Conservation and Human Rights

Human Rights—
a brief introduction to key concepts

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...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
— Universal Declaration of Human Rights, 1948

Abstract. Understanding the relationships between conservation and human rights is difficult in part because of the nature of human rights themselves. We provide a brief overview of some (though by no means all) key concepts, debates, and contemporary instruments protecting international human rights. Given the vastness and complexity of the issue, we aim only to provide a helpful overview for readers unfamiliar with the international human rights framework.

Despite general consensus within the United Nations (UN), definitions and characteristics of human rights are still debated, and are still emerging, all over the world. According to one general definition: “Human rights are the rights possessed by all persons, by virtue of their common humanity, to live a life of freedom and dignity. They give all people moral claims on the behaviour of individuals and on the design of social arrangements—and are universal, inalienable and indivisible. Human rights express our deepest commitments to ensuring that all persons are secure in their enjoyment of the goods and freedoms that are necessary for dignified living.”1

Rights can be understood as entitlements2 that create constraints and obligations in interactions between people. Rights, in their broadest sense, may arise from various institutions that establish binding obligations (citizenship rights granted under laws particular to a state, inter-party contractual rights, etc.) An example may be the right to be paid for a service rendered under a contractual obligation. Human rights, however, are based on the concept that all people are entitled to basic compo-
nents of lives commensurate with human dignity.

When most people talk about human rights they refer to those recognized in the UN and/or regional and national frameworks that arose since World War II, but the concept developed over a much longer period of time. Similarly, contemporary human rights are sometimes criticized for coming primarily from western philosophical traditions, but their conceptualization has been much broader than the relatively narrow focus on ‘liberty rights’.4 In Shimam’s summary: “The earliest attempts of literate societies to write about rights and responsibilities date back more than 4,000 years to the Babylonian Code of Hammurabi. This Code, the Old and New Testaments of the Bible, the Analects of Confucius, the Koran, and the Hindu Vedas are five of the oldest written sources which address questions of people’s duties, rights, and responsibilities. In addition, the Inca and Aztec codes of conduct and justice and the Iroquois Constitution are Native American sources dating back well before the eighteenth century. Other pre-World War II documents, such as the English Bill of Rights, the US Constitution and Bill of Rights, and the French Declaration of the Rights of Man and the Citizen, focused on civil and political rights.”5

Some basic concepts

There is growing consensus around the recognition of human rights as being, among other things: Minimal standards of lives commensurate with dignity;6 Universal, i.e., they “belong to all people, and all people have equal status with respect to these rights”7 by virtue of her or his being human;8 and Interdependent and indivisible, i.e., all political, civil, economic, social and cultural rights are important and non-hierarchical, and the realization of each ultimately depends on the realization of them all.9

However, even these core characteristics are much contested. Regarding interdependency, some States prioritize economic development and see a potential threat to that development arising from democracy and public freedoms.10 Others continue to view economic, social and cultural rights as, at best, second to political and civil rights. The view of rights as non-hierarchical has gained wide acceptance only since the end of the Cold War (see Box 1). Some authors suggest that recognition of some hierarchy may be important for supporting key inderogable rights.11 Universality is sometimes rejected on the grounds that human rights come from, and reflect, western cultural traditions, or more generally that universality is difficult to defend given global cultural diversity.12

Another widely recognized but contested characteristic is that human rights are recognized and supported in international law. The point of some contention here is whether or not such legal recognition is necessary for something to in fact be a human right13 One definition provided by the UN OHCHR makes the following distinction: “Human rights are legally guaranteed by human rights law...expressed in treaties, customary international law, bodies of principles and other sources of law. .... However, the law does not establish human
Conservation and Human Rights

rights. Human rights are entitlements that are accorded to every person as a consequence of being human.”14 Thus, while human rights may not exist solely because they are established in international law, international law is an important part of what makes human rights powerful. As Hausermann states, “Human rights are a global vision backed by state obligations. The term “human rights” refers to those rights that have been recognized by the global community and protected by international legal instruments”.15

Collectively, the human rights recognized in international law today cover numerous dimensions of human well-being and dignity, including:

- **substantive rights** such as the rights to life, health, food, housing, and work;
- **procedural rights** such as the rights to participate in political affairs, to information, and to access to justice; and
- **cross-cutting principles** including being free from all forms of discrimination.16

Of course the relationships between rights are very complicated, and this is only one of many ways to categorize them.

![Picture 2. All humans have a right to food that is economically and physically accessible over time, healthy, and culturally acceptable.](Courtesy Grazia Borrini-Feyerabend)

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Box 1. Successive ‘generations’ and the principles of non-hierarchy and indivisibility

Human rights have often been referred to in terms of first, second, and third ‘generations’.17 While such divisions have been disappearing since the end of the Cold War, and with increasing recognition of the principle of indivisibility, these ‘generations’ reflect historical treatment.

The first generation encompasses civil and political rights, covered within the UN framework primarily by the International Covenant on Civil and Political Rights (ICCPR, 1966). These rights were primarily supported by western democratic states in the negotiations over the UDHR. While often regarded as negative rights —those that define actions duty-bearers (traditionally states) must refrain from taking against claims-holders (traditionally citizens)— it is increasingly recognized that protecting civil and political rights requires positive action (e.g., creating institutions to support the rule of law and an independent judiciary). In fact, all human rights have positive and negative obligations associated with them.18

Second generation rights include economic, social and cultural rights, covered within the UN framework primarily by the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). These rights were most supported by socialist and communist states in the negotiations over the UDHR. While long seen as positive rights —those that define steps duty-bearers must actively take in support of claims-holders— as with first generation rights, it is now increasingly recognized that ESC rights have both negative and positive duties associated with them.

In the 70’s, a third generation— solidarity rights— emerged, reflecting new concerns of the inter-
What ARE Human Rights, anyway?

Inter-and intra generational rights

Calls for ‘inter-generational rights’ reflect concern for equity, solidarity and responsibility between our generation and the future generations, those at the heart of sustainable development aiming to meet the needs of the present without compromising the ability of future generations to do the same.19 Present generations have a duty to protect and sustainably manage natural resources24 and the common heritage of humankind.25 In this sense, the precautionary principle aims to protect the rights of future generation by taking into account future irreversibility of present decisions. But: who can represent future generations? How can we determine the needs and the contents of the rights of future generations, as we cannot compare our needs to theirs? How can we guarantee respect for their rights?26

The rights of future generations were first expressed in the Stockholm Declaration (1972), and then restated in numerous international instruments (Rio Declaration Principle 3; Climate Change Convention Article 3; Convention to Combat Desertification; and Convention on Biological Diversity, preamble). The International Court of Justice mentions “future generations” in its advisory decision on the legality of the threat or use of nuclear weapons27 and in the Case concerning Gabčíkovo-Nagymaros.28 The Minors-Oposa case29 brought before the Supreme
court of the Philippines provides a legal example of the protection of future generations. In this case, the plaintiffs (minors represented by their parents) filed a complaint in their name and “their yet unborn posterity”. The Court decided that the plaintiffs had the legal capacity to sue in the name of future generations based on the “concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.” UNESCO proclaimed in 1997 the Declaration on the Responsibilities of the Present Generations Towards Future Generations.30 In contrast, ‘intra-generational rights’ are only concerned with responsibilities among individuals and groups within a given generation. This concept has arisen primarily in the context of discussion of (and demands for) equitable resource-sharing and distributive justice across states (specifically Southern and Northern States).31

**Individual and collective rights**

In the traditional human rights framework, rights holders are individuals. However, some rights have a collective character. A distinction must be made between those individual rights with a collective dimension (they are exercised collectively by a group of people, such as work-related rights operated through trade-unions) and collective rights as such, in which the group itself (a people, minority, community) is the holder. Article 27 of the ICCPR, for instance, protects minorities, but does not recognize collective rights held by a group per se. Rather, it recognizes individual rights with collective dimensions, maintaining that it is the individual members of the community who are rights-holders.32

The understanding of human rights as exclusively individual is slowly changing in response to increasing recognition that some rights, in fact, are best understood as essentially collective. For instance, recognition of the collective rights of indigenous people— to their land, resources, etc.— is essential to their identity and integrity. According to a recent literature and issues review, “emerging human rights standards relating to indigenous peoples apply in large part to collectivities, focusing on the rights of indigenous peoples as a whole rather than on indigenous individuals, in accordance with their philosophies (cosmovisions) and lifestyles, which are much more based on collective property, knowledge generation, cultural identity and integrity”.33

**Indigenous Peoples and local community rights**

Collective rights are particularly important for understanding the significance of indigenous peoples and local and mobile community rights vis-à-vis conservation practice — the topic at the heart of this journal. As stated by Oviedo34 “From the conservation perspective, collective rights can have great impact. First of all, when applied to land, they are the basis for maintaining the integrity of the territory and avoiding ecological fragmentation, which is in turn a key requirement for meaningful biodiversity conservation. Secondly, collective rights provide a strong basis for the building and functioning of community institutions, which are indispensable for sound, long-term land and resource management. Thirdly, they strengthen the role of customary law as related to land management, and of
traditional knowledge applied to broader territorial and landscape units."

Prior to the 1970s, human rights bodies were at best slow to address indigenous peoples’ issues. However, the last decades have seen numerous positive changes, including a growing body of international, regional and national law on indigenous peoples’ rights. In sum, “[t]hanks to the lobbying efforts of indigenous representatives over the past 30 years, the rights of indigenous peoples have received greater attention in the UN and in the international community, as a whole.” According to Ferrari, “[many] rights of indigenous peoples relevant to biodiversity conservation [are] already established under the UN system”. Colchester summarises recognized indigenous peoples’ rights applicable to protected areas as follows:

- Self-determination
- Freely dispose of their natural wealth and resources
- In no case be deprived of their means of subsistence
- Own, develop, control and use their communal lands, territories and resources, traditionally owned or otherwise occupied by them
- The free enjoyment of their own culture and to maintain their traditional way of life
- Free and informed consent prior to activities on their lands
- Represent themselves through their own institutions
- Exercise their customary law
- Restitution of their lands and compensation for losses endured.

In addition to relevant provisions in several core human rights treaties, in more recent decades a set of instruments specifically addressed to indigenous peoples and, to a less extent, local communities have emerged. These include:

- ILO Convention No. 169 Concerning Indigenous & Tribal Peoples in Independent Countries (1989), which was the first international convention to specifically address indigenous peoples' human rights. However, relatively few states have ratified this important instrument.

- Convention on Biological Diversity (CBD) (1992), which, among other things, advocates in Article 8j that States Parties “respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional life styles relevant for the conservation and sustainable use of biological diversity”; that they “promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices”; and that they “encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”. Article 10(c) advocates that States Parties “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”. Further, under its 2004 Programme of Work on Protected Areas, the CBD suggests that parties “[e]nsure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations.”

- The (Draft) Declaration on the Rights of Indigenous Peoples which would, among other things address rights to secure tenure of land
Currently or previously occupied; free, prior informed consent; restoration of lands lost; conservation of the 'total environment'; and control of development priorities.43

Despite this, many states continue to express reluctance to recognizing collective rights for indigenous peoples, and perhaps even more so for minorities and non-indigenous communities. This reluctance is expressed on the grounds of national unity, fearing that collective rights open the door to new claims of and demands for self-determination and sovereignty. Several states (acting in their capacity as General Assembly members) postponed adoption of the Declaration on the Rights of Indigenous Peoples in part for these reasons.

