of human activity. This difference between law and science becomes especially pertinent in legal adjudication faced with a complex reality.⁴⁹⁶

In the legal culture/legal deep structure, there is an inherent belief that law must pronounce on an issue based on dichotomies such as legal or non-legal, guilty or not guilty etc.⁴⁹⁷ This is in stark contrast to (natural-)science in which uncertainties and probabilities are the very basis of research. Furthermore, in civil claims and to some extent in criminal cases, a court's role is to decide only on the factual material brought before the court. Hence, the world-view of the court is limited to what has been claimed and deemed relevant *to reach a conclusion in a specific case*, as opposed to natural science. Hence, the question of the legal causation depends on what area of reality the rule is interested in. Therefore the relevant question is not so much "what caused the effect" but rather "did the defendant cause the effect". To be able to answer this question one has to define the scope of the relevant rule. Lord Hoffman has in this regard explained that "[t]he fact that for different purposes or even for the same purpose one could also say that someone or something else caused the pollution is not inconsistent with the defendant having caused it."⁴⁹⁸

This gives legal causation a specific epistemology where evidentiary rules are important tools for the court in establishing what should be regarded as the legally relevant knowledge. In other words, the legal epistemology is "merely a method for handling uncertainty with the purpose of always being able to deliver a judgment to be applied in the natural-scientific – or general, if you want – ontological uncertainty."⁴⁹⁹ However, this does not exclude the effect of natural science on legal causation. At least as regards causal relation (1) legal practice clearly rely on evidence on aspects of reality as understood by natural science. Therefore legal causation relies, to some extent, on the epistemology of natural science.⁵⁰⁰

⁴⁹⁴ As has been noted above the distinction between application and active interpretation can hardly be maintained. This complicates the matter of the normativity of the causal relation between (1) and (2) further.

⁴⁹⁵ L. Wahlberg, *supra* note 491, p. 26.

⁴⁹⁶ S. Rosenne, 'Fact-Finding Before the International Court of Justice', in S. Rosenne, *Essays on International Law and Practice*, p. 238. See also the dissenting opinion of Judges Khasawneh and Simma in the *Pulp Mills* case in the ICJ.

⁴⁹⁷ Zupančič found in his partly dissenting opinion in the *Tatar* case that this requirement of attributing fault to one of the parties to a dispute was a typical characteristic of the accusatory legal system.

⁴⁹⁸ *Empress Car Co. (Abertillery) Ltd. v. National Rivers Authority*, The House of Lords, the United Kingdom, Judgment of Lord Hoffmann, 22 January 1998, 1 All E.R. 481.

⁴⁹⁹ L. Wahlberg, *supra* note 491, p. 20.

⁵⁰⁰ Wahlberg has noted that the fact that law sometimes does not rely on natural science for establishing liability, such as in the case of omissions, merely should be regarded as a

The theory on legal causation above would, however, need to be refined when law is faced with more complex causes such as if a defendant should be liable for a specific toxic that has allegedly affected health.⁵⁰¹ In this field, where environmental law meets human rights law, there has been a vivid debate especially in the United States over so called toxic torts.⁵⁰² It has in this regard been recognized that toxic torts entail insurmountable obstacles in evidencing traditional specific causation (establishment of a causal link). To require specific causation in these cases would be “oppressively problematic”.⁵⁰³ This is so because causation is especially complex in toxic cases both since natural science falter in establishing clear causality between toxic exposure and different diseases, and because of the difficulties in isolating multiple sources.⁵⁰⁴

One possible solution to these problems has been *epidemiological causation* as understood by Golanski. Causation must, in this theory be divided into general and specific causation. General causation is established by evidence such as statistics and general research on the toxicity and health effects of a certain substance. It can furthermore be evidence of increased prevalence of negative health effects on, for instance, a population living nearby a polluting factory. If general causation can be established in this way, it indicates that the substance in question is *capable* of causing the specific injury in the case. If such general effects can be evidenced, “a general causation element functions to justify *relaxing* the level of specific causation evidence that would otherwise be required.”⁵⁰⁵ The means of this relaxation could be so called differential diagnoses, *i.e.* when there is a problem with multiple possible sources, the court should determine whether the specific circumstances of the case could rule out alternative causes.⁵⁰⁶

Hence, our theory on legal causation would be modified as follows: the general causal relation between the substance and damage (1), the specific causal relation (2) between an act and a damage involving (1), and the causal relation (3) between (1) + (2) and liability. It has been found above that (3) is the most *pure* legal causation involving policy assessments related to evidence and the scope of the rule in question. Hence, the court (and/or the legislator) has the evidentiary means to indirectly decide on the scope of

temporary procedural solution. According to Wahlberg, the law's interests in metaphysics does not go further than the epistemology of natural science, L. Wahlberg, *supra* note 486, p. 20. Lord Hoffman has said that he is in “doubt whether the use of abstract metaphysical theory has ever had much serious support and I certainly agree that the notion of causation should not be overcomplicated. Neither, however, should it be oversimplified.”, *supra* note 498.

⁵⁰¹ Zupančič, concurring opinion in the *Băcilă* case.

⁵⁰² *Op. cit.* in A. Golanski, 'General Causation at a Crossroads in Toxic Torts', 108 *Penn State Law Review* 479 (2003-2004), pp. 479-480.

⁵⁰³ J.M. Eggen, 'Clinical Medical Evidence of Causation in Toxic Tort Cases: Into the Crucible of *Daubert*', 38 *Houston Law Review* 369 (2001), p. 372.