The status of local community rights is more ambiguous, in part because their standing as clearly defined groups may also be more ambiguous. In the context of conservation, local communities may be farmers, fishers, pastoralists, mobile people, etc, or a mixture of two or more of these social groups.44

One important distinction between local communities and indigenous people, made more complicated by this ambiguity, concerns the collective rights recognized for each. What rights are accorded to non-indigenous local communities in relation to land and resources, customary laws and institutions, language and cultural practices?45

Given the diversity of social groups that the term may encompass, the answer may be to analyze which rights each group is accorded by international law (such as Farmers Rights under the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture), or to try to develop a broad based ‘integrated rights approach’ that could apply to the various social groups concerned,46 such as the concept of Traditional Resource Rights.47 With few exceptions (see CBD Article 8j above), international law does not, yet, widely acknowledge collective rights of local communities.

The importance of collective rights, particularly as they relate to land and natural resource access, often arises in the context of protected areas establishment and management. Protected areas have been, and are likely to continue to be, a core conservation strategy. While the ecological services they protect and provide can contribute to human rights in important ways, over the last two centuries protected areas have often been established on land held in common property by indigenous peoples or local communities, resulting in phy-
sical displacement or severely restricted resource access. This in turn often resulted in conflicts and resistance that in many cases continues today. Borrini et al., point out that “[t]oday, few people argue against the need to engage positively with resident or neighbouring communities in protected area management, and probably no-one would defend the proposition that human rights are less important in relation to protected areas than else where”.48 However, as can be seen in many of the cases in this journal, protected areas related displacement (including through restricted resource access) of indigenous peoples and local and mobile communities remains an issue demanding serious attention and action.49

Box 2. Defining Indigenous Peoples and Local Communities (Adapted from Ferrari 2005)

**Indigenous Peoples**

There is no internationally accepted definition of the term 'indigenous peoples'. However, the recognition of indigenous status is important in part because of the rights that are attached to it. The term has increasingly been gaining international attention since the 1970s in the context of debates about the rights of 'ethnic minorities', 'tribal peoples', 'natives', 'aborigines' and 'indigenous populations', who in varying forms have suffered, and continue to suffer, discrimination, marginalisation and human rights violations as a result of colonialism, and post-colonial processes of nation-building, development and modernisation.50 The term ‘indigenous peoples’ has been adopted by a broad movement of self-identified peoples as it is the only category that offers them with clearly recognized collective (group) rights. Although a large number of governments and international agencies have accepted this approach, many governments still object to recognition of indigenous peoples’ inherent rights.51

For one widely used definition, we can look to the International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries,52 ‘statement of coverage’ (Art. 1):

“1. This Convention applies to:
(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

Significantly, this definition differs from many others,53 perhaps in part because it makes explicit reference to self-identification and deals with both Indigenous and Tribal Peoples, clearly establishing its applicability to all regions of the world.54

**Local Communities**

The term 'local communities' has also increasingly been used in development and conservation debates but it has also proved elusive in terms of a definition, as it may carry different meanings in different countries and contexts. Two definitions— both relevant to the issues arising in this journal, and both demonstrating the diversity and complexity in defining local communities— are listed below.
Rights addressees (duty-bearers) and their obligations

Human rights imply corresponding obligations or duties. According to the 2000 World Development Report, “Duty bearers are the actors collectively responsible for the realization of human rights. Those who bear duties with respect to a human right are accountable if the right goes unrealized. When a right has been violated or insufficiently protected, there is always someone or some institution that has failed to perform a duty.” Such obligations are directed primarily to the government of that person’s state, which has duties to:

▶ Respect rights: refrain from taking actions that interfere with the exercise of a right;
▶ Protect rights: ensure that third parties (e.g., private individuals, businesses, NGOs, etc.) do not take actions that interfere with the exercise of rights; and
▶ Fulfil rights: develop an enabling environment (through legislation, budgetary policy, public policies, etc) in which people can fulfil their rights, and provide services to more directly fulfil rights when people are not able to do so for themselves.

Not all states can fully meet all these requirements in the same way, or at the same time, a fact recognized in many instruments protecting economic, social, and cultural rights. The ICESCR, for example, allows for ‘progressive realization’ of certain aspects of the rights it covers, and provides a margin of discretion allowing states parties to decide which policies they want to enact to meet obligations. These provisions oblige states parties to make progressive steps, reflecting their maximum available resources, toward full rights realization in ways that are realistic for and appropriate to their context. Progressive realization does not allow inaction or discrimination, however, and certain steps must be taken immediately, e.g., removing legislation that actively undermines people’s ability to fulfil their own right to food or other ESC rights.

While states remain the focus of human rights, it is becoming more important for non-state actors to recognize their responsibilities towards human rights.
This is true both in traditional cases, where states hold non-state actors accountable through binding law, but also increasingly where states do not, or cannot, hold non-state actors directly accountable. The nature and scope of non-state actors’ responsibilities, however, remain highly debated.\(^6^0\)

**Human rights instruments**

**UN Covenants and Treaty Bodies**

Partly in response to the global atrocities experienced during WWII, states came together in the UN and, with pressure from citizens acting through NGOs,\(^6^1\) drafted the United Nations Charter, the Universal Declaration of Human Rights (UDHR) and several legally binding human rights conventions that laid the groundwork for much of contemporary internal law addressing human rights.

Human rights covenants are legally binding for states parties, i.e., those states that fully ratify them. Each covenant is overseen by a UN “treaty body” (bodies set up to supervise implementation of obligations under specific binding covenants). Table 1 includes some of the key UN covenants and the names of their corresponding treaty bodies.

None of the core covenants mentioned above specifically addresses conservation practice or grants rights to sustainable and healthy environments.

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<tr>
<th>Human rights treaty(^6^2)</th>
<th>Corresponding supervisory treaty bodies(^6^3)</th>
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</thead>
<tbody>
<tr>
<td>The International Covenant on Civil and Political Rights (ICCPR)</td>
<td>The Human Rights Committee</td>
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<tr>
<td>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</td>
<td>The Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</td>
<td>The Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)</td>
<td>The Committee Against Torture</td>
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<tr>
<td>The Convention on the Rights of the Child (CRC)</td>
<td>The Committee on the Rights of the Child</td>
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**Table 1.** Some human rights treaties and their corresponding supervisory treaty bodies
However, they contain many rights that are linked to the environment including the rights to self-determination and permanent sovereignty over natural resources, life, health, food, safe and healthy working conditions, housing, information, participation, freedom of association, and culture. 

Within the UN framework there are also a large number of non-binding instruments—e.g., declarations, principles, guidelines, standard rules and recommendations—which do not establish legal obligations but do establish important moral obligations. In some cases (as in the case of the UDHR) such instruments may attain the status of international customary law. Table 2 provides examples of some of the instruments that may be of interest to conservation professionals.

<table>
<thead>
<tr>
<th>Table 2. Examples of non-binding instruments relating to human rights in UN framework</th>
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<tr>
<td>Vienna Declaration and Programme of Action</td>
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<td>United Nations Millenium Declaration</td>
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<td>United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples</td>
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<tr>
<td>General Assembly resolution 1803 (XVII) of 14 December 1962, “Permanent sovereignty over natural resources”</td>
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<tr>
<td>Universal Declaration on the Eradication of Hunger and Malnutrition</td>
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<td>Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security</td>
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<td>Declaration on the Right to Development</td>
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<td>Stockholm Declaration; (Principle I)</td>
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<td>Rio Declaration on Environment and Development; (Principles 1 and 10)</td>
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<tr>
<td>Dublin Statement on Water and Sustainable Development</td>
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<tr>
<td>Draft Declaration on the Rights of Indigenous Peoples</td>
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<td>Draft Declaration of Principles on Human Rights and the Environment</td>
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Finally, a number of international agreements and conventions, which are not strictly human rights conventions, deal at least implicitly with rights and concerns of people in connection to the use of natural resources. Two notable, previously mentioned instruments are ILO Convention No. 169 and the Convention on Biological Diversity.

**UN human rights charter bodies**

The United Nations Charter and subsequent General Assembly (GA) resolutions also set up several bodies, referred to as “charter bodies”, which generally “hold broad human rights mandates, address an unlimited audience and take action based on majority voting.” These bodies thus deal with broad human rights trends, including convening research and action around emerging human rights (like environmental human rights) and can in some cases take action against states for rights violations even where those states may not have ratified specific conventions. There are two currently operating UN Charter Bodies, explained briefly below.
The Human Rights Council\textsuperscript{68} has responsibility for various, broad human rights initiatives. The Council oversees “special procedures”, which refer to various mechanisms the Council sets up to address human rights situations in a specific country, or an emerging thematic issue. One well known mechanism is the appointment of “special rapporteurs”, independent experts that are mandated to investigate and report on specific topics for specific periods of times. Among the many current special rapporteurs are: Mr. Rodolfo Stavenhagen, on “the situation of human rights and fundamental freedoms of indigenous people”; Mr. Okechukwu Ibeanu, on “the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights”; and Mr. Jean Zielger, on the right to food. Ms. Fatma Zohra Ksentini, former special rapporteur on human rights and the environment, gave her final report in 1994. This report included the Draft Principles on Human Rights and the Environment.\textsuperscript{69} Special procedures can be important for exploring and advancing new issues in the human rights framework and, as explained briefly below, can sometimes provide an additional avenue for people to raise individual complaints about rights violations. The Council oversees some working groups, which can act as forums for raising, exploring, and gaining greater recognition for emerging rights principles. Two of the current working groups address rights of indigenous peoples\textsuperscript{70} and the right to development.\textsuperscript{71}

The other main UN charter body is the Subcommission on the Promotion and Protection of Human Rights,\textsuperscript{72} which reviews reports from working groups and special rapporteurs, undertakes various studies on emerging human rights issues, and reports to the Human Rights Council.\textsuperscript{73}

Regional bodies & instruments

There is a vast network of regional human rights bodies and instruments, which often reflect the most important issues for a particular region.\textsuperscript{74} Further, most states include at least some set of human rights in their constitutions or national laws. In her final report, the Special Rapporteur on Human Rights and the Environment shows that at least 61 countries have made provisions for the environment in their constitutions,\textsuperscript{75} many of which either explicitly or implicitly link environment to human rights. In fact, it is in part through provisions in national law that states parties are expected to meet their obligations under international human rights instruments.

Table 3 lists some regional bodies and some of the key instruments they have established. There are many general sources available for anyone seeking more information about such institutions in their region or state.\textsuperscript{76}

Procedures to address human rights violations

Part of what makes human rights powerful is the ability to take recourse in international law systems against rights violations. Processes for seeking remedies exist at all levels—the international UN bodies, regional bodies, and many national bodies.\textsuperscript{77} While
important, the universal mechanisms for human rights enforcement are non-judicial, and often criticized for being weak as decisions are not binding in the name of state sovereignty.78 However, non-binding instruments can have strong political and public opinion consequences on states.

Within the UN framework, depending on the nature of the rights violation and the party bringing the complaint, one can use either the treaty bodies or the charter bodies discussed above, each having specific advantages and disadvantages.79

**Complaints mechanisms under the UN treaty bodies**

Any state party to a UN human rights convention is required to submit periodic reports to the corresponding treaty body to describe its progress and challenges in meeting its obligations. Some non-state actors, including NGOs, UN agencies, the press, academic institutions, and other international bodies can also submit reports or other information on a country’s implementation. The treaty body will consider all available information and then publish a report, called ‘concluding observations’, stating its concerns and making recommendations.80 Additional information from non-state actors can be important for raising issues that may not be reflected in states’ own reports, and may serve as an important avenue for action in cases where there isn’t a process for individual complaints (i.e., under the ICE-SCR).81

In addition to reports, there are some cases in which an individual can bring a complaint against a state directly to a treaty body. Such complaints must be brought to the supervisory body for the convention in question, and procedures vary by convention. For instance, under...
the ICCPR, individuals can submit complaints under what is called the ‘optional protocol’ to this convention if their state has both ratified the convention and accepted the optional protocol. In the case of the ICESCR, there is currently no similar provision for individuals to bring complaints against their state.82

**Complaints mechanisms under the UN charter bodies**

UN charter bodies allow more options for individuals to bring complaints against states even when those states may not have ratified particular conventions. For instance, under what is commonly called ‘the 1503 Procedure’, an individual or group can file a complaint with the Human Rights Council regarding a “consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms occurring in any country of the world”, even where the alleged violator is not a state party. Processes and stipulations for filing such a procedure can be found on the OHCHR website.83 In some cases, individuals can also raise rights violations with the holders of “special procedures” mandates (e.g., special rapporteurs). This depends largely on the rules of a given special procedure.84

**Complaints mechanisms under regional instruments**

The European Court of Human Rights (ECHR) is open to any contracting States of the European Convention of Human Rights and also to individual complaints alleging a breach by a contracting State of one the Convention rights. The Inter-American Court of Human Rights with the Inter-American Commission on Human Rights85 make up the Human Rights protection system of the Organization of American States. Complaints can be brought before the Court by the Commission (after revie- wing the admissibility of petitions which can be submitted by individuals) or by a State. Contrary to the ECHR, individual complaints cannot be brought before the Court.

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**Notes**

1. UNDP, 2000, P16.
2. See, for instance, Bromley, 1989, p42.
7. UNDP, 2000, p16.
8. “It is the universality of human rights that distinguishes them from other types of rights— such as citizenship rights or contractual rights” (Hausermann 1998, p28, emphasis in original).
9. This characteristic, while now widely accepted, reflects a relatively recent change explained elsewhere in this paper.
10. For example, according to Sen (2000, p.25), some countries in Asia followed the “Lee thesis”, named for Lee Kuan Yew, former Prime minister of Singapore, which advocates authoritarian political regimes to strengthen economic development. On the contrary, Sen (2000, p.151-164) has demonstrated the necessary interdependence between public freedoms and economic development.
14. UN Guide for Indigenous Peoples, leaflet 2, p1 (emphasis in original)
16. See Hausermann 1999, p27 for background on this categorization, including ‘cross-cutting’ rights
17. The division of human rights into 3 generations dates back to 1977. Its origin is attributed to Karel
As of February 2007, 18 States have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in its entirety, indicating a growing international consensus on the importance of recognizing and protecting the right to food. Countries such as Australia, Brazil, Canada, Costa Rica, Denmark, the Netherlands, Nepal, New Zealand, Norway, Paraguay, Peru, Spain, Sweden, Switzerland, Venezuela and the United States have all ratified the treaty. However, the formulas are not always implemented in practice. As of 2001, only 34 States have made specific commitments to the International Covenant on Civil and Political Rights (ICCPR) in relation to the right to food, and only 26 States have ratified the United Nations Convention on the Rights of the Child (UNCRC). The UNCED agreement on sustainable development, Rio Declaration, identifies the need for action on the right to food, and Method of Operation. However, the implementation of the right to food is not always a priority in the national development plans. It is not currently included, for example, as a priority in the National Development Plans of Argentina and Brazil, both of which are signatories to the Convention. The right to food is also not currently included in the National Development Plans of other countries, such as India, South Africa and South Korea. The right to food is often not included in national policy documents, and when it is, it is often not given sufficient attention. It is not currently included in the National Development Plans of many countries, such as India, South Africa and South Korea. The right to food is often not included in national policy documents, and when it is, it is often not given sufficient attention.
64 Zohra Ksentini, 1994, par 163—243.
65 UNDP, 2000, p.87.
66 Each instrument can be downloaded at http://www.ohchr.org/english/law/index.htm
68 The HRC was established in March 2006 (GA resolution 60/251). It continues the work of the Commission on Human Rights, which concluded its final session in March 2006. See http://www.un.org/Depts/dhl/resguide/spechr.htm
69 As found in the report prepared by Ksentini, 1994.
70 http://www.ohchr.org/english/issues/development/index.htm
71 See, in particular UNOHCHR Fact Sheet 7, Complaints Procedures
72 The subcommission was established by the Commission on Human Rights in 1946. It was called the Subcommission on Prevention of Discrimination and Protection of Minorities until its name changed in July 1999. See http://www.un.org/Depts/dhl/resguide/spechr.htm for more information.
73 http://www.ohchr.org/english/bodies/subcom/index.htm
75 See Annex III the final report prepared by Ksentini, 1994.
76 See, for instance, links available from University of Ottawa human rights database at http://www.cdp-hrc.uottawa.ca/links/sitesint_e.html
77 For a more complete summary, see the UN OHCHR Fact Sheet 7, Complaints Procedures
79 Specific advantages and disadvantages are explained in detail in the UNOHCHR Fact Sheet 7, Complaints Procedures
80 Summary adapted from OHCHR web resources at http://www.ohchr.org/english/bodies/treaty/index.htm
81 Sudre, 2005.
82 Summary adapted from OHCHR web resources at http://www.ohchr.org/english/bodies/treaty/index.htm
83 See, in particular UNOHCHR Fact Sheet 7, Complaints Procedures
84 See http://www.ohchr.org/english/bodies/chr/special/complaints.htm for more information
85 See for the Court http://www.corteidh.or.cr and for the Commission http://www.cidh.oas.org

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Herczegh, G., “Droits individuels et droits collectifs (Mythes et réalités)”, pages 171-187 in Frison-


Ziegler, J. (Special Rapporteur on the right to food), Note by the Secretary-General, 28 August 2003, UN Doc. A/58/330
Abstract. This article analyses the links between human rights and environmental protection, with a view to clarifying the way, and the extent to which, the mechanisms and procedures established by human rights instruments adopted at the universal and regional levels may be used by environmental activists to pursue protection of the natural environment. It provides an overview of the ‘environmental’ jurisprudence of international human rights mechanisms, focusing on those human right provisions that are more frequently invoked to address cases of environmental harm. The article argues that the recognition of a substantive right to a healthy environment is not necessary, and may not even be desirable. The mechanisms and procedures set forth in international human rights instruments already provide a useful tool to environmental activists challenging State environmental policies and practices that prevent or limit the enjoyment of the rights set forth in human rights treaties.
may be used by environmental activists to pursue the goal of the protection of the natural environment.

**Human rights and the environment: a brief history**

Human rights are universal legal guarantees protecting individuals and groups against actions by governments or non-State actors which interfere with fundamental freedoms and human dignity. They are inherent entitlements which come to every person as a consequence of being human, and are protected through a body of international norms commonly referred to as ‘international human rights law’.

The Charter of the United Nations is usually regarded as the starting point of modern international human rights law.\(^2\) It reaffirms the faith of the ‘Peoples of the United Nations’ in fundamental human rights, and includes the promotion of, and respect for, human rights and fundamental freedoms among the purposes of the United Nations.\(^3\) The Charter “does not identify the human rights and fundamental freedoms which would contribute to the economic and social advancement of all peoples, nor does it provide any support for the idea that a clean or healthy environment should or did form a part of those rights and freedoms.”\(^4\)

The first international instrument to elaborate human rights standards was the Universal Declaration of Human Rights.\(^5\) The Declaration sets forth the human rights and fundamental freedoms to which all human beings are entitled, without distinction of any kind. As is the case for the UN Charter, the Universal Declaration neither enshrines a substantive right to a clean and healthy environment nor refers to the protection of the natural environment among the pre-conditions for the enjoyment of the substantive rights recognised in it.

In 1966, two treaties open to all States— the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^6\) and the International Covenant on Civil and Political Rights (ICCPR)\(^7\)— expanded upon the rights and freedoms proclaimed in the Universal Declaration, providing protection for a wide range of human rights and fundamental freedoms. The right to a decent environment is not included in the list of guarantees they set out.\(^8\)

The two Covenants have since been supplemented by several treaties adopted at the global and regional level. At the global level, a number of treaties expanded the content of the rights and freedoms set out in the Covenants, and adapted it to the particular situation and needs of the target group that these treaties aim to protect.\(^9\) At the regional level, four ‘core’ human rights treaties have been adopted: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),\(^10\) the European Social Charter (ESC),\(^11\) the American Convention on Human Rights (ACHR),\(^12\) and the African Charter on Human and Peoples’ Rights (ACHPR).\(^13\)

At the time most of these treaties were adopted, i.e. in the period between the end of the Second World War and the 1970s, the protection of natural environment was not included in the human rights agenda. The international community had more immediate hu-
What ARE Human Rights, anyway?

human rights concerns to deal with at that time, and this explains why ‘environmental rights’ were not considered. Among international human rights instruments, only the most recent ones contain explicit references to ‘environmental rights’ or to the protection of the environment as a pre-condition for the enjoyment of human rights.

The Convention on the Rights of the Child (CRC) is the first universal treaty which expressly recognises that the enjoyment of human rights depends, *inter alia*, on a decent environment. The ACHPR and the Additional Protocol to the ACHR go even further, and expressly include the right to a healthy environment in the catalogue of rights that States parties undertake to implement.

The remaining part of this article looks in greater detail at the way in which existing human rights complaint procedures may be used by environmental activists to seek redress against human rights violations originated by poor environmental policies or practices of States. It considers the main arguments for and against adopting a substantive right to a healthy environment *vis-à-vis* a rights-based approach to environmental protection, and looks at the way in which global and regional human rights compliant procedures have been used in order to preserve and protect the natural environment.

A substantive right to a healthy environment

The African Charter and the San Salvador Protocol are the only human rights instruments that enshrine a right to a healthy environment.

Article 24 of the ACHPR states that: *All peoples shall have the right to a general satisfactory environment favourable to their development.* Article 11 of the San Salvador Protocol contains a more complete formulation, which reads as follows:

1. *Everyone shall have the right to live in a healthy environment and to have access to basic public services.*

2. *The States Parties shall promote the protection, preservation, and improvement of the environment.*

Both formulations have been criticised for being extremely vague and generic. More generally, the existence of, and the need for, a substantive right to a healthy environment have been seriously questioned at the international level. As Boyle put it, there are very powerful arguments that the recognition of such a right is neither necessary nor desirable.

First of all, it is problematic to identify the holders of this right. The San Salvador Protocol refers to ‘everyone’. The ACHPR states that this right is to be enjoyed ‘by all peoples’, as opposed to ‘every individual’ who is the beneficiary of the traditional human rights recognised in the Charter. This reference seems to include the right to a healthy environment in the category of collective rights, which are difficult to uphold within the traditional human rights framework. Furthermore, it is unclear whether the expression ‘all peoples’ refers to the whole population of the State concerned, to a particular group within the State or even— as Anderson suggested—to unborn persons and future generations.

Secondly, existing legal instruments...
recognising this right contain no definition or other indication of what is meant by ‘healthy environment’. The African Charter refers to a ‘general satisfactory environment’. The San Salvador Protocol prefers the term ‘healthy environment’. Principle 1 of the Stockholm Declaration used yet another expression, referring to ‘an environment of a quality that permits a life of dignity and well-being’. As Boyle noted, “[w]hat constitutes a satisfactory, decent, viable, or healthy environment is bound to suffer from uncertainty and ambiguity. Arguably it may even be incapable of substantive definition, or prove potentially meaningless and ineffective (...) and undermine the very notion of human rights. At best, it may suffer from cultural relativism, particularly from a North-South perspective, and lack the universal value normally thought to be inherent in human rights.”