⁵⁰⁴ M. A. Berger, 'Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts', 97 *Columbia Law Review* 2117 (1997), pp. 2120-2121.

⁵⁰⁵ A. Golanski, *supra* note 502, p. 487. See also G. Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, p. 85, who argues that the burden of proof should be set in line with the precautionary principle in instances of oil pollution at sea.

⁵⁰⁶ A. Golanski, *supra* note 502, pp. 500-503. However, it is acknowledged that a total elimination of all possible sources is impossible.

the actual causation that establishes the legally admissible relevant reality. How this has been made in the relevant jurisprudence is examined below.

5.3 Causation in the jurisprudence examined

5.3.1 Causation and indirect accountability

The cases examined raise the question as to how the assessment of causation is affected by the fact that the international legal responsibility falls on the state as a passive actor, rather than the company as the source of the violation. However, as we have seen above, at least in the ECtHR, the judicial organ examines *de facto* the harmful activities of a company as an applicability matter, while the passivity of the state qualifies the interference as a violation. Therefore, legal causation has the direction corporate harmful activity – state omission – violation. However, it should be noted that the legal basis for responsibility in these cases is the positive obligation of the state. If one adopts a legalistic point of view on this issue narrowing down the question of legal relevance to state omission, the discussion on *positive legal* causation is irrelevant, since an omission by definition is not a positive cause. Nevertheless, the omission to act can be interpreted as a *negative legal* causation, since the state because of the positive obligation is required to act. This is not the place to dwell further on the legal-philosophical issue of the distinctions between acts and omissions and their legal aspects and relevance.⁵⁰⁷ However, from a legal point of view, the omission by the state is a necessary legal aspect of the finding of a violation while the actual harm caused by the corporate activities may had or had not occurred if the state had done what the law on positive obligations requires.

Here, in line with the causation theory presented above of three causal relations leading to liability, we are examining both the actual interference of a human right by a company (1) + (2), and the causal relation between (1) + (2) and (3), the omission by the state.

5.3.2 The European Human Rights System

The European Commission and Court of Human Rights have seldom explicitly elaborated on their understanding of causation. This is especially true for the older cases examined.

In the landmark case, *López Ostra*, the ECtHR established that Article 8, the right to private and family life, could be breached in environmental cases, even without evidence of serious health effects on the applicants. It was enough that the pollution “may affect individuals' well-being and

⁵⁰⁷ There is disagreement on whether negative legal causation can be described as causality in metaphysical terms. For proponents of causal omissions, *see e.g.* D. Lewis, 'Causation' in *Philosophical Papers Vol. I*; and J. Schaffer, 'Causes Need Not be Physically Connected to their Effects', in C. Hitchcock (ed.), *Contemporary Debates in Philosophy of Science*. For a contrary view, *see e.g.* H. Beebe, 'Causing and Nothingness', in J. Collins *et al.* (eds.) *Causation and Counterfactuals*.

prevent them from enjoying their homes in such a way to affect their private and family life adversely”.⁵⁰⁸ However, the Court gave little direction on the standards used concerning the quality of the causes and their specific effects. We therefore have to infer these standards from the facts of the case. In the case, the Court noted, based on medical reports and expert opinions, that “hydrogen sulphide emissions from the plant exceeded the permitted limit and *could* endanger the health of those living nearby and that there *could* be a causal link between those emissions and the applicant’s daughter’s ailments”⁵⁰⁹ Therefore, it appears that the Court has given some weight to the risks that the toxic emissions were *capable* of producing. Two of these reports had mentioned the specific health effects on the applicant's daughter, but there were no reports on the effects on the applicant herself. However, it may be suggested that the Court in fact drew conclusions from these specific findings, since the daughter lived with the applicant. Nevertheless, it seems that the Court based its ruling on the general reports on the levels of pollution nearby the plant in combination with medical reports on the health of the applicant's daughter.⁵¹⁰

In any case, since it sufficed to evidence the existence of nuisance affecting the private and family life of the applicant, severe specific health effects were not necessary. Based on mostly general evidence the Court found that the nuisance had amounted to a violation *re* the applicant.

In the *L.C.B.* case, the Court found that the applicant had not established “a causal link between the exposure of her father to radiation and her own suffering from leukemia”.⁵¹¹ It would have been otherwise if “it had appeared likely that exposure of her father to radiation might have caused a real risk to her health”.⁵¹² The Court found that this was not the case, especially considering that in the late 1960s scientific evidence of the health effects of radiation were not that well established as at the time of the judgment, and that therefore “it was not reasonable to hold that, in the late 1960s, the United Kingdom authorities, on the basis of an unsubstantiated link, could or should have taken action in respect of the applicant.”⁵¹³

In this case, it seems like the Court has followed the theory requiring full support from evidence produced by the applicant of specific causation establishing 'a causal link'. It appears that this would be an impossible burden for the applicant. The Court also touched upon the issue of general causation when it mentioned the scientific knowledge about radiation in the 1960s. However it did not give weight to this issue in relation to specific causation.

In *Guerra and Others* the Court found Article 8 applicable since there were “direct effect of the toxic emissions on the applicants’ right to respect

⁵⁰⁸ *López-Ostra v. Spain*, 23 November 1994, ECtHR, Application no. 41/1993/436/515, para. 51.

⁵⁰⁹ *Ibid.*, para. 49 (emphasis added). This expression by the Court could be interpreted as suggesting that the *risk* of severe health effects was sufficient for Article 8 to be violated.

⁵¹⁰ *Ibid.*, paras. 18-19,49.

⁵¹¹ *L.C.B. v. the United Kingdom*, 9 June 1998, ECtHR, Application no. 14/1997/798/1001, para. 39.