The practical implementation of this right would also pose a number of problems. Article 24 of the ACHPR remains silent as to the measures that States parties are required to adopt in order to implement this provision, and does not explain what States parties are supposed to do in the event of a conflict between environmental measures and economic development. Article 11(2) of the San Salvador Protocol requires States parties to “promote the protection, preservation, and improvement of the environment”, but does not indicate what kind of measures States parties should take. The vague and laconic way in which these provisions have been drafted is also likely to undermine the effectiveness of mechanisms put in place under the respective treaties to ensure States parties’ compliance with the obligations they have undertaken.

Another objection to the recognition of a right to a healthy environment concerns its anthropocentricity. Such a right —like any other human right— is inherently focused upon the human being, and is thus opposed by some environmentalists on the account of its failure to recognise adequately the inherent value of other species and of the environment in general. The limited focus of this right “may indeed reinforce the assumption that the environment and its natural resources exist only for the human benefit, and have no intrinsic
Consequently, biodiversity in Antarctica and other ecosystems would indeed be protected only insofar as their preservation is necessary, or desirable, for the protection of human lives and health, or for the realisation of human interests (e.g. the protection of natural landscape or the promotion of tourism).

Finally, it has been objected that while a substantive right to a healthy environment would have undoubted rhetorical force, it would in reality add little to what already exists in international environmental law, and would therefore be largely redundant.25

The lack of a reference to a human right to a clean environment in the Rio Declaration, which abandoned the human rights vocabulary used in Principle 1 of the Stockholm Declaration, seems to be indicative of continuing uncertainty concerning the need or desirability of such a right.26

A rights-based approach to environmental protection recognises that the preservation of the environment represents a pre-condition for the effective enjoyment of a number of human rights. This approach is based on existing international human rights standards and principles and seeks to ensure the promotion of human rights through a sound management of environmental resources.

Using existing human rights law as a tool to protect the natural environment presents several advantages vis-à-vis the creation of a new substantive right to a healthy environment. As Boyle observed, such an approach “avoids the need to define such notions as satisfactory or decent environment, falls well within the competences of existing human rights bodies, and involves little or no potential for conflict with environmental institutions.”27

Nonetheless, the real added value of this approach consists in allowing victims of environmental harm the right to bring complaints against the State through the mechanisms and procedures established under the existing human rights treaties. Such mechanisms and procedures represent an important tool for environmental activists, given the general absence of procedures to bring complaints in existing environmental treaties and the very conservative approach adopted by many international and domestic tribunals with regard to environmental litigation. Indeed, as Shelton has correctly noted, “[i]n nearly all cases, human rights tribunals provide the only international procedures currently available to challenge government action or inaction respecting environmental protection.”28

The real added value of a rights-based approach consists in allowing victims of environmental harm the right to bring complaints against the State.
Not all forms of environmental degradation can be addressed by using existing human rights mechanisms. The limits of a rights-based approach lie in the very nature of human rights law, which aims to promote and protect the fundamental rights of individual human beings. Thus, recourse to human rights procedures would prove useless with regard to those environmental threats—like climate change or loss of biodiversity—that cannot be regarded per se as human rights violations or directly evaluated in relation to their impact on the life and well-being of particular persons. On the other hand, human rights law provides a powerful means to protect the natural environment against pollution and other forms of degradation that have the effect to prevent or limit the enjoyment of the rights set forth in human rights treaties.

The following analysis provides an overview of the ‘environmental’ jurisprudence of international human rights mechanisms, focusing on those human right provisions that are more frequently invoked to address cases of environmental harm.

- **Right to life**

  All human rights treaties recognise that every person has an inherent right to life. This right places upon States two obligations: a negative obligation not to ‘arbitrarily’ deprive individuals of their right to life and a positive obligation to take active measures to ensure everyone’s right to life. In the environmental sphere, the right to life “might be invoked by individuals to obtain compensation where death resulted from some environmental disaster, like Bhopal or Chernobyl, in so far as the State is responsible.”

  However, the potential of this provision has never been tested in practice. International bodies have adopted a very cautious approach towards cases of alleged violation of the right to life caused by hazardous activities undertaken by the State or by its failure to provide a proper regulatory framework and monitoring mechanisms to ensure the respect of the right to life by private actors.

  The Human Rights Committee received a number of complaints under the Optional Protocol concerning alleged violations of the right to life relating to radioactive waste and nuclear tests. In *E.H.P. v. Canada*, the Human Rights Committee acknowledged that the storage of radioactive waste close to the applicants’ homes raised serious issues with regard to the obligation of States parties to protect the right to life of present and future generations, but declared the communication inadmissible for non-exhaustion of domestic remedies. In *E.W. v. Netherlands*, a communication concerning an alleged violation of the right to life based on the deployment of cruise missiles fitted with nuclear warheads on Netherlands territory was found to be inadmissible because the authors failed to prove that they were ‘victims’ within the meaning of Article 1 of the Optional Protocol. In *Bordes and Temeharo v. France*, concerning France’s nuclear tests in the South Pacific, the Committee conceded 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”.

Conservation and Human Rights
but found the case inadmissible on the ground that the claimants had not substantiated their claim that the conduct of nuclear tests by France had violated or threatened their right to life.

The European Court on Human Rights has taken a similarly cautious approach in its interpretation of alleged violations of the right to life resulting from environmental harm caused by State action (or failure to act). In *Guerra and Others v. Italy*, the applicants complained of pollution resulting from operation of a nearby chemical factory. The applicants claimed that the Italian authorities’ failure to take appropriate action to reduce the risk of serious environmental pollution and to avoid the risk of major accidents amounted to an infringement, *inter alia*, of their right to life and physical integrity. The European Court did not rule on this alleged violation. Having ascertained a violation of the right to respect for private and family life, the Court found it unnecessary to consider whether the right to life had been violated in the present case, despite the fact that deaths from cancer had occurred in the factory. This decision has been criticised by several commentators, including some of the judges of the Court.

### Right to respect for private and family life

Several human rights treaties recognise the right to respect for private and family life, home, and correspondence. This right aims to protect individuals against arbitrary or unlawful interferences with a wide range of interests related to the personal sphere. In the field of environmental litigation, this right could be invoked by individuals to complain against pollution or other forms of environmental degradation which might be attributed to the State, in particular for its failure to prevent private actors from polluting or degrading the natural environment.

Notwithstanding its great potential, this right does not appear to have been invoked under the Optional Protocol to the ICCPR or the Inter-American system. However, several cases brought under the European Convention provide examples of the way in which this right has been used in environmental cases.

Most of the cases of alleged violation of the right to private and family life involve noise pollution. In *Powell and Rayner v. United Kingdom*, the Strasbourg Court found that the excessive noise caused by the increasing volume of aircraft at Heathrow Airport was justified under Article 8(2) because it is ‘necessary in a democratic society’ for the economic well-being of the country. In reaching this conclusion, the Court noted that the Government had struck a fair balance between the competing interests of the individual and of the community as a whole, without exceeding the margin of appreciation afforded to it in determining the steps to be taken to ensure compliance with the Convention.

In *Hatton and others v. United Kingdom*, a chamber of the European Court found that the government policy on night flights at Heathrow airport gave rise to a violation of the applicants’ rights under Articles 8 of the Convention. This decision was overturned by the Grand Chamber of the European Court, which reaffirmed that it is primarily the State’s responsibility to strike a fair balance between the economic interest of the country and the conflicting interests of the persons affected by noise disturbances. Environmental protection should be taken into consideration by States in acting within their margin of appreciation and
Conservation and Human Rights

by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.\textsuperscript{42}

The Court found that the authorities had not overstepped their ‘wide’ margin of appreciation by failing to strike a fair balance, and concluded that there had been no violation of Article 8.

The most important decision of the Court concerning environmental protection is \textit{López Ostra v. Spain}.\textsuperscript{43} Here, for the first time, the Strasbourg Court found a breach of the Convention as a consequence of environmental harm. The applicant and her daughter suffered serious health problems from fumes from a tannery waste treatment plant which was situated only a few metres away from her home. The European Court noted that “[s]evere 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.”\textsuperscript{44}

The Court applied its ‘fair balance’ test and reaffirmed that States enjoy a ‘certain’ margin of appreciation in striking such a balance. However, it found that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being and the applicant’s effective enjoyment of her right to respect for her home and her private and family life, and concluded that the facts of the case revealed a breach of Article 8.

The position of the Court in the \textit{López Ostra} case has been confirmed in subsequent Article 8 cases. In \textit{Guerra and Others v. Italy},\textsuperscript{45} the Court found the failure of the Italian Government to provide essential information to the applicants concerning environmental hazards associated with the functioning of a nearby chemical factory to be in breach of Article 8. The Court reached the same conclusion in the recent \textit{Giacomelli v. Italy},\textsuperscript{46} concerning the lack of prior environmental impact assessment and failure to suspend operation of a plant located close to dwellings and generating toxic emissions.

\textbf{Right to property}

The ICCPR does not contain a right to property. Such a right is included in Article 17 of the Universal Declaration of Human Rights and in the European and Inter-American human rights systems.\textsuperscript{47}

These provisions aim to protect the right to peaceful enjoyment of one’s possessions, i.e. the right to have, use, dispose of, pledge, lend and even destroy one’s property. Enjoyment is protected primarily against interference by the State. However, such a right also imposes positive obligations on the State, most notably a duty to prevent private actors from interfering with the enjoyment of peaceful enjoyment of one’s property.

In the environmental sphere, this right has been relied upon only within the European human rights framework, and often in conjunction with the protection afforded by Article 8 of the Convention. In general terms, Article 1 of Protocol No. 1 (hereinafter, P-1), which protects the right to peaceful enjoyment of one’s possessions, may be invoked only in cases where pollution or other forms of environmental degradation result in a substantial fall in the value of the property, provided that the State may be held responsible and that the economic loss has not been adequately compensated by the State. This is an
area where States enjoy a wide margin of appreciation, and subsequently there will be no violation when the State can prove that a fair balance was struck between the competing interests of the individual and the community as a whole.

There are several cases in which the Court affirmed that excessive noise and other forms of environmental pollution may adversely affect the right to peaceful enjoyment of one’s possessions in breach of Article 1, P-1. In *Rayner v. United Kingdom*, the European Commission on Human Rights noted that Article 1, P-1 “does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment” but recognised that aircraft noise of considerable level and frequency may seriously affect the value of real property or even render it unsaleable. However, it considered the application manifestly ill-founded because the applicant had failed to submit evidence showing that the value of his property was substantially diminished on the grounds of aircraft noise. The European Commission reached similar conclusions in *S v. France*, concerning the building of a nuclear power station within 300 metres from the applicant’s house.

In other cases concerning the right to property, the European Court ruled that State interferences with the enjoyment of property in order to protect the environment were to be justified under Article 1(2), insofar as they were considered to be “in accordance with the general interest”. In *Fredin v. Sweden*, the Court—recognising “that in today’s society the protection of the environment is an increasingly important consideration”—upheld the Government’s interference with property rights in order to protect the environment. The Court confirmed this position in the case of *Pine Valley Developments Ltd and Others v. Ireland*. It noted that interference with property rights conformed with planning legislation designed to protect the environment, and concluded that it was clearly a legitimate aim “in accordance with the general interest” or the purposes of the second paragraph of Article 1.

- **Right to information**
  The right to freedom of expression—intended as the freedom to seek, receive and impart information and ideas of all kinds, without interference by public authorities—is included in all major human rights instruments. This right protects individuals against arbitrary or unlawful interferences aimed at excluding or limiting the right to receive or circulate information. However, it is unclear whether such a right can be construed as imposing a positive obligation upon public authorities to disclose information in their hands, and, conversely, as a right of individuals to receive information held by public authorities.
The right to access to information regarding the environment has come to the attention of existing international authorities only in one occasion, namely in the Guerra case. The applicants alleged that the relevant authorities’ failure to inform the public about the environmental hazards associated with the functioning of a nearby chemical factory, and about the procedures to be followed in the event of a major accident, infringed their right to freedom of information. The Court did not subscribe to this view. It affirmed that “freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him” but “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.” The Court thus concluded that Article 10 was not applicable in the instant case.

• Minority rights
Among the core human rights treaties, only the ICCPR contains a specific provision on minority rights. Article 27 provides that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

This provision aims to protect the cultural life of minorities, rather than their physical survival. However, the Committee has interpreted the concept of culture in a broad manner, observing that culture “manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. (...) The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.”

Under the Optional Protocol, indigenous individuals and communities have brought several complaints relating to the ownership of the land and the use of the natural resources within the territories they traditionally inhabited prior to the arrival of the present dominant population. As the ICCPR does not include a clause on the right to property, and as cases related to the right of all peoples to self-determination or the right to participation have not proven successful, “the main perspective applied by the Human Rights Committee in considering these cases has been on Article 27— the right of members of minorities to enjoy their own culture in community with the other members of their group.”

A number of these cases provide interesting examples of the way in which Article 27 can be invoked to protect indigenous land and culture from environmental degradation. In Ominayak and the Lubikon Lake Band v. Canada, concerning an alleged deprivation of the Band’s means of subsistence through the State’s selling oil and gas concessions on their lands, the Committee expressly recognised for the
first time that the rights protected by Article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. The Committee concluded that “historical inequities (...) and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.”

In the first Länsman case, related to private companies quarrying building stone in traditional lands of the Sami, the Committee found that there had been no violation of Article 27. In reaching this conclusion, the Committee noted that the amount of quarrying that had taken place did not appear to have adversely affected reindeer herding in the area, and that the local Sami had been consulted during the proceedings. With regard to future activities, the Committee stated that if mining activities “were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors’ rights under article 27.”

In the second and third Länsman cases, the Committee adopted the same combined test of consultation and sustainability to exclude that logging already conducted or planned within the Samiland amounted to a violation of Article 27. It is worth noting that, in applying the sustainability test, the Committee pointed out that “though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.”

The absence of a specific provision on indigenous rights has not prevented the Inter-American Commission on Human Rights from entertaining cases concerning alleged violations of the right of indigenous peoples over their land and its natural resources. In the Yanomami case, the Commission found that the construction of a highway through Yanomami territory and the authorization to exploit the territory’s resources amounted to a violation of the Yanomami rights to life, liberty, and personal security, as well as their rights to residence and movement, and to the preservation of health and well-being. The readiness of the Commission to consider environment-related cases is confirmed by two recent cases brought to its attention. In the San Mateo de Huanchor case, the Commission accepted the request for precautionary measures to protect the life and health of an indigenous community affected by mining toxic waste in Peru. In the Ralco case, it approved a friendly settlement between indigenous communities affected by the construction of the Ralco dam in southern Chile and the Government.

**Conclusions**

This analysis of jurisprudence highlighted several examples of the willingness showed by international organs and tribunals to strengthen environmental protection by making a creative use of existing human rights provisions, in particular those relating to the right to private and family life and the right to property. It also showed the limits...
of the protection afforded by human rights complaint procedures, which can only be used in those cases where environmental harm has the effect to prevent or limit the enjoyment of the rights set forth in human rights treaties. In those cases where environmental degradation and pollution can be measured in relation to their impact on the human rights of individuals, human rights mechanisms provide a formidable instrument in the hands of environmental activists to challenge the poor environmental policies and practices of the State.

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Notes
2 The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organisation, and came into force on 24 October 1945. For the text of the UN Charter, see http://www.un.org/aboutun/charter/
3 Articles 1(3), 55 and 56 of the UN Charter.
4 Sands, 1995, p. 221.
5 Universal Declaration on Human Rights was adopted by the United Nations General Assembly on 10 December 1948. For the text of the Universal Declaration, see http://www.unhchr.ch肄udhr/index.htm
6 The ICESCR was formally adopted and opened for signature and ratification in 1966, and entered into force in 1976. For the text of the Covenant, see http://www.ohchr.org/english/law/cescr.htm
7 As the ICESCR, the ICCPR was adopted in 1966 and entered into force ten years later. For the text of the Covenant, see http://www.ohchr.org/english/law/ccpr.htm
8 The only explicit reference to the protection of the environment can be found in Article 12(2)(b) of the ICESCR, which requires States Parties to the Covenant to take steps to achieve the full realisation of the right to the highest attainable standard of physical and mental health, inter alia by improving "all aspects of environmental and industrial hygiene".
9 For the text of other core United Nations human rights treaties, see http://www.ohchr.org/english/law/index.htm
11 The ESC was adopted in 1961 and entered into force in 1965. The ESC was revised in 1996, to take account of the evolution which has occurred in Europe since the Charter was adopted. For the text of the ESC, see http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG
12 The ACHR was adopted in 1969 and entered into force in 1978. For the text of the Convention, see http://www.oas.org/juridico/english/Treaties/b-32.htm
13 The ACHPR was adopted in 1981 and entered into force in 1986. For the text of the Convention, see http://www1.umn.edu/humanrts/instree/z1achar.htm
14 Article 24(2) on the right of the child to the enjoyment of the highest attainable standard of health requires States parties to consider “the dangers and risks of environmental pollution” and ensure that all segments of society have access to information and education with regard to, inter alia, hygiene and environmental sanitation. Article 29(e) includes “the development of respect for the natural environment” among the goals of educational programmes.
16 For a detailed analysis of these provisions, see Churchill, 1996.
17 Boyle, 1996.
20 Boyle, 1996, p. 50.
23 On the issue of anthropocentricity, see Redgwell, 1996.
26 Principle 1 of the Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro in June 1992, reads as follows: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.
29 For a more in-depth analysis of the jurisprudence of international courts and quasi-judicial bodies on the issue of environmental protection, see *inter alia* Shelton, 2003, pp. 1-30; Shelton, 2002; and Churchill, 1996.
30 Article 6 ICCPR; Article 2 ECHR; Article 4 ACHR; Article 4 ACHPR.
32 The Optional Protocol to the International Covenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976. For the text of the Covenant, see http://www.ohchr.org/english/law/ccpr-one.htm
36 *Guerra and Others v Italy*, Judgment of 19 February 1998, Reports 1998-I.
37 In his concurring opinions, Judge Jambrek noted that "[i]t may therefore be time for the Court's case-law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life. Article 2 also appears relevant and applicable to the facts of the instant case in that 150 people were taken to hospital with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the activity carried on at the factory thus constituted a "major-accident hazard dangerous to the environment"."
38 Article 17 ICCPR; Article 8 ECHR; Article 11(2) ACHR.
40 *Hatton and others v. United Kingdom*, Judgement (Third Section) of 2 October 2001.
41 *Hatton and others v. United Kingdom*, Judgement (Grand Chamber) of 8 July 2003, Report of Judgements and Decisions 2003-VIII.
45 *Guerra and Others v Italy*, Judgment of 19 February 1998, cit.
47 Article 1 of Protocol No. 1 to the ECHR; Article 21 ACHR.
52 Article 19(2) ICCPR; Article 10 ECHR; Article 13 IACHR; Article 9 ACHPR.
53 As far as environmental law is concerned, the importance of public participation in environmental decision-making has been first affirmed in Principle 10 of the Rio Declaration. The drafters were very careful to avoid references to the 'rights language', an attitude which reflects a reluctance on the part of States to allow an unlimited right of access to information. However, express references to this right have been since then included in several international instruments, including the EC Environmental Information Directive (Council Directive 90/313/EEC) and, most notably, the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
54 See supra, footnote 36.
56 Among the legal instruments concerned with minority groups and indigenous populations, see the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and the European Framework Convention for the Protection of National Minorities.
58 Scheinin, 2000, at pp. 163-164.
59 For an in-depth analysis of the jurisprudence of international courts and quasi-judicial bodies on cases concerning the use of land and natural resources by indigenous people, see Shelton, 2003, pp. 18-22; see also Scheinin, 2000, pp. 159-222.
65 Jouni Länsman et al. v. Finland, cit., para. 10.7.

References

Derechos humanos y medio ambiente

Mario Peña Chacon y Ingread Fournier Cruz

Abstract. Despite being recognized as a fundamental human right, the right to environment is not explicitly regulated in any of the various international human rights instruments. Neither the international human rights system, nor regional systems such as the Inter-American or European system regulate the right to a healthy environment in a clear, explicit or exhaustive way. Although theoretical exceptions exist, such as in the African Charter on Human Rights, which does codify third-generation human rights, these have not been implemented so far. Therefore, for all practical aspects, the right to environment lacks adequate protection under regional mechanisms. An indirect protection of this right can be observed in the European system, which through the Commission and the European Court of Human Rights has “environmentalised” other human rights mentioned explicitly in the Treaty of Rome. However, this indirect recognition is far from constitut-
La evolución de los derechos humanos y la incorporación del derecho ambiental como derecho humano de tercera generación

Por lo general, la mayoría de las definiciones sobre Derechos Humanos están cargadas del fundamento filosófico de sus respectivos autores, ya sea positivista o más bien, con tendencia hacia el derecho natural. En el primer caso, el profesor Arturo Pérez Luño dice: “Los Derechos Humanos aparecen como un conjunto de facultades e instituciones que, en cada momento histórico, concretan las exigencias de la dignidad, la libertad y la igualdad humanas, las cuales deben ser reconocidas positivamente por los ordenamientos jurídicos a nivel nacional e internacional.” En el segundo, el profesor Eusebio Fernández, señala: “Toda persona posee unos derechos morales por el hecho de serlo y que estos deben ser reconocidos y garantizados por la sociedad, el derecho y el poder político, sin ningún tipo de discriminación. Estos derechos son fundamentales, es decir se hallan estrechamente conectados con la idea
Siguiendo una definición de tipo positivista, los Derechos Humanos son el conjunto de normas y principios reconocidos tanto por el Derecho Internacional como por los distintos ordenamientos jurídicos internos, de observancia universal e inherentes al ser humano, tanto en su faceta de individuo como de sujeto integrante de la colectividad, y que definen las condiciones mínimas y necesarias para que el individuo pueda desarrollarse plenamente en el ámbito económico, social, cultural, político y jurídico, en armonía con el resto de la sociedad. En este sentido es importante considerar la posición de los Derechos Humanos como indicadores de democracia en una sociedad, donde su existencia implica el reconocimiento a la dignidad del hombre, por ser anteriores, superiores y prevalentes a la conformación de los Estado. Se parte de la premisa de que los derechos y libertades fundamentales de los individuos son universales, interdependientes, indivisibles y de igual jerarquía, pero desde una perspectiva meramente didáctica, a los Derechos Humanos se les puede clasificar en tres generaciones:

La primera generación de Derechos Humanos es positivizada por el Bill of Rights norteamericano de 1776 y por la Declaración de Derechos del Hombre y el Ciudadano suscrita en Francia en el año 1789. Se trata de los denominados derechos civiles y políticos, dirigidos a proteger la libertad, seguridad, la integridad física y moral de los individuos. Se caracterizan por ser derechos excluyentes del individuo, sin atención a la sociedad, ni a ningún otro interés, porque deben responder a los derechos individuales, civiles o clásicos de libertad.