⁵¹² *Ibid.*, para. 38.

⁵¹³ *Ibid.*, para. 39.

for their private and family life”.⁵¹⁴ However, the main issue in the case was rather the risks of a serious environmental catastrophe than the actual harm the emissions had caused. The only mention that is made of actual emissions were that these emissions often had been channeled towards the town where the applicants lived, but no information about the general or specific effects of these emissions on the residents of the town were mentioned. Furthermore, in the conclusion that Article 8 had been breached, nothing was said about these emissions. Rather, a violation was found on the basis of the risks of a serious environmental accident, a claim substantiated by previous accidents, and the failure of the state to provide the applicants with “essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.”⁵¹⁵

The *Hatton* case demonstrates the claim above that legal causation delimits the field of relevant reality with the purpose of solving a particular dispute. When rejecting the claim of the applicants that the government had failed to substantiate its position with scientific data, the Court considered that

“a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided.”⁵¹⁶

Therefore, this illustrates the interrelationship between actual and legal causation and evitentiary issues *in casu*.

In the *Moreno Gómez* case, the Court based its findings of a violation of the private and family life of the applicant due to nuisance on general reports on the situation in the surroundings of the apartment of the applicant and the fact that the authorities already in a bylaw had designated the area as an acoustically saturated zone. The Court thereby found that requiring specific evidence on the effects of the nuisance on the applicant would be “unduly formalistic”.⁵¹⁷ Hence, in this case, general causation was clearly enough to find a violation of Article 8 based on nuisance.

In *Öneryildiz*, the Court clarified the content of the positive obligation in Article 2. It identified several factors as relevant in the determination of state responsibility:

“the harmfulness of the phenomena inherent in the activity in question, the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances, the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are merely factors among

⁵¹⁴ *Guerra and Others v. Italy*, 19 February 1998, ECtHR, Application no. 116/1996/735/932, para. 56.

⁵¹⁵ *Ibid.*, para. 60.

⁵¹⁶ *Hatton and Others v. the United Kingdom*, 2 October 2001, ECtHR, Application no. 36022/97, para. 128.

⁵¹⁷ *Moreno Gómez v. Spain*, 16 November 2004, ECtHR, Application no. 4143/02, para. 59.

others that must be taken into account in the examination of the merits of a particular case”⁵¹⁸

Hence, the judgment provides evidence that the Court has increasingly integrated the issue of risk into legal causation assessments concerning violations of the Convention.

In *Fadeyeva v. Russia*, the Court for the first time in an environmental case elaborated more clearly on issues of causation and evidence. Firstly, the multiple sources-problem in the case was radically mitigated given that the Severstal plant contributed almost 95 per cent to the total emissions in the town. On the assessment of evidence the Court noted that

“the general principle has been to apply the standard of proof “beyond reasonable doubt”. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. It should also be noted that it has been the Court’s practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the respondent Government have access to information capable of corroborating or refuting the applicant’s allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* [the burden of proof lies upon him who affirms, not upon him who denies] is impossible”⁵¹⁹

The Court considered that a report from a clinic on the health of the applicant did not succeed in establishing “any causal link between environmental pollution and the applicant’s illnesses”.⁵²⁰ Turning instead to the evidence on the general impacts of the plant on the population in the town, the Court noted that the government had failed to produce certain requested documents, giving rise to the conclusion that the environmental situation could have been even worse than described in available data.⁵²¹

The ECtHR went on explaining that on many occasions had the state recognized that the pollution had caused an increase in the morbidity rate in the town. Furthermore the Court relied on a medical report on the general health situation in the town stating that the pollution had adverse effects on the inhabitants, with higher risks of cancer in the nasal passages, headaches, and chronic irritation of the eyes, nose, and throat. The report alerted that the population residing near the plant was especially affected. In addition to this, the Court observed that the state had itself recognized that the applicant had to be relocated due to the pollution.⁵²² The ECtHR explained that:

“the Court observes that over a significant period of time the concentration of various toxic elements in the air near the applicant’s home seriously exceeded the MPLs. The Russian legislation defines MPLs as safe concentrations of toxic elements (see paragraph 49 above). Consequently, where the MPLs are exceeded, the pollution becomes potentially harmful to the health and well-being of those exposed to it. This is a presumption, which may not be true in a particular case. The same may be noted about the reports produced by the applicant: it is conceivable that, despite the excessive pollution and its proved negative

⁵¹⁸ *Öneryildiz v. Turkey*, 30 November 2004, ECtHR Grand Chamber, Application no. 48939/99, para. 73.

⁵¹⁹ *Fadeyeva v. Russia*, 9 June 2005, ECtHR, Application no. 55723/00, para. 79.

⁵²⁰ *Ibid.*, para. 80.

⁵²¹ *Ibid.*, para. 84.

⁵²² *Ibid.*, paras. 85-86.

effects on the population as a whole, the applicant did not suffer any special and extraordinary damage.”⁵²³

“In the instant case, however, the very strong combination of indirect evidence and presumptions makes it possible to conclude that the applicant's health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel plant. Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home.”⁵²⁴

Hence, in the terms of the theory on legal causation here used, strong indirect evidence of general causation gave rise to a presumption of specific causation concerning the negative health effects on the applicant. Since this presumption had not been rebutted it could be concluded that the state had violated Article 8.

It is interesting to note that the Court did not quail on the question of health effects, even if it could have taken the easier way and just establishing nuisance. It is also interesting to note the expression by the Court that if the presumption had been rebutted, the applicant would nonetheless be “more vulnerable to various illnesses”. This indicates that the Court is ready to elaborate on the issue of capabilities and risks in line with the precautionary principle.