La segunda generación de Derechos Humanos incorpora los derechos económicos, sociales y culturales, estos hacen referencia a la necesidad que tiene el hombre de desarrollarse como ser social en igualdad de condiciones. Nacen a raíz del capitalismo salvaje y de lo que se ha conocido como “la explotación del hombre por el hombre”. Su primera incorporación la encontramos en la Constitución Mexicana de Querétaro suscrita en el año 1917, siendo desarrollada también tanto por la Constitución de las Repúblicas Socialista Federativa de Rusia del año 1918 y por la Constitución de la República de Weimar de 1919. El derecho a la educación, a la salud, al trabajo, seguridad social, asociación, huelga y derecho a la familia, forman parte de esta segunda generación de Derechos Humanos. Un sector de la doctrina denomina a esta generación como “derechos de crédito” o sea, aquellos que son invocables por el ciudadano ante el Estado al asumir éste último no ya el papel de garante de la seguridad, (estado gendarme) sino la realización de los objetivos sociales.

Los Derechos Humanos, tanto de primera como de segunda generación, fueron incorporados rápidamente en una gran cantidad de constituciones a nivel global, pero no pasaban de ser parte del derecho interno de los distintos Estados. Esto viene a cambiar a partir de 1948, cuando a raíz de las atrocidades cometidas en las dos anteriores guerras mundiales, y el fracaso de la Liga de las Naciones, el 10 de diciembre de 1948 una gran cantidad de países reunidos en el seno de la emergente Organización de las Naciones Unidas tomaron el acuerdo de suscribir la Declaración Universal de Derechos Humanos.

Esta Declaración marca el inicio de una era en pro de la codificación, recono-
cimiento, defensa y promoción de los Derechos Humanos.

Así, la corriente de cambio iniciada con la promulgación de la Declaración Universal de los Derechos Humanos sienta las bases para que en el año de 1966 se suscribiera el Pacto Internacional de Derechos Civiles y Políticos, así como el Pacto Internacional de Derechos Económicos, Sociales y Culturales. Con la promulgación de la Declaración Universal de los Derechos Humanos y el complemento necesario de estos Protocolos, los Derechos Humanos se incorporan efectivamente en el Derecho Internacional, naciendo a la vida jurídica el Derecho Internacional de los Derechos Humanos.

A diferencia de los Derechos Humanos de primera y segunda generación, al día de hoy, los Derechos Humanos de tercera generación no han sido tratados con la misma complejidad, ni en los tratados internacionales ni en las respectivas legislaciones nacionales. Se trata de derechos colectivos, pues los beneficios que derivan de ellos cubren a la colectividad y no sólo al individuo en particular. La doctrina les ha llamado derechos de la solidaridad por estar concebidos para los pueblos, grupos sociales e individuos en colectivo. Otros han preferido llamarles “derechos de la humanidad” por tener por objeto bienes jurídicos que pertenecen al género humano, a la humanidad como tal, entendiendo por ésta, no sólo a las generaciones presentes sino que también a las generaciones futuras. Igualmente, se les suele llamar también “intereses difusos”, debido a su característica de no ser necesaria la demostración de violación de un derecho subjetivo para poder reclamarlo. Son derechos que, de manera clara, se identifican con una suerte de *actio popularis* que legitima a cualquier persona, incluso algunas instituciones del Estado, a incoar un proceso de reclamación para la restitución del derecho violado. Al tratarse de derechos colectivos, no pueden ser monopolizados o apropiados por sujetos individuales, pues pertenecen al género humano como un todo. El punto es que se trata de derechos modernos, no bien delimitados, cuyos titulares no son estrictamente personas individuales, sino más bien los pueblos, incluso la humanidad como un todo. De acuerdo a la teoría de los Derechos Humanos, los derechos de tercera generación, están dentro de la categoría de derechos de síntesis, pues para que se hagan efectivos es necesario que en ellos se sinteticen los de primera y segunda generación, en una interconexión necesaria, pues a manera de ejemplo, únicamente se puede tener acceso al medio ambiente sano, cuando el hombre sea libre, se respete su vida, el Estado garantice su educación, su salud, etc.

Algunos han caracterizado a la tercera generación de Derechos Humanos con el calificativo de “soft rights” o derechos blandos, por carecer de atribuciones tanto de juridicidad como de

Foto 1. “Dentro de los Derechos Humanos de tercera generación se encuentran el derecho a la protección del ambiente…”
(Cortesía Grazia Borrini-Feyerabend)
coercitividad. Lo anterior encuentra su justificación por la escasa positivización de los mismos en las Constituciones Políticas de los distintos Estados. La tarea de incorporarlos dentro de las distintas constituciones ha sido lenta, siendo el derecho al ambiente y el derecho al desarrollo los únicos que han tenido eco en una gran cantidad de cartas fundamentales.

Dentro de los Derechos Humanos de tercera generación se encuentran el derecho a la protección del ambiente, el derecho al desarrollo, el derecho a la paz, libre determinación de los pueblos, patrimonio común de la humanidad, derecho a la comunicación, y por último el megaderecho humano al desarrollo sostenible conformado tanto por el derecho al ambiente como por el derecho al desarrollo. Específicamente, el derecho a la protección del ambiente contiene una serie de principios que inundan la totalidad del sistema jurídico y tienen por objeto la tutela de la vida, la salud y el equilibrio ecológico.

El derecho a la protección del ambiente tiene su aparición a nivel internacional en el año 1972 a raíz de la promulgación de la Declaración de Estocolmo sobre Medio Ambiente Humano. Se ve desarrollado por la Carta de la Tierra del año 1982, la Declaración de Río sobre Medio Ambiente y Desarrollo del año 1992 y por la reciente Declaración de Johannesburgo del año 2002. De la fusión del derecho al ambiente y del derecho al desarrollo nace el megaderecho humano denominado derecho al desarrollo sostenible, entendiendo por éste aquel tipo de desarrollo que satisface las necesidades de las generaciones presentes sin comprometer la capacidad de las generaciones futuras de satisfacer sus propias necesidades.

El derecho al ambiente como derecho humano de primera o de tercera generación.

El derecho a un ambiente adecuado y a su protección

Además de la clasificación de los Derechos Humanos por generaciones, el autor Demetrio Loperena Rota ofrece otra clasificación dividida en dos categorías: por una parte, los derechos que el Estado debe respetar y proteger, y por otra, los que el Estado debe promover o proveer. Como bien lo afirma el autor, sólo los primeros son imprescindibles para que una sociedad pueda ser calificada como tal, mientras que los segundos son opciones “civilizatorias”, actualizables con el desarrollo social y progreso económico en su contenido.

Siguiendo esta clasificación, los derechos civiles y políticos o derechos de primera generación formarían parte de los Derechos Humanos que el Estado debe respetar y proteger; por tratarse de derechos intrínsecos a la naturaleza humana. Respecto a estos derechos, la función del Estado es reconocerlos, respetarlos y protegerlos. Se trata de
Los derechos que son anteriores a la conformación del mismo Estado y que por tanto, éste debe reconocerlos como derechos fundamentales y encomendar a los Poderes Públicos su tutela. Contrario a lo anterior, los derechos de segunda y tercera generación entrarían dentro de la categoría de los derechos que el Estado debe promover o proveer. Se trata de Derechos Humanos que necesitan o dependen de los sistemas sociales o políticos. De esta forma, el derecho a la educación o a la asistencia sanitaria universal, son consecuencia de un desarrollo “civilizatorio”, y por tanto, requieren necesariamente de la intervención del sistema social y político del Estado.

Ahora bien surge la duda respecto al lugar que debería ocupar el derecho al ambiente dentro de estas categorías. El medio ambiente precede al hombre, al Derecho y al mismo Estado. Por ello el derecho a un medio ambiente sano y ecológicamente equilibrado como derecho fundamental no depende de los sistemas sociales y políticos, al no ser forjado por el actuar humano sino por la misma naturaleza. Lo mismo sucede con el derecho a la vida, el cual también precede al Estado. En este sentido el rol del Estado respecto al derecho al ambiente lo es de dar reconocimiento, respeto y protección. Por ello y siguiendo la acertada tesis esbozada por el profesor Loperena Rota, el derecho a un medio ambiente adecuado encuadra dentro de la categoría de los derechos que el Estado debe reconocer, respetar y proteger, en donde el rol estatal se ve supeditado a tutelar que estos no sean violentados, sin que su actuación positiva sea imprescindible.

Es importante en este punto resaltar la diferencia que existe entre el derecho a un ambiente adecuado y el derecho a la acción pública para la protección del ambiente. Mientras el primero es cronológicamente anterior y por ende, no se ejerce frente al Estado, el segundo es posterior y si se ejerce frente a éste. El derecho a la protección del medio ambiente está debidamente relacionado con los derechos de solidaridad, ya que por el principio de equidad intergeneracional, las futuras generaciones dependen del uso actual que se le da a los recursos naturales. De ahí que la intervención Estatal sea necesaria para asegurar que las generaciones venideras lleguen a gozar de un ambiente sano, en donde se puedan desarrollar en armonía con el equilibrio ecológico.

El derecho a la protección del medio ambiente por medio de la acción pública del Estado, así como de la participación solidaria de los demás individuos, encuadra dentro de la segunda categoría expuesta, sea aquellos derechos que el Estado debe promover o proveer. A esta categoría pertenecen los Derechos Humanos de tercera generación o de solidaridad, los cuales, como se expuso, necesitan de la plena acción del medio ambiente sano y ecológicamente equilibrado como derecho fundamental, que el Estado debe reconocer, respetar y proteger, en donde el rol estatal se ve supeditado a tutelar que estos no sean violentados, sin que su actuación positiva sea imprescindible.

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aparato estatal para su debida implementación y protección.

**El derecho al ambiente en el sistema universal de los derechos humanos**

Con la adopción de la Declaración Universal de Derechos Humanos de 1948, se reconoció por parte de una organización de naciones, que son los Estados los primeros obligados en respetar, proteger y promover los Derechos Humanos y por ende, es también un derecho de los individuos, por sí y como colectividad, el exigir este respeto.

**El Sistema Universal de los Derechos Humanos**

El sistema Universal de los Derechos Humanos nace con la Organización de las Naciones Unidas y la suscripción de los países miembros de Declaración Universal de Derechos Humanos, adoptada por la Asamblea General de las Naciones Unidas el día 10 de diciembre de 1948. La Declaración fue seguida de dos instrumentos internacionales sobre Derechos Humanos adoptados en 1966: la Convención Internacional de Derechos Civiles y Políticos y la Convención Internacional de Derechos Económicos, Sociales y Culturales. Tanto la Declaración Universal de Derechos Humanos como estas dos Convenciones, fueron redactadas y puestas en funcionamiento con anterioridad al inicio de la preocupación mundial por el medio ambiente, lo cual ocurre a partir de 1972, luego de la Conferencia de Naciones Unidas sobre el Medio Ambiente Humano de Estocolmo.

En la Declaración Universal de Derechos Humanos de 1948, se encuentra la primera base en donde se puede asentar el Derecho a un Medio Ambiente Sano cuando se establece que “toda persona tiene derecho a un nivel de vida adecuado que le asegure, así como a su familia, la salud y el bienestar.” Es importante aclarar que un medio ambiente sano y ecológicamente equilibrado es un requisito indispensables para el efectivo desarrollo de la salud y el bienestar del ser humano, de hecho, del derecho a la vida se extrae el derecho a la salud, y de estos dos se extrae el derecho a un ambiente sano y adecuado, pues sin éste último es imposible el desarrollo adecuado de los dos primeros. Por su parte, el Pacto Internacional de Derechos Económicos, Sociales y Culturales de 1966 menciona la necesidad de mejorar el medio ambiente como uno de los requisitos para el adecuado desarrollo de la persona.