In *Budayeva and Others* the Court found a violation of the right to life, *inter alia* because a domestic court had applied “a burden of proof in respect of facts that were beyond the reach of private individuals” in a civil suit. This was especially so given the complexity of the case which would have required the applicants to provide evidence such as “a complex expert investigation involving the assessment of technical and administrative aspects, as well as by obtaining factual information available to the authorities alone”.⁵²⁵

In *Tătar v. Romania*, the ECtHR further clarified the standard of legal causation and its relationship to evidence. Concerning the asthma suffered by one of the applicants, the Court investigated if the activities of Aurul could have aggravated his asthma. Firstly, the Court established that the asthma as such had been properly attested in medical certificates. Secondly, it found that it was indisputable that sodium cyanide could negatively affect the human health. Thirdly, it found it proven that the level of pollution in the vicinities of the home of the applicants had increased as a result of the accident. Furthermore, the Court emphasized the evidentiary problems in issue. It noted that a report of the WHO had stated that even experts had difficulties in establishing the effects of sodium cyanide in the human body.⁵²⁶ The Court thereafter noted that:

“105. En l’absence d’éléments de preuve à cet égard, la Cour pourrait éventuellement se livrer à un raisonnement probabiliste, les pathologies modernes se caractérisant par la

⁵²³ *Ibid.*, para. 87.

⁵²⁴ *Ibid.*, para. 88.

⁵²⁵ *Budayeva and Others v. Russia*, 20 March 2008, ECtHR, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, paras. 163-164.

⁵²⁶ *Tătar v. Romania*, 27 January 2009, ECtHR, Application no. 67021/01, paras. 102-104.

pluralité de leurs causes. Cela serait possible dans le cas d'une incertitude scientifique accompagnée d'éléments statistiques suffisants et convaincants.

106. La Cour considère cependant qu'en l'espèce l'incertitude scientifique n'est pas accompagnée d'éléments statistiques suffisants et convaincants. Le document réalisé par un hôpital de Baia Mare et attestant un certain accroissement du nombre des maladies des voies respiratoires ne suffit pas, à lui seul, à créer une probabilité causale. La Cour constate donc que les requérants n'ont pas réussi à prouver l'existence d'un lien de causalité suffisamment établi entre l'exposition à certaines doses de cyanure de sodium et l'aggravation de l'asthme.

107. Elle estime toutefois que malgré l'absence d'une probabilité causale en l'espèce, l'existence d'un risque sérieux et substantiel pour la santé et pour le bien-être des requérants faisait peser sur l'État l'obligation positive d'adopter des mesures raisonnables et adéquates capables à protéger les droits des intéressés au respect de leur vie privée et leur domicile et, plus généralement, à la jouissance d'un environnement sain et protégé. En l'espèce, cette obligation subsistait à la charge des autorités tant avant la mise en fonctionnement de l'usine Sasar qu'après l'accident de janvier 2000. A cet égard, la Cour observe qu'en 1992 l'État roumain invita l'Institut de recherche du ministère de l'Environnement à mener une étude d'impact sur l'environnement. Sept ans plus tard, l'État défendeur, actionnaire de la société Aurul, décida d'autoriser la mise en fonctionnement de celle-ci, en se basant principalement sur les conclusions de cette étude, réalisée en 1993.”⁵²⁷

On the positive obligation of the state under the right to private and family life, the Court found that the danger to the environment and the well-being of the population posed by the accident, which had effects, not only in Romania but also in Hungary and Serbia-Montenegro, had been foreseeable. The Court in this regard pointed to the fact that a study already in 1993 had warned of the ecological effects of the activities in question.⁵²⁸

Invoking the Aarhus Convention, the resolution of the Parliamentary Assembly of the Council of Europe on industrial hazards and the precautionary principle in the Rio Declaration, the Court concluded that the applicants had to live in a state of anguish and uncertainty which was exacerbated by the passivity of the authorities in their failure to provide information to the population.⁵²⁹ For these reasons the Court held that Article 8 had been violated.

In a strong separate opinion Judge Zupančič criticized the concept of legal causation used by the majority. While welcoming the probabilistic legal causation adopted by the Court, he observed that this approach nevertheless was replaced with the traditional theory on causation, which is incapable of handling uncertainties.

Zupančič opined that so called toxic cases required a different approach to causation than other cases. He explained that it in science had been established that different causal factors don't add up, but rather multiply. Therefore, and when there is no clear causal agent and no signature of such agent, the traditional theory on causation becomes obsolete and archaic.⁵³⁰

⁵²⁷ For my translation, *see supra* note 288.

⁵²⁸ *Tătar v. Romania*, *supra* note 525, para. 111.

⁵²⁹ *Ibid.*, paras. 118, 120, 122.

⁵³⁰ *Ibid.* It was further explained that the traditional formalist understanding of legal causation was based on an accusatory view according to which “la faute doit absolument être attribuée à l'une des parties. Dans un sens très réel, le fétichisation du lien de causalité est le produit secondaire du besoin de répartir la faute, d'une manière discrète, selon le modèle de l'alternative.” He continued: “Le processus juridique, dans lequel la recherche

Furthermore, the Judge explained how the probabilistic theory on causation should apply. It was observed that the mere exposure to a certain product is not sufficient for establishing a specific effect.