Si bien no existe referencia expresa en los instrumentos de Derechos Humanos de las Naciones Unidas que haga suponer la existencia del Derecho Humano a la protección del ambiente, si es posible deducir su protección indirecta. Esto ocurre por ser tales instrumentos anteriores al nacimiento de la preocupación internacional por el medio ambiente. Sin embargo, es por la vía interpretativa por medio de la cual se puede extraer las bases que permiten asentar el derecho a un ambiente sano dentro de los primeros documentos de la protección de los Derechos Humanos del Sistema de Naciones Unidas.

**Los Sistemas Regionales de Derechos Humanos**

América, Europa y África han establecido sistemas regionales de protección de los Derechos Humanos mediante la adopción de Declaraciones y Convenciones, así como la creación de Comisiones y Cortes que refuerzan su aplicación.
El Sistema Africano de Derechos Humanos
La Carta Africana de Derechos Humanos fue adoptada por la Organización para la Unión Africana, y entró en vigor a partir de 1986. Por ser de reciente creación, la Carta expone la lista tradicional de derechos civiles y políticos, los derechos económicos, sociales y culturales, así como los derechos de solidaridad o de tercera generación; incluyendo el derecho explícito de los sujetos a “un ambiente favorable y satisfactorio para su desarrollo”.

A pesar de ser un documento de vanguardia, el cual incluye derechos de tercera generación, la Carta Africana de Derechos Humanos en su aplicación, no ha tenido consecuencias prácticas favorables. Esto se debe principalmente a que ella es aplicada por una Comisión y no por una Corte, la cual a pedido de la Organización para la Unión Africana, investiga y rinde recomendaciones, las cuales pueden ser acogidas o rechazadas por la Asamblea de la Organización para la Unión Africana, incluso la publicidad de los reportes se da sólo en el caso que así lo decida la Asamblea General de la Unión Africana. Por ende, la Carta Africana de Derechos Humanos se encuentra casi en desuso, debido a la falta de mecanismos efectivos que la lleguen a poner en práctica.

El Sistema Interamericano de Derechos Humanos
El Sistema Interamericano de Derechos Humanos está compuesto por la Convención Americana sobre Derechos Humanos o Pacto de San José de Costa Rica de 1969, el cual entró en vigencia en 1978, junto con sus protocolos sobre Derechos Económicos, Sociales y Culturales mejor conocido como Protocolo de San Salvador suscrito el 17 de noviembre de 1988, y el relativo a la abolición de la pena de muerte aprobado en Asunción Paraguay el 08 de junio de 1990, y las cuatro convenciones interamericanas sectoriales sobre: prevención y sanción de la tortura, desaparición forzosa de personas, prevención, sanción y erradicación de la violencia contra la mujer, y la eliminación de discriminación contra personas con discapacidad.

Con el fin de implementar la puesta en ejecución de los derechos contenidos en la Convención se crea la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos. La Convención Americana sobre Derechos Humanos no hace referencia expresa al derecho a un ambiente adecuado, principalmente por haber sido redactada con anterioridad al advenimiento de estos últimos. Por su parte, el Protocolo Adicional a la Convención Americana sobre Derechos Humanos en Materia de Derechos Económicos, Sociales y Culturales o...
Protocolo de San Salvador de 1989 si regula expresamente el derecho al ambiente en su artículo 11, donde expresa “Todo individuo tiene el derecho a vivir en un ambiente sano y a tener acceso a los servicios básicos públicos. Los Estados parte deben promover la protección, preservación y el mejoramiento del ambiente”.

El protocolo de San Salvador entró en vigencia hasta el día dieciséis de noviembre de mil novecientos noventa y nueve cuando fue ratificado por Costa Rica. El problema adicional que presenta tiene que ver con la falta de mecanismos procesales para demandar la violación de algunos derechos económicos, sociales y culturales, mediante la interposición de peticiones individuales ante el Sistema Interamericano.

El derecho a un ambiente sano como Derecho Humano no ha sido implementado aún por el Sistema Interamericano. Prueba de ello, es la poca cantidad de casos por violación al derecho al medio ambiente en conocimiento de la Comisión Interamericana de Derechos Humanos, con la salvedad de casos en que se involucran situaciones de pueblos indígenas donde, por lo general, se vincula el derecho humano a la propiedad colectiva con situaciones de medio ambiente.13

**El Sistema Europeo de Derechos Humanos**

En el año 1950 en la ciudad de Roma las naciones europeas crean la Convención Europea de Protección de los Derechos del Hombre y de las Libertades Fundamentales, la cual entró en vigencia en el año 1953, creándose además la Comisión Europea de Derechos Humanos y la Corte Europea de Derechos Humanos. Además de la Convención de Roma, el Sistema Europeo de Derechos Humanos se encuentra constituido por la Carta Europea de Derechos Sociales y la Convención Europea para la prevención de la Tortura y trato o castigos degradantes e inhumanos. El sistema europeo de Derechos Humanos es ejercido por dos instituciones que velan por el cumplimiento del Tratado de Roma, la Comisión Europea de Derechos Humanos y el Tribunal Europeo de Derechos Humanos. A diferencia de los otros sistemas regionales, el Sistema Europeo, por medio de su Tribunal de Derechos Humanos, si ha entrado a conocer de lleno violaciones medioambientales, lo que merece un análisis por aparte.

**Protección del derecho al ambiente por parte del tribunal Europeo de derechos humanos**

Al igual que el sistema de Derechos Humanos de las Naciones Unidas, así como al Sistema Interamericano, el Tratado de Roma no reconoce explícitamente un derecho humano a gozar de un medio ambiente adecuado.

La interpretación dinámica y teleológico-
ica de los derechos protegidos por el Tratado de Roma, tanto por parte de la Comisión como el Tribunal Europeo de Derechos Humanos, han permitido para fines prácticos, proteger el derecho al medio ambiente a través de una doble vía indirecta.\textsuperscript{14} De esta forma, los particulares pueden beneficiarse de la protección del derecho al medio ambiente en conexión con el Convenio de Roma. Por una parte, esta protección puede darse en cuanto a titulares de derechos cuya garantía exija, en determinados supuestos, protección de las condiciones medioambientales de calidad. Por otro lado, también puede darse esta protección al derecho al medio ambiente cuando éste se encuentre en conexión con un interés general, cuya salvaguardia permite a los Estados Parte en el Convenio, imponer limitaciones y restricciones en el ejercicio de algunos derechos reconocidos por este instrumento regional de Derechos Humanos.\textsuperscript{15} Esta doble vía indirecta de protección al derecho al medio ambiente por parte del Tribunal Europeo de Derechos Humanos, se ha desarrollado a raíz de la aplicación por violación, por acción u omisión, de los artículos 2 y en especial el 8 del Tratado de Roma.

El numeral 2 del Tratado de Roma establece la tutela del derecho a la vida, mientras que el artículo 8 establece el derecho al respeto a la vida privada y familiar, y al disfrute del domicilio. Por tanto, y siguiendo el criterio esbozado por el autor Daniel García San José, si puede afirmarse a la luz de la jurisprudencia del Tribunal Europeo de Derechos Humanos, la existencia de una creciente percepción de la dimensión medioambiental de algunos de los derechos reconocidos en el Tratado de Roma, lo que conlleva en la práctica a la protección del derecho al disfrute de un medio ambiente adecuado, por encontrarse implícito en algunos de los derechos enunciados dentro del mismo, tales como el derecho a la vida, el respeto a la vida privada y familiar y al disfrute del domicilio.

A pesar de la protección del derecho al ambiente, vía indirecta, por parte del Tribunal Europeo de Derechos Humanos, ello no implica necesariamente que se esté creando un nuevo derecho humano dentro del Tratado de Roma que tutele un medio ambiente adecuado, pues del análisis de la jurisprudencia de dicho Tribunal no se puede deducir una tutela directa de tal derecho.

De lo anteriormente manifestado se puede concluir que el Tribunal Europeo de Derechos Humanos ha llegado a tutelar el derecho al ambiente indirectamente a través de la protección del derecho a la vida privada y familiar y al domicilio, otorgándole a tales derechos, bajo determinadas situaciones, una dimensión medioambiental, lo cual no implica que dichos derechos se hayan “ambientalizado” \textit{per se}, pues perfectamente pueden ser restringidos por las autoridades estatales, siempre que se trate de una medida con base legal que persiga un fin legítimo y que sea necesaria en una sociedad democrática, tal y como lo establece el párrafo segundo del numeral 8 del Tratado de Roma. El Tribunal Europeo se ve obligado a velar por el justo equilibrio entre los intereses en juego, sea el interés estatal versus el interés del particular o el interés de lo particulares afectados. Con ello, el Tribunal Europeo debe analizar caso por caso mediante el sistema de ponderación de los intereses, sin que pueda establecer a priori, cual de los intereses en juego irá a prevalecer sobre el otro.

A manera de ejemplo, en el caso López Ostra versus el Reino de España,\textsuperscript{16} el Tribunal Europeo consideró que las
emanaciones de gases, olores, pestilencias y contaminación por parte de una estación depuradora de aguas y desechos que funcionaba sin la respectiva licencia municipal, violentó los derechos al respeto del domicilio y a la vida privada y familiar de la señora López Ostra. El Tribunal europeo estimó que el municipio no adoptó las medidas oportunas y constató que no se mantuvo el justo equilibrio entre el interés económico del municipio y los derechos de la señora López Ostra, declarando en sentencia que estos últimos fueron violentados por la acción omisiva del municipio.

La tutela ambiental por parte del Tribunal Europeo de Derechos Humanos es posible en el tanto la injerencia contra el derecho incoado sea injustificada, y el efectivo disfrute de los mismos no sea posible a consecuencia de las malas condiciones ambientales. En tal supuesto, la injerencia al derecho protegido no respetaría el justo equilibrio que debe prevalecer entre los intereses del particular y los de la comunidad, y una vez realizada la ponderación de rigor, prevalecerían los intereses de los particulares afectados sobre los del Estado. Por ello, en este caso específico se observa el supuesto de la tutela ambiental indirecta por parte del Tribunal Europeo de Derechos Humanos.

**Conclusiones y propuestas**

A pesar de ser reconocido como de un derecho humano fundamental, el derecho al ambiente no se encuentra expresamente regulado en los distintos instrumentos internacionales que versan sobre Derechos Humanos, ya que ni el Sistema Universal de Derechos Humanos, ni los sistemas Regionales como el Sistema Interamericano o el Europeo regulan de manera clara, expresa ni contundente el derecho al ambiente sano.

Si bien existen excepciones teóricas dentro de los sistemas regionales de protección de derechos, por ejemplo, en la Carta Africana de Derechos Humanos si se regula taxativamente los derechos de tercera generación, ha quedado claramente demostrado que su implementación a la fecha no se ha dado. Por esta razón, para todo efecto práctico el derecho al ambiente carece de la debida protección dentro de los mecanismos regionales. La protección indirecta a este derecho se ha observado a través del Sistema Europeo, el cual por medio de la Comisión y de la Corte Europea de Derechos Humanos ha “ambientalizado” otros derecho humanos que sí se encuentran plasmados explícitamente en el Tratado de Roma. No obstante, esta protección indirecta se encuentra lejos de crear y tutelar efectivamente el derecho a un ambiente sano.