“ Mais une cause absolument suffisante est quasi introuvable dans la réalité concrète: la plupart des causes supposent, pour produire leurs effets, la présence d’autres facteurs qui n’intéressent pas toujours la responsabilité civile. La présence d’une circonstance favorisante combinée à l’absence d’une cause discernable rend, aux yeux du juge, la causalité suffisamment probable pour qu’elle puisse être acquise.”⁵³¹

Hence, probabilistic legal causation means that the combination of a predisposing cause and the absence of discernible causes should be sufficient for establishing liability.

Turning to the present case, Zupančič asked the question whether the report indicating an increase in the prevalence of respiratory illnesses near the factory was not sufficient to suggest a correlation. He therefore proposed that the burden of proof should have been reversed to the state, given the fact that the contrary solution would place an impossible burden (*probatio diabolica*) on the applicant, especially since there was a lack of information on the harmful effects of sodium cyanide for human health. He explained that this shift of the burden of proof would be justified and consistent with the principle of equality of arms.

In *Branduse v. Romania*, a violation of Article 8 was once again found on the basis of general causation. In this case, however, the Court found that the health of the applicant had not been negatively affected by the waste-site near his detention center. Nevertheless, it held that Article 8 was applicable since there were general studies on the health effects of the substances in question and that the applicant had had to live for a long time close to the site. This, it was concluded, had negatively affected his life quality and well-being violating his private life.⁵³²

In *Oluic v. Croatia* the Court found a violation of Article 8 due to nuisance from a bar located in the same house as the home of the applicant. The noise had exceeded permitted levels and had been evidenced by a number of measurements in the applicant's flat.⁵³³ In addition to this a medical report on the health of the daughter of the applicant showed that she suffered from a hearing impairment and that she was recommended to avoid noise exposure.⁵³⁴ Hence, there were evidence in this case of specific

de la vérité est juste un moyen de résoudre le conflit, et pas un but en lui-même, a tendance à déformer la perception de la réalité. Autrement dit, l’approche scientifique objective ne souffre pas du besoin de coincer la partie responsable; elle peut ainsi se permettre de rester plus nuancée. Les langages de la science et du droit sont souvent en désaccord.”

⁵³¹ *Ibid.*, My translation: “However, an absolutely sufficient cause is almost impossible to find in reality: most causes rely on the presence of other factors to produce their effects, these other factors are not always relevant for establishing liability. The presence of a predisposing circumstance combined with the absence of a discernible cause makes the causation sufficiently probable for adoption by the judge.” Zupančič explains that the contrary solution would have two disadvantages: the first would be to affirm a lack of causation when science in fact has established a probability; the second would be to deprive the victim, who is almost always already the weaker party to the case, of all redress.

⁵³² *Brândușe v. Romania*, 7 April 2009, ECtHR, Application no. 6586/03, para. 67.

⁵³³ *Oluic v. Croatia*, 20 May 2010, ECtHR, Application no. 61260/08, paras. 7-24.

⁵³⁴ *Ibid.*, para. 25.

causation, and the Court once again seems to rely to a great extent on the fact that the noise exceeded domestic permitted levels.⁵³⁵

In *Băcilă v. Romania* it appears that the Court has used general causation to evidence specific causation. As opposed to *Fadeyeva v. Russia*, where it had been established that the plant contributed to 95 per cent of the pollution in the town, in the present case it was merely found that the factory was “the principal industrial site emitting heavily contaminated substances in the atmosphere.”⁵³⁶ When examining the question of the impact of the pollution from the corporate activities on the health of the applicant⁵³⁷, the Court firstly held that it had been established that the prevalence of illnesses, especially respiratory illnesses, was seven times higher at the town in comparison with the rest of the country.⁵³⁸ Secondly, the Court found that it had been established that the concentration of lead and byproducts in the blood of the applicant exceeded permitted levels.⁵³⁹ A doctor had furthermore attested that the applicant “lived in a toxic environment and that she suffered from problems with her larynx which *could have been* caused by her prolonged exposure to toxic substances.”⁵⁴⁰

Therefore the Court concluded that Article 8 applied. However, it is interesting to note that, even though the ECtHR appears to have reached its conclusion based on general evidence, possibly combined with limited specific evidence, it nonetheless held that “the applicant has provided medical documentation attesting an impact and a *causal link* between *the pollution* and the degradation of her health”.⁵⁴¹ Nevertheless, it appears that the Court in fact has somewhat relaxed the burden of proof of specific causation since the said medical documentation had not established with certainty this alleged causal link, merely stating that her illnesses *could have been* caused by pollution. It is furthermore interesting to note that the Court is satisfied with a causal link between *the pollution* and her illnesses, while nothing is said about the specific causation between the pollution of the factory and said health effects. However, it seems that the Court has presumed that this pollution was in fact pollution from the factory since the applicant lived nearby the factory and that the “harmful effects on human health from the toxic substances emitted into the atmosphere from this factory had been clearly established”.⁵⁴² Hence, these findings in addition to the fact that the factory was the principal polluter in the town appears to have satisfied the Court.

⁵³⁵ *Ibid.*, para. 62.

⁵³⁶ *Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04, para. 10. My translation.

⁵³⁷ *Ibid.* This examination is made under the heading “D. L'impact de la pollution générée par l'activité de la société sur la santé de la requérante”.

⁵³⁸ *Ibid.*, para. 36.

⁵³⁹ *Ibid.*, para. 37.

⁵⁴⁰ *Ibid.*, para. 38. My translation. Original: “Un médecin attesta qu'elle vivait dans un milieu toxique et qu'elle souffrait d'une atteinte du larynx dont la cause pouvait être l'exposition prolongée à des vapeurs toxiques.”

⁵⁴¹ *Ibid.*, para. 63. My translation. Original: “la requérante a fourni des documents médicaux attestant de l'impact et du lien de causalité entre la pollution et la dégradation de sa santé”.

⁵⁴² *Concurring Opinion of Judge Zupančič, Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04, para. 63. My translation.

Judge Zupančič attached a concurring opinion elaborating once again on his understanding of legal causation. He found that the “ancestral theories of causation are about to evolve”⁵⁴³. Zupančič raised the question of how the precautionary principle should affect legal causation. Firstly, he recognized that this principle is established as a constitutional principle in many countries, thus giving rise to constitutional rights. Article 8 and other rights in the Convention could give rise to human rights coinciding with such constitutional rights.⁵⁴⁴ Secondly, while the precautionary principle may be vaguely formulated on the constitutional and political level, applied in a legal situation it could mean merely the reversal of the burden of proof. It is therefore a rebuttable legal presumption. Zupančič explained that this presumption reverses the common-sense assumption so prevalent in the industrial age that industrial activity is harmless to the environment.⁵⁴⁵

The present case, he continued, could be characterized as a toxic case. Since toxic chemicals pervade the environment, spread in the ecosystem and in the food chain, this pervasiveness renders the application on individual causation absurd.⁵⁴⁶ The insistence on such an archaic theory on a chain of causation prevents the effective protection of individuals affected.⁵⁴⁷ Judge Zupančič went on to emphasize the need in law to use concepts capable of dealing with our real problems. He explained that the traditional theory on causation constituted a conceptual barrier in this regard.⁵⁴⁸

He thereafter presented his version of how the precautionary principle affects legal causation and the burden of proof in environmental cases. If the applicant succeeds in making a *prima facie* case of environmental pollution, then the burden of proof is reversed. This is coherent with the principle of equality of arms since it is the state which has all the means to evidence that the environment is safe. Therefore it is equitable to reverse the burden of proof.⁵⁴⁹

⁵⁴³ *Ibid.*, para. 3.

⁵⁴⁴ *Ibid.*, para. 3.

⁵⁴⁵ *Ibid.*, para. 4.

⁵⁴⁶ *Ibid.*, para. 6.

⁵⁴⁷ *Ibid.*, para. 7.

⁵⁴⁸ *Ibid.*, para. 8.

⁵⁴⁹ *Ibid.*, para. 9. In his own words: “Le principe de précaution n'en est pas moins capable de renverser la situation même dans des circonstances spécifiques comme celle des affaires *Tătar et Băcilă*. En présence d'un commencement de preuve de la toxicité de l'environnement pollué, la question qui se pose par rapport au principe de précaution devient celle de savoir si l'Etat partie à la Convention peut ou non défendre de manière convaincante la thèse contraire. Il dispose de tous les moyens pour démontrer l'innocuité de l'environnement; il peut engager toutes sortes d'experts et ordonner toutes sortes d'expertises scientifiques. L'individu requérant doit donc conserver son droit procédural fondamental à un renversement de la charge de la preuve. Il est tout simplement équitable de renverser la présomption afin de protéger l'individu dans son intégrité physique et dans sa dignité humaine face à un environnement qui ne serait pas dangereusement dégradé si les barrières juridiques et factuelles dont dispose l'Etat étaient mises en place et fonctionnaient selon le principe de précaution.” The majority of the judges in the ICJ *Pulp Mills* case adopted in that case a contrary interpretation on the effect of the principle of precaution on the burden of proof: It considered that “in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts.”, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj->

5.3.3 The Inter-American Human Rights System

The Inter-American Court and Commission on Human Rights tend to be satisfied with more general evidence of violations than their European counterpart. This is perhaps especially true for the groups which are designated as vulnerable. This is also indicated in the cases examined.

In the *Yanomani* case, which was concerned with the Yanomani indigenous people as a vulnerable group, the Commission merely stated that the cause of the human rights violations of the Yanomani as a collective was the general invasion of outsiders affecting their life and well-being. For instance, the Commission stated that “outsiders carrying various contagious diseases that have caused many victims within the Indian community”⁵⁵⁰ gave rise to violations, without identifying specific individuals who caused or who were victims. Hence, general causation was sufficient in establishing violations.

The same is true in the *report on the human rights situation in Ecuador*. This case also involved an indigenous group whose lands had been invaded by outsiders. The Commission appears to have been satisfied with general causation from statistical reports on prevalence of diseases combined with the general scientific knowledge on the adverse health effects of crude oil, in establishing violations.

The *Inuit* case is the only case examined that deals with climate change. However, since the case did not survive to the merits, we have no specific information on how the Commission understands legal causation in climate change cases. It is, nevertheless, interesting to note the creative argumentation of the petitioners, *inter alia* using the principle of common but differentiated obligations. The public hearing arranged by the Commission furthermore attests to its interest in the *problematique* of legal causation in climate change cases.

The Inter-American Commission will in the near future have the possibility to pronounce more clearly on its understanding of legal causation in a toxic case. In *Community of La Oroya v. Peru*, which has yet to be examined on the merits, the Commission found the case admissible based on the petitioners claim which in turn was based on a combination of general scientific data on the toxicity of the substances emitted and the general health effects of the residents of the city in question.

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>, visited on 20 November 2010, para. 162. It furthermore noted that “while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof.”, *Ibid.*, para. 164. This approach by the majority is criticized by Judge Trindade in his separate opinion. It can be noted that the Judge in this regard made reference to Article 31 (3) of the VCLT, *Separate opinion of Judge Cançado Trindade, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>>, visited on 20 November 2010.