Tal vez, mediante la ratificación de la Constitución Europea, el derecho fundamental al ambiente logre plasmarse...
dentro de los derechos fundamentales de tutela directa. El sistema Interamericano, a pesar de la entrada en vigencia el Pacto de San Salvador, carece de elementos suficientes para la protección directa del derecho al ambiente.

Consciente de ello, y debido a la necesidad imperante por la efectiva protección de este derecho fundamental, el Centro de Derechos Humanos y Medio Ambiente, organización no gubernamental con sede en Córdoba, Argentina, ha preparado un borrador de Proyecto de Legislación Internacional de Derechos Humanos y Medio Ambiente, con el fin que dicho documento sirva de base de discusión para la suscripción dentro del continente americano de un Tratado de Derechos Humanos y Medio Ambiente. Dicho borrador posee un capítulo exclusivo sobre Derechos Humanos Ambientales, entre los que se encuentran el derecho a un ambiente sano, derecho a la vida, a la integridad personal, igualdad ambiental, derechos del consumidor, derecho al desarrollo sostenible, derecho de participación e información y acceso a la justicia ambiental, entre otros.

La taxatividad de los Derechos Humanos ambientales dentro de instrumentos internacionales es fundamental para la correcta tutela de tales derechos, de ahí que la propuesta que realiza el Centro de Derechos Humanos y Medio Ambiente reviste de gran importancia, pudiéndose utilizar de punto de partida para el análisis y ejecución ya sea de un Protocolo o bien de un Tratado de Derechos Humanos y Medio Ambiente.

“Hasta hace sólo unos pocos años antes de su asesinato en 1988, Chico Mendes, el brasileño conocido internacionalmente por la batalla que libró contra la deforestación amazónica, se consideraba a sí mismo exclusivamente un activista defensor de la justicia social. Su principal objetivo era proteger el derecho de sus compañeros recolectores de caucho a ganarse el sustento gracias al bosque. Sin embargo, en 1985, Mendes conoció el movimiento ecologista y se dio cuenta de que la lucha internacional para salvar la selva tropical y su lucha local para ayudar a sus habitantes venía a ser casi lo mismo. Esa idea reside en el corazón de su legado: él mostró que las cuestiones relativas a los Derechos Humanos y las del medio ambiente están intrínsecamente unidas.” Independientemente si el esfuerzo es de un grupo de gobernantes, legisladores, especialistas, activistas o de un solo hombre, entre la teoría y la práctica, lo importante es rescatar...
el verdadero sentido de interconexión entre los Derechos Humanos y el derecho al medio ambiente.

En este capítulo se presentan ambas, una perspectiva teórica, un proyecto con esperanza de motivar discusión creada por un grupo de especialista en la Argentina, y una anécdota para mover los corazones que aún les cuesta creer en el poder del cambio que radica en cada uno de nosotros. Si el derecho ambiental es de primera, segunda o tercera generación, eso a los habitantes de la selva tropical les tiene sin cuidado, pues lo que necesitan es la respuesta efectiva del Estado para su efectiva protección. Al lector se le pide tome esta última reflexión para su propio análisis, para los autores, que la inquietud sobre la conexidad entre los Derechos Humanos y el medio ambiente deje huella ya es un triunfo.

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Notas
1 Pérez, 1924.
2 Fernández, 1982.
4 Rodríguez.
9 Suscrita en Cartagena de Indias, el 09 de diciembre de 1985, en vigor desde el 28 de febrero de 1987.
10 Adoptada en Belem du Pará, Brasil, el 09 de junio de 1994, en vigor desde el 29 de marzo de 1996.
11 Adoptada en Belem du Pará, Brasil, el 09 de junio de 1994, en vigor desde el 05 de marzo de 1995.
12 Adoptada en la Primera Sesión Plenaria de la Asamblea General de la OEA el 07 de junio de 1999.
13 Mediane la sentencia del 31 de agosto de 2001 en el caso Awas Tigni contra Nicaragua, la Corte Interamericana de Derechos Humanos reconoció a los pueblos indígenas como un colectivo de derechos en su unidad y no únicamente como derechos individuales de sus habitantes. Además, desarrolló el derecho a la propiedad colectiva y la obligación del Estado nicaragüense de titular sus tierras y de disponer de recursos legales eficaces para que los pueblos indígenas puedan tener acceso a la reivindicación de ese derecho. La Corte concluyó que el Estado de Nicaragua violó los derechos de la comunidad Awas Tigni al haber otorgado una concesión de explotación forestal a terceros sin su consentimiento, y por hacer caso omiso a las demandas de la comunidad indígena para que se delimitare su territorio. De esta forma, el Tribunal concluye que los derechos territoriales indígenas no se basan en un título formal otorgado por el Estado, sino en la simple posesión de tierras, enraizada en su propio derecho consuetudinario, valores, usos y costumbres. A la vez estableció que “los indígenas por el hecho de su propia existencia tienen derecho a vivir libremente en sus propios territorios, la estrecha relación que los indígenas mantienen con la tierra debe ser reconocida y comprendida como base fundamental para sus culturas, su vida espiritual, su integridad y su supervivencia económica”. La misma sentencia de comentario impuso medidas provisionales para que el Estado de Nicaragua proteja la integridad de las tierras y recursos de la comunidad frente a la acción de terceros o del mismo Estado como una forma de garantizar la efectividad del derecho de propiedad hasta tanto no se produzca la titulación de tierras definitiva.
14 Dejeant-Pons, 2002.
17 El borrador de Proyecto de Legislación Internacional de Derechos Humanos y Medio Ambiente puede ser accedido en la siguiente dirección electrónica: www.cedha.org.ar

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Human Rights— a new “territory” for nature conservation organizations

Yves Lador

The new UN Human Rights Council, created in June 2006 to replace the former Commission on Human Rights, is not designed to be the place to talk about ecosystems, species and genetic diversity. The mandate of the Council is to deal with people, their fundamental rights and the States’ obligations to protect and promote such rights. It could even be seen as an inappropriate “institutional biotope” for conservationists. In contradiction with such a perception of the Council, however, one the keynote speaker at the opening ceremony of the Council was Ms. Wangari Mathai, the Kenyan Nobel Prize winner. She reminded the Member States of the Council how much the mismanagement of natural resources and of the environment can create conflicts, poverty and insecurity, with a particular pressure on the weak and the poor, and thus increase human rights violations. She insisted that good governance in these matters is crucial to reach justice and security and how a body such as the Council is needed to
monitor the situation of human rights in the world and make sure that no one silence others in submission, when the world is facing the challenge of potential conflicts over scarce resources.

The presence of Ms. Wangari Mathai at the beginning of the Council was a foresight of the new challenges and issues on which the Council will have to work. But there were precedents. The former Commission on Human Rights had started, although much too slowly, to look at environmental issues relevant to its mandate. At the beginning of the nineties, it had agreed that its expert body, called the “Sub-Commission”, prepared a report on human rights and the environment. Ms Fatma Zhora Ksentini, the Commission’s expert from Algeria who tabled it in 1994, wrote the report and included in it a “Draft Principles on human rights and the environment”. Unfortunately the Commission seriously followed-up on this issue only in 2002, when preparing its contribution to the Johannesburg Summit. In that occasion it jointly organized an expert meeting with UNEP, whose conclusions were presented in Johannesburg by Ms Mary Robinson, the UN High Commissioner for Human Rights. In 2003, the Commission adopted its first Resolution on “Human Rights and the Environment as parts of Sustainable Development”.

In 1995, the Commission created also the mandate of a “Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights”, in order to see how to protect the rights of victims of such practice and look at trends in this matter. The mandate holder is today Prof Okey Ibeanu, of the University of Nigeria. The Commission also mandated in 2004 its expert body to prepare a report on the legal implications of the disappearance of States for environmental reasons, including the implications for the human rights of their residents, with particular reference to the rights of indigenous people. The study prepared by the British expert, Prof Francoise Hampson, is one of the first to look at such human rights implications of climate change and the possible raise of the sea level. It is to the new Council to discuss now the first results of this study and probably to extend it.

All these examples illustrate how the UN Human Rights Council will have to deal more and more with the human rights implications of environmental degradation and its prevention and responses. Two elements can specifically concern conservationists. First, the Council is mandated to review and strengthen the former Commission “Special Procedures”. Under this general name are either individuals (called, for example, “Special Rapporteur” or “Special Representative of the Secretary-General”) or members of a working group, serving in their personal independent capacity and in all impartiality. They are now mandated by the Council to receive information on specific allegations of human rights violations, to carry out country visits and to examine, monitor, advise, and publicly report to the Council on human rights situations in specific countries or...
on major phenomena of human rights violations.

A number of these mandate-holders have had to deal with environmental issues and conservation problems, such as Mr. Peter Leuprecht, from Austria, Special Representative of the Secretary-General for human rights in Cambodia, and Mr. Paulo Sérgio Pinheiro, from Brazil, Special Rapporteur on the situation of human rights in Myanmar, who have been confronted with the impact of illegal timber trade on people. In another field, Prof. Jean Ziegler, from Switzerland, Special Rapporteur on the right to food, mentioned in his report the impact of land degradation and desertification and its possible contribution to new flows of environmental refugees. Of course, other Special Rapporteurs are also constantly confronted with the environmental dimensions of their issue. These Rapporteurs include the on the situation of human rights and fundamental freedoms of indigenous people—Prof Rodolfo Stavenhagen, from Mexico; the one on the right to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt, of New Zealand; and the one on the right to adequate housing, Mr. Miloon Khotari, of India. The so-called “classical” mandates are also concerned, such as the Special Representative of the Secretary-General on the situation of human rights defenders, Ms Hina Jilani, from Pakistan, who includes environmental defenders in her activities and reports. In 2000, the Working Group on Arbitrary Detention, who investigate cases of arbitrary detention adopted an Opinion regarding the charges against Grigorii Pasko, detained in Russia for having tried to alert national and international opinion to the environmental risks of the breakage for recycling of defective nuclear submarines and from the clandestine dumping of their nuclear waste into the Pacific Ocean by the Russian fleet. Considering “that damage to or protection of the environment is an issue that knows no boundaries (...) it should be possible freely to engage in ecological criticism: this forms part of the right to freedom of expression “regardless of borders”, as laid down by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights”. The Working Group concluded that the deprivation of liberty of Grigorii Pasko was arbitrary and thus gave an important interpretation of these rights for the environmental movement.¹ In 2006, 13 communications were sent jointly or individually by 6 mandates on issues concerning the environment.

Finally, the second element concerns the efforts to improve the international environmental governance. A group of
States calling for a UN organisation for the environment is now known as the “Group of Friends of the UNEO”, which met last April in Agadir. It started with a meeting in Paris in February 2007 where the “Paris Appeal” was adopted. This document includes a call “for the adoption of a Universal Declaration of Environmental Rights and Duties. This common charter will ensure that present and future generations have a new human right: the right to a sound and well-preserved environment.” The 1994 Ksentini report, with its “Draft Principles on human rights and the environment”, gave for the first time a definition of such environmental rights. It contained some specific provisions concerning conservation issues, such as the following three Principles:

6. All persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.

13. Everyone has the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual and other purposes. This includes ecologically sound access to nature.

Everyone has the right to preservation of unique sites consistent with the fundamental rights of persons or groups living in the area.

14. Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence. Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.

The possible elaboration of such a new Declaration, as called for in the Paris Appeal, would require the participation of all sectors of the environmental movement. It concerns the nature conservation organisations, which are called to increase their presence where the relation between human rights and the environment is discussed and where the new “environmental human rights” are progressively emerging.

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Notes
2 Earth Justice Mission. For more information see http://www.earthjustice.org/about_us/index.html

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