⁵⁵⁰ Case 7615 (*Petitioners on behalf of the Yanomani Indians v. Brazil*), 5 March 1985, Inter-American Commission on Human Rights, *1984-1985 Annual Report* 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), para. 2 of the Considerations of the Commission.

5.3.4 The African Human Rights System

In the *Ogoniland* case examined above, the African Commission has, similarly to its Inter-American counterparts, refrained from pronouncing on specific causation. In the case, no individual causes or effects are analyzed and the Commission appears to have accepted the claims of causation presented by the petitioners.⁵⁵¹ However, it should be noted that this approach, at least to some extent, has legal basis in the fact that the African Charter protects both individuals and peoples, thus recognizing a collective as having human rights.

5.3.5 United Nations Human Rights Committee

There have been no analysis of legal causation in the cases examined in the UN HRC. However, the HRC has at least stated that a general risk, without any general or specific evidence on potential individual effects, is insufficient for the petitioner to qualify as a *victim* of a human rights violation.⁵⁵²

⁵⁵¹ An example of this is the general statement that “pollution and environmental degradation to a level humanely unacceptable has made it living in the Ogoni land a nightmare.”, Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 67.

⁵⁵² *Bordes and Temeharo v. France* and *Brun v. France*.

6 Analysis

Two questions were posed as the basis for this study:

1. What are the prospects for an emerging binding norm in international law for the accountability of companies violating civil and political human rights in environmental cases, within the legal framework of justiciable rules already in place?
2. What are the obstacles in this norm emergence process with special regard to legal causation?

The very approach of these questions appears to imply an integrative understanding of international law. We have through the jurisprudence examined seen an increased willingness of the judicial institutions to address environmental issues within their respective jurisdictional spheres. However, we have not seen, and ought not to have seen, a fully fledged accommodation of international environmental law, given that the constituting instruments of these bodies provide for jurisdiction over human rights. At the same time, the understanding of these rights has not been static, they are living instruments that recognize the need for reinterpretation when society is changing.

While the earliest cases demonstrate a remaining cautious approach towards environmental claims, we have seen how the framing of an environmental problem through human rights now hardly surprises anyone. The most recent judgments of the ECtHR even refer explicitly to the failure of the state to take adequate measures for “the enjoyment of a healthy and protected environment”.⁵⁵³

The Inter-American institutions have perhaps recognized an integrative approach more clearly than the European Court. In the report on the situation of human rights in Ecuador it held that:

”[t]he realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one’s physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.”⁵⁵⁴

In the African human rights system, the right to a healthy environment is explicitly protected in the African Charter. Therefore, it is perhaps not surprising that the Commission has addressed environmental concerns. However, the Commission has interpreted the Charter to implicitly include other rights, such as in the *Ogoniland* case, where the Commission found a violation of the right to food, which is not explicitly included in the African Charter, implicit in the right to life and right to health.

⁵⁵³ *Tătar v. Romania*, para. 112. My translation.

⁵⁵⁴ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. No. OEA/Ser.L/V/II.96 Doc. 10 rev. I, 24 April 1997, at ch. VIII, Part 2: Relevant Inter-American Law.

The right to health has also been integrated to some extent in the European and Inter-American case law. In cases of toxic emissions it is clear that the judicial bodies have placed a special emphasis on how these emissions have affected human health. Most strikingly, this integration has been made with the right to life and the right to private and family life.

The special holistic character of international environmental law has also been giving rise to the integration of substantive and procedural aspects of the right in question. Hence, the European Court has placed an emphasis on the right to information of the risks of environmentally hazardous activities as an aspect of the right to life and the right to private and family life to guarantee the protection of the health and well-being of the applicant. Similarly, the Inter-American institutions have attached importance to information and participation in decision-making in protecting indigenous vulnerable groups. In the *Ogoniland* case the African Commission likewise appealed to the Nigerian government to ensure appropriate environmental and social impact assessments, to provide information on health and environmental risks and also to compensate for substantive rights breached. Although outside of the jurisprudential scope of the study, it is noteworthy that several judges in the ICJ in the *Pulp Mills* case in a similar manner emphasized the integration of the precautionary principle into the legal framework of the case⁵⁵⁵, and the interrelatedness of substantive and procedural environmental law⁵⁵⁶.

The development of the understanding of the integration of international environmental law and international human rights law as manifested in the cases above challenges the traditional cognitive aspect of the legal culture/legal deep structure that implies that environmental law is autopoietically distinguished from the scope of the legal rules deemed relevant. This latter perception also attaches special importance to the causal link, or in Zupančič' words, the “fetishism of the causal link”, and is socialized into the understanding of law as a system based on dichotomies (legal – non-legal, guilty – not guilty) and the role of adjudication as an activity *ex post*.⁵⁵⁷

⁵⁵⁵ *Separate opinion of Judge Cañado Trindade, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>>, visited on 20 November 2010.

⁵⁵⁶ In their dissenting opinion in the *Pulp Mills* case Judges Khasawneh and Simma noted that environmental law “principles are frequently, where there is a dispute, in a state of tension with each other. Clearly in such situations, respect for procedural obligations assumes considerable importance and comes to the forefront as being an essential indicator of whether, in a concrete case, substantive obligations were or were not breached.”, *Joint dissenting opinion of Judges Al-Khasawneh and Simma, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, ICJ, <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>>, visited on 20 November 2010, para. 26. Trindade similarly made reference to this interrelationship in his separate opinion, *Ibid.*, para. 174.

⁵⁵⁷ This latter role was an interesting aspect of the *Pulp Mills* case in the ICJ where Judges Khasawneh and Simma in their dissenting opinion discussed the possibility for the Court to assess the environmental risks of the project *ex ante* rather than exclusively *ex post*, *Ibid.*, paras. 21-24.

Therefore, we can observe how certain judges in the cases examined function as *norm entrepreneurs* in that they challenge the prevailing perception of law as unaccommodating towards environmental law as more holistic. However, even though articulations at the surface level of law are slowed down by the stabilizing legal culture, the jurisprudence above seems to evidence an internalization of the accommodation of environmental aspects within human rights law.

This is similarly the case of positive obligations pertaining to the indirect accountability of companies. Nobody is anymore surprised with international judicial human rights bodies addressing harm stemming from corporate activities. As noted above there are tendencies in this regard to be less reluctant even to discuss the details of these activities. Therefore, at least, one can argue that the aspect of corporate indirect accountability of the norm is becoming nearly internalized in the jurisprudence studied. Nevertheless, it must be recognized that one specific systemic condition, the jurisdiction of the examined institutions over solely violations by states, poses a systemic barrier to a more elaborate approach to corporate accountability. Thus, there can be no legal accountability for the company where the state has not been passive. The indirect accountability of corporations therefore relies per definition on this obstacle. However, the degree of passivity tends to be increasingly accommodating towards corporate accountability. For example, in the more recent cases, the state has in fact often tried to take certain measures towards the company producing the harmful activities. The perhaps strongest example is in the *Băcilă* case where the state had fined the company for its pollution, the fine amounting to EUR 180.000.⁵⁵⁸ This did not convince the court that the applicant had had redress, perhaps in line with the rights-preceding duties approach.

Hence, the prospects of a binding norm for the corporate environmental indirect accountability in international human rights law do not, at least on a general and conceptual level, appear foreclosed.

However, one specific aspect of this prospect, legal causation, was in the research question deemed as important for the emergence of this norm. Thus, does legal causation pose an obstacle in this regard?

Judge Zupančič highlights the will- and cognitive inputs to the norm in this regard. It is not a question of an insurmountable systemic barrier in law, it is rather the judge who can accommodate a complex reality by modifying evidentiary standards such as the burden of proof. If one accepts his argument, the problem of legal causation is not so much inherent obstacles on the surface level of law than obstacles permeating the legal or/and legal deep structure. As noted above, environmental law challenges this culture by placing an emphasis on precaution and a holistic world-view. The European Court has seemingly dealt with the *problematique* of legal causation through the increasing acceptance of general causation and the relaxation of requirement of evidence of specific causation. For example, in *Băcilă v. Romania*, the Court was satisfied with evidence of general causation combined with a medical report on the health of the applicant

⁵⁵⁸ *Băcilă v. Romania*, 30 March 2010, ECtHR, Application no. 19234/04, para. 21.

stating merely that her illnesses *could have been* caused by pollution.⁵⁵⁹ However, the Court has, at least semantically, remained attached to the concept of a *causal link*. It is uncertain how the Court will develop its understanding of legal causation in toxic cases, but the increasing pressure on the ECtHR to handle environmental issues affects it and forces it to develop its understanding of legal causation. It appears at least that the Court is more willing to modify legal causation in toxic cases. Therefore, the will input into the norm is rather unclear at the same time as it appears that the systemic conditions/coherence requirement do not pose such an obstacle as it could have appeared *prima facie*. What is certain is that the *problematique* of legal causation in environmental cases is increasingly recognized and that the legal culture affecting it is made cognitively articulated in the cases examined. Therefore, the obstacles posed by legal causation for the emergence of the norm is rather surmountable cognitive and will-based aspects than a systemic one.

Another way of overcoming the obstacles posed by complex causation is provided by the approach of the Inter-American and African human rights mechanisms. These mechanisms appear to have implicitly accommodated the problem of legal causation in environmental cases simply by being satisfied with general causation. This approach is possible because of the legal culture and surface level of law in these jurisdictions recognizing collective human rights. Hence, also in these cases we can observe how the systemic input into the norm on the surface level of law is played down while the cognitive input, and perhaps the will-input, are more important in the constitution of the norm.

Thus, the approach of the legal cultures in the Inter-American and African human rights systems seems to be more accommodating to the understanding of human rights as a dialectic of hard core positive law and human rights as having more aspirational connotations. Evidence of this differing approach is the recognition of collective rights which permits the use of only general legal causation in finding violations. Nevertheless, we should be cautious to draw these conclusions too far, since we have yet to see a *pure* toxic case in the Inter-American or African systems. The *Community of La Oroya* case soon to be examined on the merits, however, may clarify this approach in the Inter-American system.

It should, however, be remembered that only one case examined dealt with climate change with multiple sources dispersed thousand of miles from the alleged victims and that the causation in this regard would have had to be relaxed to accommodate this situation. Most of the other cases concern rather clearly delimited geographical areas without problematic multiple sources contexts. Hence, the understanding of legal causation in climate change cases remains unclear.

The conclusion of all this would be that judges and courts as *norm entrepreneurs* have articulated a norm for the indirect environmental accountability of companies for human rights violations through the emphasis on how the cognitive and will-based inputs in the legal culture/deep structure rather than systemic conditions on the surface level as

⁵⁵⁹ *Ibid.*, para. 63.

such affect legal causation in environmental cases. While it is uncertain if and when the norm will attract sufficient support to reach the tipping point as to enter a *norm cascade*, the tendencies to this development is strengthened by the urgency of legal causation to adapt so as to *environmental fit* in and to be able to handle pressing issues in the society in which law is a part.

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